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# How to Speak Well of the State: A Rhetoric of Civil Prudence

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# How to Speak Well of the State: A Rhetoric of Civil Prudence

Jeffrey Minson\*

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## INTRODUCTION

*It is a fine thing to do well by the commonwealth, but to speak well of it is not contemptible.*<sup>1</sup>

At the close of the 2012 UC Irvine “Law As . . . ? II, History As Interface for the Interdisciplinary Study of Law” symposium, someone commented to the effect that a unifying undercurrent of the proceedings was “disgust” with the sovereign state. I took the comment as a marker of the *sensus communis* common to many critics of law and state.<sup>2</sup> It is not just emoting. It is venting a reflective ethical stance of disaffection, or even “self-subtraction” from the state, imagined as a *hostis humani generis*—in the name of a transformative politics of social justice, freedom, and democracy.<sup>3</sup> And it reprises a pattern of connections between

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1. Letter from Alexander Wedderburn to Sir Gilbert Elliot of Minto (July 2, 1757), *reprinted in* JAMES BUCHAN, *CAPITAL OF THE MIND: HOW EDINBURGH CHANGED THE WORLD* 369 n.1 (2003). Wedderburn was a leading Scotch lawyer and politician and a friend of David Hume.

2. In regard to its distance from the genre of theoretical critique of the state and its sense of the sufficiency of contextual description, this Article echoes the argument of DAVID SAUNDERS, *ANTI-LAWYERS: RELIGION AND THE CRITICS OF LAW AND STATE* (1997). On this, compare Peter Goodrich, *Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality*, 9 *SOC. & LEGAL STUD.* 143, 154–59 (2000), with conservatism. Of course, not all legal theory is committed to critique. *Cf.* Anton Schütz, *Legal Critique: Elements for a Genealogy*, 16 *L. & CRITIQUE* 71 (2005). Schütz presents himself as an insider-critic of critical legal theory. Like Saunders, Schütz too (in this Article) focuses on critique as an historical transformation of Christian intellectual programs.

3. WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 180 (1997) (“[D]isgust has certain virtues for voicing moral assertions. It signals seriousness, commitment, indisputability, presentness, and reality.”). On “self-subtraction,” as understood by Alain Badiou, see ALAIN BADIOU, *METAPOLITICS* 87–88 (Jason Barker trans., Verso 2005) (1998).

expressions of disgust and promises of transcendence in the history of Western metaphysics, from ancient Stoicism through Shaftesbury to Kant's aesthetic philosophy, and into Marxist and other theory.<sup>4</sup>

In contrast, my Article sees the state as a locus of a de-transcendentalizing political civility indifferent to uppermost principles. It is not a theory of the state, or a philosophical justification. There are moments of philosophical argument, and a normative stance, but the main intent is to describe an early modern way of "norming" a state from within. There is a doctrine to grasp, but also a *mentalité d'état*, a habitus. A name for this undertaking might be an ethnography of jurisprudential habits of mind, though it is also an exercise in *rhetoric*.<sup>5</sup>

For we are dealing with an old clash between *styles* of arguing shaped by persuasive devices of which logical argument is one, by passions, institutional milieus and their standings, self-culture, and danger. My vignette of a gesture of disgust for the state, and the gesture itself, evinced rival "thought-imbued intensities" of affection and disaffection, association and dissociation.<sup>6</sup> The sentimental economy associated with state civility tends toward, in David Hume's words, the "calm" as distinct from the "violent" end of the passional spectrum. A calm passion like imperturbability is not per se more rational than, say, moral disgust.<sup>7</sup> Jurisprudence is not all rhetoric, but there are affinities between rhetoric and a dispassionate jurisprudential ethos.

Metaphysics has not always channeled disgust for the state, or a transformative ethos.<sup>8</sup> Still, these are common ways to cut a figure in critical-

4. See Jeffrey Minson, *Resonances of "Raillery,"* in BLACK SPHINX: ON THE COMEDIC IN MODERN ART 35, 45 (John C. Welchman ed., 2010) (adumbrating links to modern theory, including the famous Derridean connection between disgust and Kantian beauty). Particularly pertinent here is the link between the surprisingly rationalist theme of aesthetic transcendence in ANTHONY ASHLEY COOPER, THIRD EARL OF SHAFTESBURY, CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES (Lawrence E. Klein ed., Cambridge Univ. Press 1999) (1711) [hereinafter SHAFTESBURY, CHARACTERISTICS OF MEN], and Shaftesbury's private notebooks, collected in THE LIFE, UNPUBLISHED LETTERS, AND PHILOSOPHICAL REGIMEN OF ANTHONY, EARL OF SHAFTESBURY 1-272 (Benjamin Rand ed., 1900) [hereinafter SHAFTESBURY, THE LIFE]. These contain spiritual exercises modeled on those of the ancient Stoic Epictetus, and crafted to create disgust with Shaftesbury's own sociable conduct where it clashes with Stoic principles. See SHAFTESBURY, THE LIFE, *supra*, at 183. Such conduct is likened to "vomit." See *id.*

5. This Article further develops an argument about the intersections of rhetoric, ethics, and civil politics presented in JEFFREY MINSON, QUESTIONS OF CONDUCT: SEXUAL HARASSMENT, CITIZENSHIP, GOVERNMENT (1993). In particular, see Chapter 2, "Kant, Rhetoric and Civility." *Id.* at 16-40.

6. See WILLIAM E. CONNOLLY, WHY I AM NOT A SECULARIST 27, 29 (1999), on "thought-imbued intensities moving below linguistic sophistication . . . and reflective judgment as well as through them."

7. DAVID HUME, A TREATISE OF HUMAN NATURE, 418-19 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739). The distinction between violent versus calm passions is part of a descriptive matrix: "We must, therefore, distinguish betwixt a calm and a weak passion; betwixt a violent and a strong one." *Id.* at 419. Hume is struck by how often a violent passion does *not* become "a settled principle of action" and can morph into calmer forms. *Id.* at 418-19.

8. Shaftesbury himself approved of the British state as an antidote to violent religious "enthusiasm." See SHAFTESBURY, CHARACTERISTICS OF MEN, *supra* note 4, at 68-69.

intellectual society, where, “[t]o be a friend of the state has been made to seem an index either of stupidity or of corrupt purpose.” “The state as idiot” is one of the varieties of “state-scepticism” in criminological discourses that Ian Loader and Neil Walker moderate as a prelude to re-theorizing security as a state-based yet democratic good.<sup>10</sup> Pitting democracy against the state is a popular trope too. In a post-Cold War movie, a submarine commander tells his mutinous crew members: “We are here to preserve democracy, not to practice it.”<sup>11</sup> *Crimson Tide* renders this military maxim illegible. Uttered by a rogue officer intent on starting a world war by launching a thermonuclear device, it can only signify a representative of the state’s rationalization of egregious nondemocratic authority.

So what intellectual heat-seeking missile am I about to launch? Taking the opening aphorism by Alexander Wedderburn as my motto, the Article offers an anatomy of the ethical face of a public law doctrine of the state as nondemocratic and de-idealized sovereign. This ever-contested doctrine came out of an early modern European tradition known inter alia as “civil prudence” or “civil philosophy.” It targeted the driver of internecine warfare, powerful states dedicated—in part via metaphysical teachings—to the salvific goals of religious confessions. Civil philosophy, it has been said, sought to “dismantl[e] the legal and political architecture of the confessional state,” contributing to a “desacralization of politics” in which public authority was obliged to be committed only to worldly civil ends.<sup>12</sup>

That desacralizing aim, limited though it was, has only ever been imperfectly realized. Concomitantly, civil prudence’s fate was to be appropriated in piecemeal, tacit, or contorting ways by later traditions of political and juristic thought.<sup>13</sup> To

9. JOHN DUNN, *THE CUNNING OF UNREASON: MAKING SENSE OF POLITICS* 246 (2000).

10. IAN LOADER & NEIL WALKER, *CIVILIZING SECURITY* 117–40 (2007).

11. *CRIMSON TIDE* (Hollywood Pictures 1995). See also this Article’s concluding remarks, *infra* Part V, for further comment on the defending versus practicing democracy maxim.

12. See IAN HUNTER, *THE SECULARISATION OF THE CONFESSIONAL STATE: THE POLITICAL THOUGHT OF CHRISTIAN THOMASUS* 14 (2007); J.G.A. Pocock, *Religious Freedom and the Desacralization of Politics: From the English Civil Wars to the Virginia Statute*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 43, 45 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

13. In what follows, I make intermittent comparisons between civil prudence and liberal thinking (omitting significant conservative and other repositories of civil prudential thought). The version of liberalism closest to civil prudence derives from a historical distinction between tolerance-and-pluralism-based liberalism and equal-libertarian versions in the Kantian-rationalist tradition. See, e.g., JOHN GRAY, *TWO FACES OF LIBERALISM* 2 (2000) (contrasting a view of liberal institutions as “applications of universal principles” with one that sees them as “a means to peaceful coexistence”). See also STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 15, 20 (2001), for a parallel jurisprudential perspective; for example, the wedge Smith drives between James Madison’s invoking a question-begging “formal principle of equality” in his *Memorial and Remonstrance* and his pluralist arguments in *Federalist* 10 and 51 for institutional structures that permit the “multiplicity of sects” to flourish rather than subjecting them to some supposedly substantive principle of free exercise. Stephen Holmes, in *STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 100–01 (1995), attempts to reclaim for liberal political philosophy early modern understandings of limited government, those

appreciate how civil prudence differs from these inheritor-traditions requires returning to its undiluted earlier forms. I try to reassemble it, to defamiliarize constituents like the trope of protection and to appreciate how they cohere inside a stand-alone “de-idealized” ethic of state. My hypothesis is that civil prudence yields a state form that is neither an essentially amoral power entity, nor acquires its legitimacy from uppermost moral-political or jural principles. The ends and ethic of a civil state are its own.

So, in the following four sections, I offer a semiformalized account of civil prudence as comprising a jurisprudential ethic for a sovereign state defined by two responsibilities: protecting its citizenry from external or internal evils, and fostering sociability.

Supporting these responsibilities are what I see as the four main constituent planks or aspects of civil prudence. The first two aspects are about how it construes threats to civil life, the second pair with the form and internal structure of public authority answering to this problematization. In Part I of the Article I show how civil prudence emerged as a *contextual-historical* problematization of pathological combinations of political power, conscientious faith, and philosophy. This historicizing aspect of civil prudence is internally related—that is, more than merely a propaedeutic—to its ethic of state and, equally crucially, to its rhetoric. Secondly, in Part II, we will see how civil prudence nevertheless revolves around something of a nonhistorical order: namely, an antiredemptive picture of human nature, or a *moral anthropology*. In the interests of enhancing its pertinence, I outline a way of giving the civil prudential image of man a contemporary psychological inflection.

Part III concerns the form of *paramount sovereign authority* that this tradition takes to be a necessary precondition of a civil security state’s having at once the capacity and responsibility to protect its citizenry. At a certain point historico-philosophical reconstruction gives way to some modern instantiations, which suggest how this aspect of the tradition persists, often interstitially, in contemporary states, including the United States. In Part IV, I pick out the *office-based* account of the differentiated jurisdictions and moral personae or mentalities associated with the civil prudential form of state; this conception of civil prudence as an ethic of office will be crucial to my claim that civil prudence is not a political or moral philosophy applicable to all citizens, or rational members of a political

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of Thomas Hobbes and Jean Bodin especially, which were historically crucial to shaping the “consolidated . . . and concentrated political capacities” of a civil state on which the norms and practices we call liberal democracy continue to depend. For Holmes, one of the “common blunders” of modern liberal constitutional theory is that the core aim of a constitution is “to secure individual liberty by hamstringing the government.” *Id.* at 101. As a corrective to this emphasis, Holmes shows how the sixteenth-century jurist Bodin articulated—long before liberal democracy—the key premise of the latter’s insistence on dividing and limiting government: “The less the power of the sovereign is (the true marks of majesty thereunto still reserved) the more it is assured.” *Id.* at 115. The state that *binds itself* through diverse constitutional constraint will be more powerful than one characterized by capricious unlimited assertions of sovereign power. *Id.* at 109.

community. Part V concludes the Article by addressing the civil prudential state form's indifference to democracy. If indifference does not entail hostility, what sense does the civil prudence model of the state make of democracy? How do they get to be grafted onto one another? This Introduction began with leftist disgust with the state. My concluding sketch of a civil prudential optic on state-democracy relations is shadowed by its pre-eminent American conservative counterpart.

### I. PRUDENTIA CIVILIS AS HISTORY

What are the early modern origins of the locution “civil prudence”? To come at this question, which right away raises the question of civil prudence's relation to the counter-concepts of moral idealism and political realism, I begin with its component of contextual history. According to Gerhard Oestreich, in its seventeenth and early eighteenth-century European heyday, the era of early modern European monarchical state-building, “prudential civilis . . . embraced the whole area of the training of princes and . . . their advisers, the new bureaucracy and, not least, the military.” Civil prudential writing, counsel, and teaching prepared its students for an active life of nonsectarian, disciplined, authoritarian public service.<sup>14</sup> Its ethical component, argues Oestreich, drew primarily from seventeenth-century reworkings of Stoicism, most notably by Justus Lipsius.<sup>15</sup>

*Prudentia civilis* sits alongside the overlapping generic rubrics of *politica*, *ius publicum*, civil science, and natural law. But not everything written under these rubrics comported with civil prudence. An example is the sacralizing *telos* of Althusius' *Politica*, epitomized in his anti-Bodinian conception of the people—vested with sovereignty—as bound together in a “universal symbiotic communion.”<sup>16</sup> Conversely, as I will illustrate, historiographical texts written under color of civil prudence report themselves as engaged in a quest for objective truth. But is it that simple? How might contextual history form part of civil prudence as an ethic (and moreover as not the same as neo-stoicism)?

To my knowledge, the most uncompromising exponent of the ethic of state-citizen relations I am calling “civil prudence” was the German civilian Samuel Pufendorf. Open up his best known treatise of philosophical natural law, the *De Jure Naturae et Gentium*, and you see a medley of genres: eclectic philosophical polemic, copious examples drawn from classical *auctores*, lay anthropological observation, Ramus-like juristic classification, and revealed Christian truths.<sup>17</sup>

14. GERHARD OESTREICH, NEOSTOICISM AND THE EARLY MODERN STATE 162–65 (Brigitta Oestreich & H.G. Koenigsberger eds., David McLintock trans., 1982).

15. *Id.* at 13–75. The discipline of civil prudence was also modified to be of use to non-noble parts of the citizenry not involved in politics. *Id.* at 163.

16. JOHANNES ALTHUSIUS, *POLITICA* 73–74 (Frederick S. Carney ed. & trans., Liberty Fund 1995) (1603). Althusius does make a place, though, for practical political prudence and even pro tem toleration of religious difference. *Id.* at 135–74.

17. See 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* [ON THE

What Pufendorf's natural law writings do *not* generally deploy are recent historical reference-points.<sup>18</sup> Nor do these texts make use of the locution "civil prudence."

However, that rubric *is* pivotal to the controversial conclusion to one of his most (in)famous historiographical works, known as the *Monzambano*.<sup>19</sup> Underlining the want of a dependable locus of sovereignty within the Holy Roman Empire haphazardly presiding over the miscellaneous German territories, Pufendorf dubbed it a diseased, uniquely "misshapen monster, if it be measured by the common rules of politicks and civil prudence."<sup>20</sup> The very commonality of those rules cautions against reading too much of Pufendorf's natural law ethic into this formulation.

For the seventeenth-century exponent of *prudentia civilis*, Hermann Conring,<sup>21</sup> it was synonymous with *politica scientia*. Combining a Galenic medical-empirical stance with an analytic/synthetic Aristotelian method, *prudentia civilis* engages in objectifying historical and comparative investigations of the "illnesses" afflicting political bodies, how they arose (in relation to which interests), and the techniques of political domination required to "cure" them. It disclaims a power to predict the future, but claims to equip those who master it with "the oracles of prudence" needed to govern a commonwealth in a context of antagonistic ecclesiastical pluralism.<sup>22</sup> So it is not only a science. But is this extra-scientific dimension more than an amoral pragmatism?

We can gather from that interface of knowledge and the office of counsellor that if the ethical edge of Pufendorf's historical writings should not be overstated, neither should Conring's amoral realism.<sup>23</sup> Consider his contention that civil prudence teaches bearers of governmental responsibility, including historians, how

LAW OF NATURE AND NATIONS IN EIGHT BOOKS] (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688).

18. Compare Hobbes' brilliant analysis of the unprecedented threat to public peace posed by the emergence of reformed churches in THOMAS HOBBS, THE ELEMENTS OF LAW, NATURAL AND POLITIC 141–42 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1640), with a superb discussion of this analysis in Pasquale Pasquino, *Political Theory, Order, and Threat*, in POLITICAL ORDER 19, 28–32 (Ian Shapiro & Russell Hardin eds., 1993).

19. For bibliographical details, see James Tully, *Editor's Introduction* to SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, at xiv–xv (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

20. SAMUEL PUFENDORF, THE PRESENT STATE OF GERMANY 176 (Michael J. Seidler ed., Edmund Bohun trans., Liberty Fund 2007) (1667) (footnote omitted). "Monzambano" was the pseudonym under which Pufendorf originally published it in 1667. *Id.* at xiii. See also *id.* at x for the idea that historiographical polemic is integral to desacralizing genre of natural law.

21. For an introduction to the range and fascination of Conring's work, see Constantin Fasolt, *Introduction* to HERMANN CONRING'S NEW DISCOURSE ON THE ROMAN-GERMAN EMPEROR, at ix–xxii (Constantin Fasolt ed. & trans., 2005) [hereinafter NEW DISCOURSE].

22. See Constantin Fasolt, *Political Unity and Religious Diversity: Hermann Conring's Confessional Writings and the Preface to Aristotle's Politics of 1637*, in CONFESSIONALIZATION IN EUROPE, 1555–1700, at 319, 333 (John M. Headley et al. eds., 2004). The claim to scientificity regarding "the characteristics of bodies politic in and of themselves," as Conring put it in his *Miscellaneous Theses on Civil Prudence*, has to be understood in its context of a medical discourse heavily laden with moral metaphor. *Id.* at 332.

23. Fasolt, *supra* note 21, at xi.

to cultivate a distance from all religious affiliations, including their own, so as to live with religious diversity. Confessional belief should be irrelevant to a person's counting as a member of a given political community in good standing. Here Conring adumbrates a crucial component of the civil prudential ethic: a capacity for a particular kind of official indifference that is a behavioral and policy condition of religious neutrality.<sup>24</sup> Best discussed in connection with civil prudential office, this capacity (known as *adiaphorism*) is a morally demanding ability that has to be cultivated and appropriately performed.

This performative dimension of civil prudence suggests a way of making a non-Habermasian sense of its location “between facts and norms.” Civil prudence, I want to say, offers a way of avoiding the critical theoretical supposition of a “chasm between ideal-theoretical demands and social facts,” which it is then theory's job to dialectically bridge.<sup>25</sup> That way passes through rhetoric. After all, Pufendorf and Conring were part of Renaissance rhetoric's greatest pedagogical-institutional support: the humanist movement. Among the links between the *studia humanitatis* curriculum and historical (and philological) studies, none were closer than their connections with rhetoric, the standing of which the early humanist movement did so much to promote.<sup>26</sup> Rhetoric and historiography alike were “devoted to concrete, causal and didactic description.” *Descriptio* begins life as a rhetorical category, an exercise in *ekphrasis*<sup>27</sup> in turn linked to *epideictic*, the rhetoric of praise, or disapprobation. It is as rhetorically inflected discourse—which is *not* to say rhetorical through and through—that historiography may be lodged inside the ethic of civil prudence.<sup>28</sup>

24. Fasolt, *supra* note 22, at 340–41.

25. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992). As Habermas's discussion of Adam Ferguson's attempt to historicize civil society implies, in Habermas's book, contextual historiography of law and society has to be read as a “non-normative” enterprise in order to exemplify the more general loss of normativity in the modern institutional social order that calls for a discourse-theoretical reconciliation with terms of moral-political legitimacy. *Id.* at 44–45. Part of the interest of civil prudence's contextual historical component (with its rhetorical-ethical edge) may lie in its divergence from the Kantian dialectical problematic that Habermas reanimates in his search for “an account of modern law that is neither sociologically empty nor normatively blind.” William Rehg, *Translator's Introduction to HABERMAS*, *supra*, at xxiii.

26. Donald R. Kelley, *Humanism and History*, in 3 RENAISSANCE HUMANISM: FOUNDATIONS, FORMS, AND LEGACY 236, 236 (Albert Rabil, Jr. ed., 1988).

27. For a pithy account of *ekphrasis* and its ethical bias, see MICHAEL BAXANDALL, GIOTTO AND THE ORATORS 87–88 (1971).

28. I am not discounting the difference between, say, Conring's historical demonstrations of the disconnect between the German imposture known as the “Holy Roman Empire” and the territory, laws, and rights of the historical Roman Empire, and Desiderius Erasmus's perfectly rhetorical (prosopopoeic) polemic of 1517, in which a personified Peace complains of how Christian princes, nobles, commoners, scholars, and priests alike reject him in favor of infernal strife and destruction. DESIDERIUS ERASMUS, *A Complaint of Peace*, in THE ERASMUS READER 288, 288–314 (Erika Rummel ed., 1990) (“[I]n the name of immortal God I must say this: who would believe those beings to be human . . . when they devote so much expenditure and application . . . to rid themselves of me . . . ? What Fury from hell could have implanted this poison in a Christian heart?”).



Between an ethic of civil peace that avows its connections to rhetoric via arts of describing, and civil prudence-as-history, sits the ancient rhetorical device of *paradiastole*. Thomas Hobbes was preoccupied with its political dangerousness. As taught by ancient Roman rhetoricians, *paradiastole* consists, in Quentin Skinner's formulation, of "morally redescribing" people, actions or situations, so as to raise or lower public estimations of them (though it lends itself to other ethical purposes).<sup>29</sup> Do you deem an action courageous or reckless, cautious or timid? Think of how normativity, facticity and controversy mesh in Pufendorf's characterization of the Holy Roman Empire as a "misshapen monster."

As Aristotle explained, *paradiastole* was built into the grammar of talk about virtues and vices. It remains a feature of all discursive ethical conflict. A deficiency of courage (cowardice) is usually unmistakable. However, between a courageous act and its "excessive" correlate (recklessness), there is room for both informative or erroneous, and good or bad faith judgment.<sup>30</sup> The modern fate of moral redescription is to have become either ignored or else ignominious. Where it is noticed, as in political discourse, it is typically identified with duplicitous *spin*.<sup>31</sup> In fact that identification is itself an example of using *paradiastole* in bad faith, or at least thoughtlessly. The same is true of Kant's use of *paradiastole* to deprecate "the doctrine of prudence" in politics, by arbitrarily limiting its semantic reference to the pursuit of selfish advantage.<sup>32</sup> His covert use of rhetoric to purify moral discourse of contamination by civil/socialable dispositions is part of the story of how statist prudence lost its ethical coloration, as it came to be identified with its amoral-realist dimension.<sup>33</sup> This is why part of the work of repurposing the ethic of civil prudence involves affirming its character as a historical deployment of rhetoric.

While contextual history can serve various purposes, it may have a special affinity with civil prudence. John Pocock has argued that contextual history, considered as a genre, emerged in Western Christendom as a competitor to sacred philosophical history. This was centered around God's actions in the world he created, those of his Son, and the role of outpourings of the Holy Spirit embodied

29. On these "techniques of re-description," see QUENTIN SKINNER, *REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS* 138–80 (1996). Skinner makes no mention of a *non-agonistic* classical use of the device as a means of charitable and tactful interpretation of conduct. *Id.* For an example of this formulation of *paradiastole*, see *THE COMPLETE ODES AND SATIRES OF HORACE* 204–05 (Sidney Alexander trans., 1999) ("Hot-headed is he? Let him be accounted a man of spirit.") Tactful redescrptions are surely indispensable to political negotiation.

30. See *THE NICOMACHEAN ETHICS OF ARISTOTLE* 28–47 (David Ross trans., Oxford Univ. Press 1963) (1925).

31. For a widely read discussion of framing, which is unaware of its origins in the classical art of rhetoric, but which does not assume that spin is necessarily duplicitous, see GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002).

32. See IMMANUEL KANT, *TOWARD PERPETUAL PEACE* (1795), reprinted in *PRACTICAL PHILOSOPHY* 317, 338 (Mary J. Gregor ed. & trans., 1996).

33. See *id.* at 338–47. On Kant's intellectual purification of the ethical, see IAN HUNTER, *RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY* 274–315 (2001).

in communities, prophets, and martyrs in building on that action.<sup>34</sup> Ian Hunter's genealogies illustrate both sides of this sacralizing/de-sacralizing divide. He has tracked the secular afterlife of sacralizing histories in critical philosophy, "theory," and some legal histories, where a theoretical sense of history is expressed in narratives built around the surfacing—incarnations—of universal ideals of justice in "breakthrough" moments.<sup>35</sup>

On the side of contextual history, Hunter's accounts of Pufendorf's greatest follower, Christian Thomasius, trace the importance, for his program for reforming philosophy, of "histories of morality."<sup>36</sup> These were built around accounts of competing philosophical schools, their pedagogies and sectarian cultural-political impacts.<sup>37</sup> Thomasius's moral redescriptions of Platonism in such terms trace their ruinous effects on Christian theology and civil government, from Roman imperial times to the era of confessionalization. Thomasius does not hide the ethico-rhetorical implications of his history, in which philosophical error about the meaning of "substance" could issue in anathemas: "[M]yriads of men have been butchered and banished not for God's sake, but for the sake of . . . Plato's metaphysics. Nonetheless, this paradox is only too true."<sup>38</sup> The Platonic assumption that moral phenomena were possessed of an intrinsic nature to which a suitably philosophically and spiritually formed metaphysician could accede was no innocent seminar topic when it got to be built into confessional politics.

Thomasius here enunciates explicitly a part of the contextual-historical problem, in part a problem of the comportment of the personnel of the confessionalizing state, which Pufendorf had previously addressed in what scholars blandly term his "demarkation argument" about the scope of natural law. Let us see how it lends further support to my claims that contextual history is an intrinsic part of the ethic of civil prudence, and that civil prudence is best regarded as less a moral philosophy than a jurisprudential doctrine and its accompanying disciplined demeanor.

Like an opening salvo in a battle, the preface to his primer on natural law begins with a drastic proposal for reforming natural law. Pufendorf attempts, by way of a definitional fiat, to entirely exclude the "moral theology" habitually taught in philosophy faculties from playing its accustomed role in the composition

34. J.G.A. Pocock, *Historiography as a Form of Political Thought*, 37 *HIST. EUR. IDEAS* 1, 3 (2011).

35. See Shaunnagh Dorsett & Ian Hunter, *Introduction*, in *LAW AND POLITICS IN BRITISH COLONIAL THOUGHT: TRANSPOSITIONS OF EMPIRE* 1, 1–7 (Shaunnagh Dorsett & Ian Hunter eds., 2010); Ian Hunter, *Global Justice and Regional Metaphysics*, in *LAW AND POLITICS IN BRITISH COLONIAL THOUGHT*, *supra*, at 11, 11–25; Ian Hunter, *The History of Theory*, 33 *CRITICAL INQUIRY* 78, 108–111 (2006).

36. See HUNTER, *supra* note 12 (describing how Thomasius would explicate metaphysical principles by tracing their historical origins).

37. On this genre, see T.J. HOCHSTRASSER, *NATURAL LAW THEORIES IN THE EARLY ENLIGHTENMENT* 11–30 (2000). On Thomasius's (and his father's) historiographical onslaught on confessionalist intellectual culture, see HUNTER, *supra* note 12, at 54–73.

38. CHRISTIAN THOMASIUS, *ON THE RIGHT OF PROTESTANT PRINCES REGARDING HERETICS* (1697), *reprinted in* HUNTER, *supra* note 12, § 28, at 178.

and teaching of natural law, and hence in the formation of governmental policies and personnel. Moral theology's business is confined to spiritual guidance of Christians based less on metaphysical subtleties than on Biblical revelation. Concern with the ends of civil government and the duties of citizens to the state should rest with natural lawyers (located in law faculties). In turn, natural law must not impose on the spiritual welfare of citizens. Natural law's jurisdiction "is confined within the orbit of this life . . . form[ing] men to conduct themselves more sociably with others."<sup>39</sup>

The obverse of his demarcation of moral theology and natural law was no less controversial: a reduction of the distance between natural law and positive law-government.<sup>40</sup> The former can function as a source of internal normative pressure on the latter. Yet this is not to say that natural law concerns the law as it ought to be, as distinct from what it actually says or does. Both are yoked to the same normative end: civil peace and sociality. Moreover, civil prudential natural law is distinguished from positive law by its greater generality rather than by its location above and beyond it. For instance, a state's statutory taking or disgorgement of citizens' assets, through eminent domain or civil forfeiture proceedings, could be said to particularize a natural-law-based sovereign prerogative ("radical title") over national assets.<sup>41</sup>

Pufendorf's twofold demarcation cut through the intellectual continuum between spiritual-philosophical and secular-political concerns that had long been inseparable from Christian natural law as a university discipline, and which vested natural law with responsibility for setting the moral-spiritual standards and policing the boundaries of "the two cities." It is in large part the civil-prudential jurists' contextual historical antennae that drive their sense of the problem posed by this continuum. The result of the way the schism in Christendom played out was an irrepressible plurality of churches. Coupled with the newfound capabilities of centralizing states, the continuum—subjecting political rule to the imperatives of spiritual truth—became a charter for endless, devastating, and savage religious warfare, as states imposing confessional uniformity provoked internal popular insurgency and foreign invasions in defense of persecuted co-religionists. As Thomasius's polemic underlines, metaphysically honed theologies worked to intensify confessions' identities and inclination to hereticize rival faiths. The solution to this situation, as one of the greatest contemporary civil prudential historians, Martin Heckel, has shown, was a straight and narrow form of secularization in the form of limited juridifications of church-state jurisdictional and property relations.<sup>42</sup> The imperfect realization of the civil prudential program

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39. See PUFENDORF, *supra* note 19, at 8–9.

40. David Saunders, "Within the Orbit of This Life"—Samuel Pufendorf and the *Autonomy of Law*, 23 CARDOZO L. REV. 2173, 2181 (2002).

41. See Jeffrey Minson, *Civil Prudence, Sovereignty and Citizenship in the Justification of Civil Forfeiture*, 29 U.N.S.W. L.J. 61, 83–84 (2006) (describing Pufendorf's interest in eminent domain).

42. For an account of Martin Heckel's research project and its wider implications, see HUNTER, *supra* note 33, at 13–14, 81–84.

of de-sacralization alluded to in the Introduction above was not by reference to a general ideal or society-wide developmental process of secularization.

Can fact and norm be separated out here? In Thomasius's eyes, the metaphysical moral theologians had blood on their hands, to marginalize them was amply justified. But he knows this on the basis of a type of historical-political problematization. Thomasius's treatment of metaphysical philosophies not as competitors in a philosophical game of truth, but as historical objects (e.g., as schools) is not simply a methodological choice but part of an ethical stance. This is why it is inappropriate to see Pufendorf and Thomasius as competing in the same space as metaphysical philosophers. For the former, descriptive-historical studies are not, as they are for Kant (and Georg Wilhelm Friedrich Hegel too), merely empirical preliminaries to asking properly normative moral philosophical questions, but rather freighted with ethical significance.<sup>43</sup> They disclose that the pursuit of ultimate truths is deadly when allied to politics and religion. Contextual history is here a rhetorical carrier of the civil prudential ethic.

## II. MORAL ANTHROPOLOGY

"One could test all theories of state . . . according to their anthropology and thereby classify these as to whether they consciously or unconsciously presuppose man to be . . . [A] dangerous being or not, a risky or a harmless creature."<sup>44</sup>

If not all history is contextual, so too not all context is historical. In Pufendorf's bleak conjectural history of man in the natural state and the resulting "impulsive cause of constituting a state,"<sup>45</sup> he lays out a largely mythopoeic moral anthropology.<sup>46</sup> Why should anyone versed in the social-scientific tilt toward denaturalizing human conduct take it seriously?

One answer is, to parse the above quotation from Carl Schmitt, that all political argument is modulated, at least tacitly, by a representation of what human beings are perennially *like*. To capture the complexity of the genre we need to underline that their objects are human characteristics expressed not only as individual motives, but in human interactions. Following Schmitt again, human nature is manifest, not only in "associations and disassociations," but also in social

43. See CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 7–48 (Onora O'Neill ed., 1996) (providing an example of what Kantians take to be the inescapable normative question, and treating Pufendorf as a foil).

44. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 58 (George Schwab et al. trans., Univ. of Chi. Press expanded ed. 2007) (1932).

45. PUFENDORF, *supra* note 19, at 33–35, 115–19, 132–34; see also SAMUEL PUFENDORF'S *ON THE NATURAL STATE OF MEN: THE 1678 LATIN EDITION AND ENGLISH TRANSLATION* 111 (Michael Seidler trans., 1990) [hereinafter PUFENDORF, *NATURAL STATE*] (describing a natural state of man that is not perfect but built on "a human nature tinged with depravity").

46. Its mythopoeic quality is illustrated in Pufendorf's speculation that "the first humans, upon being expelled from Paradise . . . by means of God's special grace and instruction . . . [quickly] learned . . . how to use the things most important for meeting the needs of human life," such as how to make clothing. PUFENDORF, *NATURAL STATE*, *supra* note 45, at 115.

“distance[s].”<sup>47</sup> Further, a jostling range of human dispositions are typically portrayed, distributed within or across individuals, and located in a social setting—a “state of nature” that conjured up experiences or memories of life amid destructive and deadly chaos.

These ramifications undercut negative associations of human nature talk with one-dimensional generalizations claiming to be predictive of political behavior. Rather, think of a moral anthropology as a “speaking picture,”<sup>48</sup> an historico-rhetorical artifact. Look for how it mobilizes a cast of characters with their dispositions and equipment (e.g., forms of calculating); a social stage with its groups, zones and locales, furnishings, moral and power relations; a plot; an audience (or inscribed reader).<sup>49</sup>

The element of human dangerousness that for Schmitt was the touchstone of political theoretical seriousness is a big part of Pufendorf’s moral anthropology but does not suffice to capture what is special about it, what is apposite to the political and intellectual culture in which it was intervening, and what is worthy of attention today.

Pufendorf’s men are malicious and often violently aggressive, overly prone to take offense. They are variable in their passions and aspirations, which readily clash. They are creatures of lack from birth to the grave—dependent on others for care, love, protection, and benefits. Human sociability is partly a matter of enlightened self-interest—“to be safe, it is necessary . . . to be sociable”—but not entirely.<sup>50</sup> Pufendorf acknowledges some people’s naturally sociable, sympathetic, or altruistic inclinations; and stipulates that men must do their utmost to promote and preserve sociality—in other words, more than a purely self-interested negative duty of not harming others would entail.<sup>51</sup> The problem is that men are dangerous both to themselves and others to an extent that cannot be dependably offset by their sociable and friendly tendencies.<sup>52</sup> Fear of insecurity is the impulsion that leads men to acquiesce in or install a state.

Still less—and here we are reminded of the mistrust of the metaphysical disposition behind his demarcation argument—can humans depend for collective order on their rational dispositions. Moral dispositions are all too prone to malicious or aggressive overreach. Following the classical Epicureans, Pufendorf

47. SCHMITT, *supra* note 44, at 60.

48. DAVID JOHNSTON, *THE RHETORIC OF LEVIATHAN: THOMAS HOBBS AND THE POLITICS OF CULTURAL TRANSFORMATION* 66 (1986) (discussing Hobbes’s shift, in the words of a chapter subtitle, “[f]rom [d]ry [d]iscourse to [s]peaking [p]icture”).

49. A debt must be acknowledged here to ABRAHAM EDEL, *METHOD IN ETHICAL THEORY* 21–22 (1963)—an unusual attempt to develop categories for comparative description of moral philosophies.

50. PUFENDORF, *supra* note 19, at 35.

51. *Id.* In Pufendorf’s book, the obligation to promote sociality is “absolute” where its concomitant *officiae* of not harming others’ lives and acquisitions is again irreducible to terms of self-interest or private property. *Id.* at 56.

52. PUFENDORF, *NATURAL STATE*, *supra* note 45, at 130 (suggesting that men in their natural state had to act “as if the friendship of others were little to be relied on”).

casts repeated doubt on the efficacy of philosophical reasoning—including utilitarianism—as affording an antidote to human unsociability, or a transcendent rational foundation for natural law.<sup>53</sup> In questions of politics, most people—and he is not talking about the masses—forever remain children.<sup>54</sup> He is not supposing that people are always malicious or politically childish, or that they cannot acquire civic capacities through education or training. Once again it is a question of dependability, but also of rejecting Aristotle’s image of humans as fitted for politics by nature. Without effective paramount institutions of public authority it only takes some who refuse to restrain their greed, ambition, or moral zeal in order to force even the most reasonable and good-natured into defending themselves and hence perpetuating violent disorder.

It is partly philosophical rationalism’s redemptive aspect that leads Pufendorf to repudiate it as part of his organized evacuation from conventional Christian natural law via his demarcation between our Christian and natural law personae. It is proper, he argues, in our capacity as Christians to live in hope of redemption. Spiritual redemption was epitomized in the Augustinian *homo duplex* image of man as sinful, fallen, wretched, yet also as bearing traces (notably rationality) of their having been born in God’s image, therefore as redeemable. For purposes of government, argues Pufendorf, “since natural law does not extend where reason cannot reach, it would be inappropriate to try to deduce natural law from the uncorrupted nature of man.”<sup>55</sup> Speculation about humanity’s prelapsarian integrity, or capacity for redemption, should not serve as a model to which civil laws and customs must be conformed. Rather, and startlingly, “states are a sort of remedy for human imperfection . . . we [natural lawyers and state office holders] will always presuppose a human nature tinged with depravity.”<sup>56</sup> This coup against the sacred-secular continuum (in politics) is his moral-anthropology’s most radically de-transcendentalizing gesture.

But can this desacralizing image of the person be sustained in our time? Distinguishing between two intertwined obstacles to its plausibility—the metaphysics of autonomy and psychological ways of making our lives intelligible—points to how the civil prudential anthropology might be extended.

There is no doubting the moral authority and broad distribution of metaphysical images of the free self-governing citizen (or community)—as rationally self-consistent, creative, role- and rule-transcending, self-realizing, and values-expressing. It is apparent that moral anthropologies of civil prudence and metaphysics of autonomy are polar opposites. Recall Kant’s attack on political prudence, which he personifies as the exclusively opportunistic “political

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53. On Pufendorf’s skepticism about utility as a general principle of natural law, see HUNTER, *supra* note 33, at 179.

54. See 2 PUFENDORF, *supra* note 17, at 952.

55. PUFENDORF, *supra* note 19, at 10.

56. PUFENDORF, NATURAL STATE, *supra* note 45, at 111.

moralist.”<sup>57</sup> For Kant, it is unthinkable that a political actor can qualify as moral—as true to his essence as a free intelligent being, as is the “moral politician”—without conducting himself in relation to an ideal moral horizon.<sup>58</sup> The moral anthropology of civil prudence, with its emphasis on un-transcendable human lack and dangerousness, presents an opposite case. Those tasked with responsibilities of government *must* learn how to think ethically and to govern without ideals, partly to protect themselves from their own impulses as well as those they attempt to govern. But must civil prudence, self-constrained “to mould[ing] men’s external conduct to propriety”<sup>59</sup> not equally be at odds with psychological perspectives on matters of government?

In some senses it must. There is reason to be grateful where sovereign state laws still distinguish sin or moral fecklessness from crime, or rule political, moral, or religious intent, or knowledges of individuals’ psychological singularities, non-dispositive in determining criminal guilt or a drunk driving conviction. However, only to a degree have these lines of demarcation been maintained. In the era of the social state, the empire of psychological power-knowledges extends into the administration of law and order.<sup>60</sup> A politico-moral anthropology that makes no concessions to presumptions of psychological complexity in contemporary (ap)perceptions of personhood may appear too thin, and to be giving up ground. For so many psychological knowledges seek to render the metaphysical ethos of autonomy technically operative in tactics of “governing through freedom.”

This is a reason for recalibrating civil prudence’s relation to the psychological domain. Not all understandings of it rest on metaphysical understandings of the morally autonomous person. It follows that one way to enhance the plausibility of civil prudence’s moral anthropology is to assemble contemporary de-transcendentalizing counter-images of the person that are located on this psychological register.

This is not the place to canvas the range of potential sources of these “counter-images,” from psychoanalysis to studies of the amygdala. Let me call attention to just one such source. Little known in the Anglophone world, François Flahaut continues to develop his extraordinary project for a “general anthropology.” Deploying an eclectic array of arguments and methods, Flahaut attempts to subject contemporary ultramundane ethical, socio-political and spiritual discourse to what he dubs a “de-idealizing cure,” by assembling a cross-cultural array of non-redemptive depictions and experiences of the human condition.<sup>61</sup>

57. KANT, *supra* note 32, at 340.

58. *Id.*

59. PUFENDORF, *supra* note 19, at 9.

60. See NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF*, at xxi–xxii, 4–7 (2d ed. 1999) (describing how the “psy” sciences “have provided the means whereby human subjectivity and intersubjectivity could enter the calculations of the authorities”).

61. See FRANÇOIS FLAHAULT, *LE SENTIMENT D’EXISTER* 32–33 (2002); François Flahaut, *The Sense of Existing*, SALMAGUNDI, Fall 1994–Winter 1995, at 248 (his sole article in English). For a

Among many ways in which his work resonates with civil prudence, here is an (inadvertent) echo of Pufendorf's way of displacing the Augustinian image of humans as fallen-but-redeemable. In a work dedicated to investigating the inter-subjective yet irreducibly psychological springs of malice, Flahault notices the lacuna left by secular-enlightened critiques of Augustinian accounts of human nature. Fixated on rejecting guilt-mongering myths of original sin, critiques of Judaeo-Christian fall narratives left unchallenged its notions of redemption and Adamic innocence. Whence an abiding Achilles' heel of progressive thought: humans are naturally good, but corrupted or stultified by evils rooted in oppressive social relations. Flahault counters this image with a picture of the psyche as naturally disposed to evil *and* beneficence: "as being ambivalent by nature, not because of a fall, an evil by which it has become contaminated"—or from which it can be liberated.<sup>62</sup>

Not because of a fall: for sure, Pufendorf speaks of fallen man. But Flahault brings out the extra-lapsarian logic of Pufendorf's image of man as "always . . . tinged with depravity." Flahault's image of humanity's condition itself retains a *homo duplex* structure, yet its terms are no longer as in the Christian version morally asymmetrical.<sup>63</sup> Rather, the psyche's ambivalence is structured by tension between two qualities, both of which are invaluable to us and may be dangerous, self-disruptive, or frustrating—a tension that can at best be managed. A propensity to "illimitable" self-assertion—in a *Promethean* rather than egoistic or self-interested sense—has to contend with human beings' dependencies on other people for all the usual things and also on familiar milieus (houses, or places that feel at home) and possessions (owned, shared, circulated). Out of that internal friction arise human beings' malicious propensities, which (paralleling Nietzsche and Freud) have a way of latching onto moral dispositions.<sup>64</sup>

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fuller account of Flahault, see Jeffrey Minson, *The Sense of Existing and Its Political Implications (on François Flahault's "General Anthropology")*, in STATE, SECURITY, AND SUBJECT FORMATION 157, 157–71 (Anna Yeatman & Magdalena Zolkos eds., 2010). For an exceptional use of Flahault's analysis of Promethean self-images to illuminate the inter-subjective dimensions of the financial world, see Grahame F. Thompson, *The Global Regulatory Consequences of an Irrational Crisis: Examining 'Animal Spirits' and 'Excessive Exuberances'*, 7 GLOBALIZATIONS 87, 95–97 (2010).

62. See FRANÇOIS FLAHAULT, MALICE 27 (Liz Heron trans., Verso 2003) (1998) [hereinafter FLAHAULT, MALICE]. Chantal Mouffe's introduction to this English edition repays study. See *id.* at 1–15. One aspect of Flahault's work of particular relevance to the theme of (dis)enchantment is his attention to the role of atheistic (semi-Promethean) spirituality in modern idealizing social and political thought. For a recent example of this, see FRANÇOIS FLAHAULT, LE CRÉPUSCULE DE PROMÉTHÉE: CONTRIBUTION À UNE HISTOIRE DE LA DÉMESURE HUMAINE 39 (2008), noting that contemporary Promethean self-assertion is characterized by "a tragic and sad breach" (author's translation) of the classical images of Prometheus as a hubristic figure, a figure of emancipation and unlimited self-assertion destined for destruction, in favor of an unambivalent Christianized figure of illimitable liberation, progress, and justice.

63. See FLAHAULT, MALICE, *supra* note 62, *passim*. His ability to circumvent both Augustinian-Christian and secular-progressive conceptions of the sources of malice shows how readily Pufendorf's de-transcendentalizing image of the person can be bumped into a nontheological register—one reason why his theological commitments may not be an obstacle to renewing this ethic. See *id.*

64. *Id.* As to why illimitable self-assertion is not synonymous with egoism or selfishness, see



Pufendorf characterized sovereign statehood as “a sort of remedy for human imperfection.”<sup>65</sup> We will have occasion in what follows to illustrate some of the psychological twists that human imperfection can take in politics and government.

### III. THE CIVIL SOVEREIGN

Pufendorf’s conception of sovereign statehood has many literary/philosophical sources, including a critical engagement with Hobbes. But to understand how this conception short-circuits moral and political philosophical approaches, we need to learn from scholars who have focused on the way, always implicitly, the *De Jure Naturae* is about formalizing and drawing lessons from the 1648 Westphalian Peace settlements, especially the instituting of toleration for the Lutheran, Calvinist, and Catholic churches.<sup>66</sup> Without breaking with the past, the settlement inaugurated a patchwork of political entities, arrangements and citizen statuses, some of which—including states in a modern sense—were new.

David Boucher demonstrates Pufendorf’s appreciation that certain features of this nascent juristic reordering outstripped the descriptive capabilities of existing languages of politics. In the current political-legal lexicon for classifying political or institutional entities a prominent place was occupied, inter alia, by two problematic Roman law-based keywords: namely, *societas* and *universitas*. The former implies a contract between individuals, leaving no space for any notion of a state’s corporate legal personality, independently of power-holders at any given time. The problem with *universitas* was that, while it conferred a transferable legal personality, it also implied dependence on a superior conferring authority.<sup>67</sup> It is indicative of the distance between Pufendorf and political philosophical approaches to conceptualizing public authority that, as Boucher observes, Pufendorf does not pause to argue the inadequacies of *societas* and *universitas* but rather quietly “abandon[s]” them, focusing instead on amending Hobbes’ perspective on the persona, rights, and responsibilities of a sovereign “commonwealth” or *civitas*.<sup>68</sup>

Even where Pufendorf *is* in the business of offering reasons, the style of argument clashes with that of rationalist philosophies. Among the “just reasons” adduced by Pufendorf for citizens to comply with sovereign authority is that a

FLAHAULT, LE SENTIMENT D’EXISTER, *supra* note 61, at 509 (citing a comment by Hanna Arendt). Egoism implies a tendency to use others, not a desire to annihilate them. *Id.*

65. PUFENDORF, NATURAL STATE, *supra* note 45, at 111.

66. See Saunders, *supra* note 40, at 2173–98.

67. See David Boucher, *Resurrecting Pufendorf and Capturing the Westphalian Moment*, 27 REV. INT’L STUD. 557, 566 (2001). See also MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 160–63 (2010), which redeploys precisely the civilian categories of *societas* and *universitas* (as reinterpreted by Oakshott) to capture the bifocal character of *modern* civil government. Loughlin does not note Pufendorf’s expunging of these categories, which he (Loughlin) introduces as part of his dialectical undertaking to preserve Pufendorffian sovereignty theory while supplementing its perceived limitations. *Id.*

68. Boucher, *supra* note 67, at 565–66.

civil state is in a position to protect and otherwise benefit them. From the camp of rationalist philosophy, Gottfried Leibniz famously objected that Pufendorf was conflating amoral political power (*capacity* to protect) and the moral force of reasons (which found the sovereign's obligations independently of his will and power).<sup>69</sup> Pufendorf does run reasons for acting and power to act together, but whether that is a problem depends on which style of argument one is engaged in. If we are in pursuit of a transcendently rational justification for sovereign authority then Pufendorf's reasoning seems vulnerable. But if, as Martti Koskenniemi puts it, Pufendorf's inventory of just reasons is internal to a "science of government," Leibniz's objection cuts no ice. The commands of a superior are obligatory for citizens only for as long as a civil government's "techniques of peace, security, welfare" are more or less effectively in play. Absent those state capacities, once "the link between protection and obedience is broken. . . . The sovereign ceases to be such as a simple rational conclusion from his failure to govern properly," and the obligations of citizens cease.<sup>70</sup>

For a state's obligations and prerogatives regarding oversight of the common safety are worthless unless it can enforce its will. While the sovereign autonomy constructed in 1648 presupposes legal recognition by other political entities, it cannot be inferred that sovereignty depends on international and internal juridical recognition alone.<sup>71</sup> A legally recognized state, Pakistan, lacks the capacity or will to control part of its territory from which attacks on its neighbor Afghanistan are mounted. Therefore, from a civil prudential perspective, Pakistan has no ethical or public law claim on the latter to respect its sovereign jurisdiction over those areas (the wisdom of counter-attacks may be questioned but not on the grounds of Pakistan's rights of sovereignty). So in state-based reasoning, power and moral obligation *have* to be run together. However, the civil state's immanent responsibility to protect its population remains: It is not an amoral power-state.

In Pufendorf's doctrine the composite moral person that is the state is separate from the ruled *and* from those who staff the complex of inter-related yet jurisdictionally distinct offices comprising the state. So conceived, the sovereignty of a *civitas* is defined as paramount yet circumscribed. It can be characterized not

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69. For lucid accounts of the Pufendorf-Leibniz clash that defend Pufendorf against Leibniz's charges of inconsistency and confusion, see HUNTER, *supra* note 33, at 143–46, and HOCHSTRASSER, *supra* note 37, at 79–81.

70. Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT'L REL. 395, 400–03 (2009).

71. See ERSUN N. KURTULUS, STATE SOVEREIGNTY: CONCEPT, PHENOMENON AND RAMIFICATIONS 95–128 (2005), on the limits of the so-called "constitutivist" perspective that construes the authority of state sovereignty essentially as effects of legal recognition. For instance, Kurtulus cites one commentator's argument that the authority of a sovereign state regarding its exclusionary territorial rights "presupposes the recognition of [other sovereign states] who, per force of their recognition, agree to be so excluded." *Id.* at 95. For Kurtulus, state sovereignty is an amalgam of juridical recognition and "factual" capabilities for civil government. *Id.* at 129–183. See also LOUGHLIN, *supra* note 67, at 216–21, for a discussion of the re-articulation of Pufendorf's force-and-reasons view in Georg Jellinek's concept of "[t]he [n]ormative [p]ower of the [f]actual."

as omni-competent power but rather by a refusal to recognize a superior or even (a Bodinian touch) *equal* authority.<sup>72</sup> All power, however “absolute,” is limited by its means. “[M]y orders would not be carried out,” explained the Russian despot Catherine the Great, “unless they were the kind of orders which could be carried out . . .” (i.e., if not based on knowledgeable advice and “adapted to the customs, to the opinion of the people”).<sup>73</sup> Paramount power does not imply an omnipotent state, which must *then* be subject to limits constructed through non-statist normative thinking, limits seen as subtracting from or dividing absolute sovereignty power.<sup>74</sup> You do not begin with a general concept of a power-state. Pufendorf’s way of conceptualizing the establishment of the sovereign office—two pacts followed by a decree—makes it a secondary question as to whether the sovereign jurisdictional authority constituted in the initial pact is a monarch or an elected body. Pufendorf favors monarchy, but an election is another “form of securing sovereignty”: both have disadvantages.<sup>75</sup>

A notable characteristic of state sovereignty so defined has been identified by Raymond Geuss.<sup>76</sup> Recall the leading characteristics of a model contemporary polity—that it respects its citizens’ rights, permits free enterprise, political officeholders are subject to election, and that nevertheless, a sovereign and at times coercive political authority can be exercised. Geuss joins other historically minded philosophers and intellectual historians in pursuing the consequences of the fact that modern states’ civil powers and constraints emerged prior to and independently of their liberal, human rights-based or democratic characteristics.<sup>77</sup> Modern states, democracies or not, remain “non-voluntary” associations (apropos taxation, currency, prohibition of popular justice).<sup>78</sup> Citizens enjoy rights against the state; however, while in civic activist and some theoretical minds they function as a “counter-law,” it also stubbornly remains true these are conferred (and the

72. *Contra* JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 59 (Julian H. Franklin ed. & trans., 1992) (noting that, for a sovereign, even “to have a companion is to have a master . . . without whose support and consent he can . . . do nothing”).

73. ISABEL DE MADARIAGA, RUSSIA IN THE AGE OF CATHERINE THE GREAT 580 (1981) (citing a letter from a relative reporting Catherine’s observations (during a private discussion) on her “unlimited power”—a great comment on authority even if not the whole truth about the basis of her own).

74. *See* KURTULUS, *supra* note 71, at 78–82.

75. 2 PUFENDORF, *supra* note 17, at 1006; *see also id.* at 1023–33.

76. *See generally* RAYMOND GEUSS, HISTORY AND ILLUSION IN POLITICS (2001).

77. *See, e.g.*, REINHART KOSELLECK, CRITIQUE AND CRISIS: ENLIGHTENMENT AND THE PATHOGENESIS OF MODERN SOCIETY (Berg Publishers Ltd. 1988) (1959); BLANDINE KRIEDEL, THE STATE AND THE RULE OF LAW (Marc A. LePain & Jeffrey C. Cohen trans., Princeton Univ. Press 1995) (1989). For a lucid sympathetic Anglophone account of Koselleck’s argument and its implications as a genealogy of theoretical critique, *see* SAUNDERS, *supra* note 2, *passim*.

78. GEUSS, *supra* note 76, at 3, 29, 50, 64–68, 86–87. Geuss will not accord “full” normative standing to the state’s structure of offices on the ground that, although more than a power state, it will not withstand “independent” philosophical evaluation. *Id.* at 41–42.

attendant “costs of rights”<sup>79</sup> borne) by the state itself, and citizen status also includes a legitimate modicum of subordination. In Pufendorf’s language, the state is for limited purposes a superior, albeit not conceived as a superior moral person, whom citizens are obliged to love.

It is worth asking naively why such subordination so often provokes a disgusted state-skepticism. One answer lies in an non-theoretical libertarian *sensus communis* as manifested in Whig national histories that portray the historical development of the English “nation” as the unfolding or blocking of a pre-Norman spirit of liberty. To this fairy tale, Hume’s bestselling *History of England* offered a series of civil prudential counter-images, in the form of a disenchanted account of the English state’s political development. The reader encounters a *discontinuous* succession of improvisations, “divergent and conflicting practices” in successive “series of constitutions,” some in response to social and economic processes that governments attempt to coordinate around.<sup>80</sup> Some reigns, like that of Elizabeth I, suppress liberties but are not pilloried on that account. Hume suggests that the English state—to which, he insists, “liberty, though a laudable passion, ought commonly to be subordinate”<sup>81</sup>—has been on balance a producer of liberties and the conditions of sustaining them. In a moment we will open up one of those counter-images, but first let me invoke two further grounds for self-dissociation from the limited non-voluntariness entailed by the civil state.

The first of these stem from an equivalence posited in the metaphysical accounts of self-government. Citizens’ rights equate to entitlements of free rational agents everywhere, and hence to non-subjection in general. In Etienne Balibar’s succinct formulation: “Citizenship is not one among the attributes of subjectivity, on the contrary: it *is* subjectivity, that *form* of subjectivity that would no longer be identical with subjection for anyone.”<sup>82</sup> Together this equivalence renders any form of subjection (or instrumentalization) of citizens open to being morally redescribed as a condition of servility.<sup>83</sup> It underpins the tendency to conceive the state, in Blandine Kriegel’s words, as an immutable identity such that “the most extreme and oppressive forms of power [express] the quintessence of the state.”<sup>84</sup>

But is there a more empirical reason for the unpalatability of this subordinate

79. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

80. Eugene F. Miller, *Hume on Liberty in the Successive English Constitutions*, in *LIBERTY IN HUME’S HISTORY OF ENGLAND* 53, 56–57 (Nicholas Capaldi & Donald W. Livingston eds., 1990). For a reading of Hume’s history of England as in part an analysis and exemplification of the coordinating role of the state, see ANDREW SABL, *HUME’S POLITICS: COORDINATION AND CRISIS IN THE HISTORY OF ENGLAND* (2012).

81. 6 DAVID HUME, *THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 533 (LibertyClassics 1983) (1778).

82. Etienne Balibar, *Subjection and Subjectivation*, in *SUPPOSING THE SUBJECT* 1, 7–8, 12 (Joan Copjec ed., 1994).

83. BADIOU, *supra* note 3, at 145 (referring to the State as a “measureless enslavement”).

84. KRIEGEL, *supra* note 77, at 5–6.

dimension of citizen status? Even when its correlate is the establishment of norms of state civility that can be hailed as political-ethical achievements, the morally dark circumstances of their emergence is an obstacle to appreciating these norms. Hume's *History of England* offers a vivid illustration. Amid the innumerable cruelties and perfidies of England's Irish Rule documented by Hume, a few colonial policies initiated during James I's reign strike him as worthy of a civil state.<sup>85</sup> Through post-colonial eyes, many will regard these policies as equally invidious, except perhaps for one: the abolition of *vergild*.

Ubiquitous in medieval European customary law, *vergild* was an organized compensatory system for dealing with murder, in situations in which ethnic/racialized or religious communities often coexisted in an atmosphere of poisonous mutual fear and suspicion. *Wergild* was a license to kill for whoever could afford the tariff. The fine for murder was determined by a sliding scale that varied with the ethnic origins of murderer and victim and the balance of power between communities and power blocs.<sup>86</sup> In Ireland it was called the *eric*. Here is Hume's grimly humorous account of the challenge it presented to England's Irish rule:

When Sir William Fitzwilliams being Lord Deputy, told Maguire [an Irish clan chieftain], that he was to send a sheriff into Fermannah . . . *Your sheriff*, said Maguire, *shall be welcome to me: But, let me know, beforehand, his eric, or the price of his head, that, if my people cut it off, I may levy the money upon the county.*<sup>87</sup>

In a civil prudential spirit Hume presents abolition of the *eric* as a means "to render their subjection durable and useful to the crown of England."<sup>88</sup> In this instance "subjection" was to an administration of criminal justice common to the kingdom, in which the gravity of the offence of murder supposedly shall not vary with the cultural attributes of victim and offender.<sup>89</sup> Justice was hardly a keynote of Irish Rule; and one of the accompanying subjections of the Irish under James I praised by Hume included forced removals from homelands.<sup>90</sup> Nonetheless, abolition of *vergild* remains a jurisprudential paradigm of how a civil government should conduct itself; in Northern Ireland, as elsewhere, it remains a condition for a *modus vivendi* between still antagonistic religious communities.

If this sort of reform is a step towards liberal justice it is not a liberal step. The *raison d'être* of the Pufendorffian state (echoed in Locke) was its capacity to redress the radical insecurity resulting from intercommunal strife and the autonomies enjoyed by social power blocs, especially spiritual communities,

85. 5 HUME, *supra* note 81, at 47; 2 *id.* at 159; 3 *id.* at 92, 344, 425.

86. ROBERT BARTLETT, *THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE 950–1350*, at 211 (1993).

87. 5 HUME, *supra* note 81, at 47.

88. *Id.*

89. *Id.*

90. *Id.* at 49.

estates, or clans, by subjecting them to a juridically delimited subordination.<sup>91</sup> By imposing a portion of equal standing under the law, civil subordination frees up some citizens from subjection to the determination of their safety, statuses, and life-chances by communitarian or estate-based autonomy. In this way, the civil state furnishes a juridical ground for partial dis-identification—for better or worse a measure of alienation—from these communal sources of social identity. In this way, it displaces the classical Western topography of political space as a city with its “parts”—noble families, plebs, and guilds.<sup>92</sup> So it paves the way for the familiar problem-space of relations between state and rights-bearing individual, whose rights could come to be conceived in terms of liberal, social solidarist, or conservative principles of liberty; and for its correlate, some version of “the social state.” But civil prudence *qua* ethic of sovereignty is not committed to economic, political, or social liberalism. Its problem space is limited to protecting the state’s population and resources. Freedom under law is a side-effect of security.<sup>93</sup>

Given these historical upsides of civil subordination, perhaps you have to be in the grip of an autonomy-based normative democratic theory to identify the problems of uncivil sovereign states exclusively with their undoubted record of ethnic extermination, warmongering and lesser horrors of draconian overreach; neglecting their equally appalling failures to assert their civil-subordinative authority. One thinks of how long the U.S. federal government tolerated the atrocities and everyday cruelties of the Jim Crow states.

Unaccepted to this day in many conservative circles, Federalist paramountcy over the states began as we know at the 1787 Convention, with the (only ever partial) defeat of “anti-federalist” resistance to reform of the confederacy. Like the anti-Federalists, not all contemporary debates about the Convention sufficiently acknowledge the internal and external threats at that time to the very existence of the nascent union. Empowering the federal government with sovereign preeminence does of course entail limited subordination of the states, over which a civil war was fought. There is an echo of Pufendorf in Abraham Lincoln’s understanding of sovereignty as “a political community without a political superior.” The history of political thought, historical jurisprudence, and the “new institutionalist” histories associated with the American Political Development paradigm in political science furnish us with numerous pointers to a longstanding civil prudential statist contour—one among other, opposing tendencies—shaping the U.S. polity, commonly operating “out of sight” and in tandem with private corporate entities.<sup>94</sup>

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91. For his emphasis on what differentiates Pufendorf from liberal thought and gives his work pertinence today, I am indebted to Michael J. Seidler, *Pufendorf and the Politics of Recognition*, in *NATURAL LAW AND CIVIL SOVEREIGNTY: MORAL RIGHT AND STATE AUTHORITY IN EARLY MODERN POLITICAL THOUGHT* 235, 235–51 (Ian Hunter & David Saunders eds., 2002).

92. See Pasquino, *supra* note 18, at 30–32.

93. We can see from HOLMES, *supra* note 13, at 244–45, how John Locke, Baruch Spinoza, Montesquieu, and Jeremy Bentham concur with Pufendorf’s view of freedom as security.

94. On the American Political Development project and literature, see, for example, KAREN

This *modus operandi* is not surprising in light of persistent judicial disavowals of the United States' responsibility to protect its citizens (including the most vulnerable, as infamously evidenced in the *DeShaney* decision<sup>95</sup>)—as per that version of liberal-constitutionalism that mandates appellate courts to be solicitous only about citizens' protection *from* the state, never *by* it.<sup>96</sup> Civil prudential sovereignty is explicit in respect to police powers, but the two instantiations I want to discuss are both of a tacit kind.

The fugitive yet unmistakable actuality of a nondemocratic sovereign component of statehood in the United States is nicely captured in Michael Foley's challenge to American constitutionalists' ethos of "declared rules and stipulated powers" as the Constitution's defining characteristic.<sup>97</sup> To the contrary, when push comes to shove, that is, in constitutional crises, the American Constitution turns out to be no less unwritten than its British counterpart. While evidently not unwritten in the traditional generic sense of an absence of codification, the American Constitution is studded with calculated under-stipulations in the form of ambiguities, disjunctions, irreconcilable contradiction, and anomalies. These "gaps" are neither inadvertent nor repairable through legal interpretation allied to political initiative. They are symptoms of the fact that from the beginning the Constitution was an "*unsettlement*." The checks and balances celebrated as an index of the Constitution's rationality are often fig leaves, concealing the disjunction between the Convention's establishment of needful paramount powers, and the impossibility (then or now) of rationally agreeing on their location, form, and limits. Correlatively, sustaining constitutional governance depends on elected office-holders' acquiescing in "implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution." Foley terms these conventions and the studious in-definitions that they support "constitutional abeyances." The condition for their continuance is that elected office holders cultivate what in the civil prudence tradition would be called an adiaphoristic "political temperament."

The breakdown of these civil conventions is the very definition of a constitutional crisis. One of Foley's two main case studies is the crisis in the early

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ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004). *See also* BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009) (refuting a view of the federal government in the nineteenth century as relatively ineffectual by detailing the influence of little-understood federal policies of the time).

95. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196–200 (1989) (holding that a state government agency's failure to prevent child abuse by a custodial parent does not violate the child's right to liberty for the purposes of the Fourteenth Amendment to the U.S. Constitution).

96. HOLMES & SUNSTEIN, *supra* note 79, at 88–98 (1999) (discussing the policy rationales underlying the U.S. Supreme Court's holding in *DeShaney*).

97. MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS: GAPS, 'ABEYANCES' AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT*, at xiii (1989); *see also id.* at 85–130.

1970s precipitated by Richard Nixon's resort to "impoundment": the president's right to withhold authorization of government expenditures passed by Congress. Hitherto this prerogative had been used circumspectly, uncontroversially, and rarely. Nixon used impoundment belligerently, secretly, and repeatedly, rescinding funding for a swath of welfare and infrastructure measures.

His actions provoked Democratic Party-dominated challenges not only to Nixon's abridgment of Congressional legislative power, but also to the prerogative's very legitimacy. By his fiscal conservative lights, and in defense of that prerogative, Nixon felt justified in using impoundment to counter legislators' financial irresponsibility. But neither he, his party, nor their opponents grasped how by abandoning the civility of abeyances, by scrutinizing the prerogative, as opposed to leaving it in a state of dormant suspension,<sup>98</sup> they were exposing the Constitution's unsettlement, its potential for being not a means to resolve radical conflict but an incitement to it. In the end, the prerogative survived, Congress saved its honor by acquiring a veto over impoundment, while the Court refused to unambiguously rule on the inherency of impoundment.<sup>99</sup>

For my purposes, the interest of Foley's argument is its indications of an implicit but non-mystical locus of paramount power within the American polity—disconnected from democratic decisionmaking and incapable of being rationally delineated and confined.

The aim of the second example is to lend support to my thesis about the immanence of the obligation to protect to the very idea of a civil sovereign. The United States has consistently (and other imperial states, much of the time), avoided laying claims to sovereignty over their foreign insular possessions. Why, in the case of Guantanamo Bay, where the United States exercises unmistakable *dominium*, does it prefer to shelter behind the risible judicial veil of a leasehold arrangement? In the case of the "guano" islands off Honolulu, "considered as appertaining" to the United States by courts, where the federal government licensed private corporate proxies to harvest the guano, why was the United States for so long able to turn a blind eye to the subjection of American citizens to slave-like labor conditions? The answer to both questions is at once obvious and telling. Scholars of the juristic shaping of American and European imperial conduct agree that part of the point was to evade the public law-ethical burdens of protection (e.g., due process), encumbrances that are inseparable from sovereign rights.<sup>100</sup> The Constitution follows the flag. Here, in a different kind of abeyance, we see the way the responsibilities of a sovereign state are its own.

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98. *Id.* at 53.

99. *See id.* at 35–58 (describing the significance of the Watergate scandal and the resulting constitutional crisis in the context of the history and defining characteristics of the U.S. Constitution).

100. *See, e.g.,* MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 98–178 (2001); Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 *AM. Q.* 779, 781, 790–99 (2005); Amy Kaplan, *Where is Guantánamo?*, 57 *AM. Q.* 831, 834–38, 841–50 (2005).



Three ways of testing civil prudential sovereignty neglected in the Article are its relation to transnational politico-legal orderings, to rationalities and techniques of government and to the domain of the “social,” and to debates about states of exception or emergency. With respect to the relations between sovereignty and social government, we can note that Thomasius helped establish “police science” as a university subject.<sup>101</sup> And recent historical research suggests that contemporary exercises of sovereign power in respect to national security cannot be understood independently of their anchorage in legislation, techniques of government, and uses of presidential power (as with Nixon’s misuse of impoundment), that are independent of states of emergency. Rather, the occasions for the exercise of these powers concern social government.<sup>102</sup> All exercises of sovereignty and governing power by public authorities pose concerns about overreach, and it is to civil prudence’s manner of addressing these that we now turn.

#### IV. THE OFFICES OF CIVIL PRUDENCE

*Quis custodiet custodiens?*<sup>103</sup> The challenge to the civil prudential concept of paramount sovereignty cannot be adequately met by invoking worse alternatives, or relying on a virtuous “guardian” caste.<sup>104</sup> We have seen that according to civil prudence’s moral anthropology governors and governed alike need protection from one another and from themselves. The imperfect civil prudential answer to “Who guards the guards?” takes us back to the idea of the state as a structure of jurisdictionally demarcated, impersonal offices. The sovereign state makes itself accountable insofar as it binds itself<sup>105</sup>—applies normative pressure on the exercise of its own powers—via its office-based juristic and bureaucratic organization.

101. DAVID F. LINDENFELD, *THE PRACTICAL IMAGINATION: THE GERMAN SCIENCES OF STATE IN THE NINETEENTH CENTURY* 13–20 (1997) (explaining that Thomasius was a systematizer of Cameralism, a form of which became police science in universities).

102. On the social and governmental roots of recent administrations’ abrogation of habeas rights (e.g., in mental health legislation), see Mark Finnane & Susan Donkin, *Fighting Terror with Law? Some Other Genealogies of Pre-emption*, *INT’L J. FOR CRIME & JUST.* (2013). Challenging the use of the norm/exception couple in respect to government responses to national security emergencies is demonstrated in NOMI CLAIRE LAZAR, *STATES OF EMERGENCY IN LIBERAL DEMOCRACIES* 19–51 (2009) (arguing that “emergency need not be understood through the lens of exceptionalism”). On the emergence of the concept of the unitary executive in relation to the Reagan administration’s political-managerial strategies for shrinking administrative regulation and social support, see Douglas C. Dow, *The Concept of the Unitary Executive in Contemporary American Political Discourse*, Presentation to the Association of Political Theory, Texas A&M University (Oct. 2009).

103. See Locke’s unsurpassed animal metaphor for this problem. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 328 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

104. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 65–79 (1989); see also HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1994); *STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR* (Robert I. Rotberg ed., 2003).

105. On self-binding in this sense and its difficulties, see HOLMES, *supra* note 13, at 113–20, 151–52.

Hence, insofar as civil prudence is an ethic, it is a role ethic and nothing but. Conventionally, a role ethic delineates obligations, capacities, and comportments appropriate to an office holder (hence possibly not required of others, or else prohibited for them). Moral theory built around the autonomous integral person can accommodate such “agent-relative obligations” as long as their legitimacy is grounded in universal principles, which an office holder may use to challenge their orders.<sup>106</sup> Under no condition shall responsibilities folded into an office be granted independent ethical standing.

This attitude to office has a history. Role-skepticism is inseparable from critical-philosophical ways of modelling Enlightenment. The critical disposition, argues John Pocock, was from its inception staked on “a radical divorce between office and critical intelligence.” Enlightened thought about public affairs came to be redefined by Jean-Jacques Rousseau and Kant as “occupied, and indeed invented . . . by those excluded from public office or choosing not to exercise it, and acting in the capacity of citizen . . . or critic.”<sup>107</sup> Critical intelligence is incompatible with office-holding and its implication of subordination. This is the assumption behind Kant’s relegation of bureaucratic thinking to the private domain;<sup>108</sup> Rousseau’s famous hyperbolic speculation on the consequences were he to have accepted Louis XV’S offer of a pension—“farewell truth, liberty, and courage!”<sup>109</sup> or in our time, Justice Brennan’s opinion that in a self-governing republic it is as much the duty of a citizen to criticize the government, as it is the official’s duty to administer.<sup>110</sup>

It is instructive to pursue this Kantian notion of critical intelligence by

106. On agent-relative versus agent-neutral obligations, and for a full-bore Kantian critical analysis of role ethics, bringing it to the higher moral bar set by the moral obligations to which a morally autonomous person is subject, see ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* 140 n.12, 146 (1999).

107. 1 J.G.A. POCOCK, *BARBARISM AND RELIGION: THE ENLIGHTENMENTS OF EDWARD GIBBON, 1737–1764*, at 147–48 (1999). On the pre-modern “liquid empire of office,” dividing by a common language every walk of life, see CONAL CONDREN, *ARGUMENT AND AUTHORITY IN EARLY MODERN ENGLAND: THE PRESUPPOSITIONS OF OATHS AND OFFICES* 13–146 (2006).

108. IMMANUEL KANT, *An Answer to the Question: What is Enlightenment?*, in *PRACTICAL PHILOSOPHY* 11, 18 (Mary J. Gregor ed. & trans., 1996) (“What I call the private use of reason is that which one may make of it in a certain *civil* post or office [in a commonwealth] . . . . [There it is] impermissible to argue . . .”).

109. *THE CONFESSIONS OF JEAN-JACQUES ROUSSEAU* 354 (J.M. Cohen trans., Penguin Books 1953) (1781). On the two overlapping “moral international” enclave cultures formed within the European Absolutist politics in which eighteenth-century anti-civil-state critique flourished, the republic of letters and its salons and clubs, and the formidable masonic lodges, the Grand Master of a particularly influential French lodge from 1779 to 1782 being Benjamin Franklin no less, see KOSELLECK, *supra* note 77, at 64–123 (observing that the “moral international” comprising the masonic lodges “turned into the strongest social institution of the eighteenth century moral world”).

110. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 153–54 (1991) (discussing Justice Brennan’s opinion from *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)); see also STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 3–4 (1990) (defining the inward virtuous dispositions of a liberal citizen by contrast with those appropriate to a status or role, these in turn being associated with pre-modern aristocratic society).

reminding ourselves of how John Rawls idealizes political civility. It is “a moral, not a legal, duty,” and incumbent upon all self-governing citizens—who supposedly have an equal share in the coercive power they exercise over one another—to explain to one another how the principles and policies they favor are braced by public reason, to listen empathetically, and to be impartial in deciding whether accommodations to opposing viewpoints are justifiable.<sup>111</sup> This Platonic-realist assumption that *civic* disputations can be adjudicated by citizens’ exercise of critical reason can be contrasted with Pufendorf’s expressly anti-Platonic understanding of the judicial office itself. Anticipating Hume, Pufendorf conceives justice as an artificial set of imposed conventions and discretionary judgments: “the appropriate fitting of [legal] actions to persons.”<sup>112</sup> In keeping with this de-transcendentalized conception of justice-as-civility, Pufendorf denies that the judge’s role is to conform penal sentencing to a transcendent logic of proportionality vis-à-vis the intrinsically evil properties of the criminal act.<sup>113</sup> “[T]he true measure of punishments is the welfare of the state . . . .”<sup>114</sup>

Pufendorf conceptualizes office by inter-weaving the classical Ciceronian pluralized conception of moral agency with his concept of “[m]oral [e]ntities.”<sup>115</sup> Whereas attributes of physical things derive from underlying substances, *ens moralia*, paradigmatically offices, possess their characteristic attributes solely by virtue of being endowed with “a moral *where*.”<sup>116</sup> The dispositions of an office-bearer have an ethical meaning by virtue of their occupying an imposed purpose-built place or status in moral space. An *ens moralia* is a status imposed (“superadded”) by an intelligent superior, human or divine.<sup>117</sup>

Concomitantly Pufendorf takes up Cicero’s non-hierarchical distinction between a person’s ethical duties and demeanor, *qua* human being endowed with a share in reason, from those attaching for instance to marriage, occupation, or those appropriate to someone’s individual character (or the offices imposed by their humanity).<sup>118</sup> Civil prudence redefined office as impersonal comportment by pluralizing moral personality.

111. See JOHN RAWLS, *POLITICAL LIBERALISM* 217 (1993).

112. PUFENDORF, *supra* note 19, at 31.

113. 2 PUFENDORF, *supra* note 17, at 1211.

114. *Id.* at 1210.

115. *Id.* 4–8.

116. *Id.* at 7.

117. *Id.* at 5–6.

118. *Id.* at 14; CICERO, *ON DUTIES* 42 (M.T. Griffin & E.M. Atkins eds., Cambridge Univ. Press 1991) (44 B.C.E.) (“[W]e have been dressed, as it were, by nature for two roles . . . .”). And, as it turns out, several more. For an illuminating account of this conception of the person, see David Burchell, *Civic Personae: MacIntyre, Cicero and Moral Personality*, 19 *HIST. POL. THOUGHT* 101, 104–116 (1998). See also Jeffrey Minson, *In the Office of Humanity*, 14 *CYBER REV. MODERN HISTORIOGRAPHY* 1, *passim* (2009) (reviewing STÉPHANE TOUSSAINT, *HUMANISMES ANTIHUMANISMES: I, HUMANITAS ET RENTABILITÉ DE FICIN À HEIDEGGER* (2008), available at [http://www.cromohs.unifi.it/14\\_2009/minson\\_toussaint.html](http://www.cromohs.unifi.it/14_2009/minson_toussaint.html)).

Civil prudence redefined the offices of a desacralized civil order around a radical pluralization of moral personality. Individuals in public service, in Hunter's words, "would have to learn to accede to their civil duties independently of cultivating an 'integral' moral personality."<sup>119</sup> Thus, Pufendorf discusses how

one and the same man can be in different states [*pluribus statibus*] not mutually antagonistic. So the same man can at the same time represent several persons . . . . [A]lthough . . . the same person cannot be both husband and wife . . . litigant and witness, yet nothing prevents the same person from being [simultaneously] . . . the head of a family, . . . a lawyer, . . . a counsellor; in so far, at least, as the various duties concerned do not engage the entire man . . . .<sup>120</sup>

Civil personae and offices should not be defined by private conscience, and religious persons are not immune from civil duties; "he who has gathered from the Sacred Scriptures alone the . . . duty of priests, . . . [is] also obligated to perform such duties as are required by the constitutions of individual governments."<sup>121</sup>

How could one not be reminded of the failure, internationally, of senior Catholic officials to fulfil their obligations, as citizens, to report to the secular civil authorities sexual crimes against children committed by the priests over whom they had oversight? But Pufendorf's words also call to mind a notable feature of the American Constitution's religion clause case law. In the Supreme Court's calculated under-enforcement of the Free Exercise Clause, there is evidence that personnel act in accordance with what Scott Idleman terms an "inherent institutional obligation," *qua* appellate judges, to "protect and reinforce the sovereignty of civil government," by subordinating religious liberty, simply by insisting on compliance with generally promulgated law.<sup>122</sup>

Two corollaries of the Pufendorffian ethic of office can be picked out. Firstly, there are two ways of being derelict: self-dealing malfeasance and altruistic "overfeasance": yielding to the temptation to follow extra-official ethical commitments. In the above example, the Church officials' dereliction lay not only in neglect of the problem, moving child-abusers from parish to parish, but also in the more conscientious view underpinning the failure to report criminal offences, that the offending priests were in need of in-house pastoral guidance. A statist ethic of office can work, in Max Weber's terms, as an "ethic of responsibility,"

119. HUNTER, *supra* note 33, at 161. For a lucid argument linking Pufendorf's strategy of pluralizing moral personality, depicted as civil personae, to the problem of how to form the personnel of a desacralized civil order, see *id.* at 161–68.

120. 2 PUFENDORF, *supra* note 17, at 13–14.

121. 2 PUFENDORF, *supra* note 17, at 10–11; For further formulations along similar lines and more examples of his pluralization of moral personhood, see SAMUEL PUFENDORF, OF THE NATURE AND QUALIFICATION OF RELIGION IN REFERENCE TO CIVIL SOCIETY 93–94 (Simone Zurbuchen ed., Jodocus Crull trans., Liberty Fund 2002) (1687).

122. Scott C. Idleman, *Why the State Must Subordinate Religion*, in LAW AND RELIGION 175, 188 (Stephen M. Feldman ed., 2000).

hence as a brake on compulsive overreaching under the sway of an “ethic of principled conviction.”<sup>123</sup>

Already encountered, the second corollary is cultivation of indifference to extra-official commitments. Originating in classical stoicism, in the Renaissance the notion of “things indifferent” denoted matters of moral or spiritual evaluation deemed neither imperative nor prohibited by divine or natural law.<sup>124</sup> Protestant sects quarrelled furiously over whether this or that article of faith or rite could be treated as adiaphora. Thomasius approached the question from the angle of “[t]he [r]ight of Protestant [p]rinces” regarding religions.<sup>125</sup> Like Pufendorf, he drew on Pietist ideas of inward faith to identify ecclesiastical rites and liturgy as *adiaphora*, tolerable if they posed no threat to peace. Thomasius argued for decriminalizing all heresy, yet in Catholic eyes his posture is sectarian: to treat rites as essential for salvation is a theological error.<sup>126</sup>

Yet a civil ethic of office demands a non-theologically determined adiaphoristic attitude. We have noted its requirement to pluralize moral personality, hence a need to create “internal boundaries” between official conscience and extra-official commitments.<sup>127</sup> This may entail working ethically at treating one’s personal ethical or faith commitments as adiaphora while acting in an official capacity. No prejudice is entailed about the intrinsic ethical or spiritual importance of those commitments. It is that moral effort for sociality’s sake that differentiates civil indifference from amoral insouciance.

Office and its pluralization of moral personality may be “a prized accomplishment of western political theory and practice,” yet professional civility can be transported into its opposite by over-identification with office or “malignant obedience.”<sup>128</sup> Delimitation of responsibilities can be invoked, often plausibly, as a moral excuse. A state’s military service ethos can clash with the guild-like culture and ethos that goes with being a member of a unit or regiment. And as Pufendorf insisted, pluralization of moral personality has limits: some “hats” should not be worn by the same individual.<sup>129</sup> Against the desacralizing

123. For this distinction, see MAX WEBER, *POLITICAL WRITINGS* 359 (Peter Lassman & Ronald Speirs eds., 1994).

124. See ANDREW R. MURPHY, *CONSCIENCE AND COMMUNITY: REVISITING TOLERATION AND RELIGIOUS DISSENT IN EARLY MODERN ENGLAND AND AMERICA* 48–50, 153–54, 220–22 (2001); GARY REMER, *HUMANISM AND THE RHETORIC OF TOLERATION* 50–71 (1996) (on Erasmusian adiaphorism); see generally BERNARD J. VERKAMP, *THE INDIFFERENT MEAN: ADIAPHORISM IN THE ENGLISH REFORMATION TO 1554* (1977).

125. HUNTER, *supra* note 33, at 255–56; CHRISTIAN THOMASIIUS, *The Right of Protestant Princes Regarding Indifferent Matters or Adiaphora*, in *ESSAYS ON CHURCH, STATE, AND POLITICS* 49 (Ian Hunter et al. eds. & trans., 2007).

126. HUNTER, *supra* note 33, at 255–56; THOMASIIUS, *supra* note 125, at 49 (“[M]inisters shall instruct their congregations that external ecclesiastical ceremonies . . . are not divine worship, nor an essential part of it . . .”).

127. See J. PATRICK DOBEL, *PUBLIC INTEGRITY* 41, 139–43 (1999).

128. *Id.* at 41–44.

129. See 2 PUFENDORF, *supra* note 17, at 975 (“[I]t will surely be no pact if Titus, as merchant, promises something to Titus, as father.”).

thrust of his work, Hobbes actually unified the offices of civil ruler and head of the established church, thereby making civil peace depend on religious conformity. The Hobbesian sovereign is a pastor-king who determines church law and appointments.<sup>130</sup> Against Hobbes, Pufendorf argued that the latter office (which he considered as consisting in teaching through the power of love rather than coercion) and “the Royal Office . . . are of such a nature, that they cannot conveniently be [a]dministered by one and the same [p]erson.”<sup>131</sup>

That the separation of individual person and office is no panacea against pathologies of power is insufficient to gainsay its efficacy and dignity as a condition for civil government. You have to think about what happens when a sense of office-based constraints breaks down—the Iran-Contra affair is a *locus classicus*<sup>132</sup>—and of its diverse benefits. Drawing primarily on Pufendorf, I have put together a fourfold model of an immanent state. What is an effective brake against the tendencies of States to use their powers egregiously and idiotically? The foil to civil prudence has been the view that the state can only be made to serve the common good when braced by moral principles that are not “of” the state (as the Christian is not “of” this world). Civil prudence strives to take account of what actually lies within the capabilities of modern states to problematize, correct, cope with, and improve.<sup>133</sup>

#### V. CONCLUDING REMARKS: TO GRAFT DEMOCRACIES

“We are here to preserve democracy, not to practice it.”<sup>134</sup> We encountered this maxim as uttered by a deranged ultra-conservative naval officer, who had ceased acting in office.<sup>135</sup> The maxim is a staple ingredient in the professional ethos of senior military personnel. The military are one of many bodies in a democratic state that are “unbound from the political responsibilities characterizing elective organs”<sup>136</sup>—including independent central banks, courts, auditing, risk-assessing and statistical bureaus, and inspectorates. Personnel in some of these bodies might use the maxim to characterize their (a)political responsibilities. But it was at the interface of the military, civilian administration,

130. THOMAS HOBBS, *LEVIATHAN: AUTHORITATIVE TEXT, BACKGROUNDS, INTERPRETATIONS* 191 (Richard E. Flathman & David Johnston eds., W.W. Norton & Co. 1997) (1651).

131. PUFENDORF, *supra* note 121, at 93–94. On this Hobbes-Pufendorf comparison, I am indebted to Richard Johnson, *Early Modern Natural Law and the Problem of the Sacred State: Studies in Seventeenth Century Political Theology and Political Philosophy* (2002) (unpublished Ph.D. thesis, Griffith University) (on file with Center for Research Libraries).

132. For analysis in terms of office abdication, see DOBEL, *supra* note 127, at 140–43.

133. See Sunil Khilnani, *Democracy and Modern Political Community: Limits and Possibilities*, 20 *ECON. & SOC'Y* 196 (1991).

134. CRIMSON TIDE, *supra* note 11.

135. *Id.*

136. For a picture of the range of such unelected bodies in our democracies, see Pasquale Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 *RATIO JURIS* 38, 38 (1998).

and legislature that there emerged a telling echo of this protect-versus-practice maxim, redolent of civil prudence, which will set the scene for some closing remarks about the civil state and its relations to democracy.

This moment of civil-prudence-in-action occurred during U.S. Senate hearings preceding repeal of the military's "don't ask, don't tell" rule.<sup>137</sup> Senator McCain, an opponent of repeal, cited evidence of anti-gay sentiment among combat troops.<sup>138</sup> He expressed concern about the military's failure to ask service members if they wanted the law to be changed.<sup>139</sup> To this demand that the armed services practice democracy, Defense Secretary Gates responded, "I can't think of a single precedent in American history of doing a referendum of the American armed forces on a policy issue. . . . That's not the way our civilian-led military has ever worked . . . ."<sup>140</sup>

Recall the tenets of civil prudential sovereign power outlined above: the state as non-voluntary association, an ensemble of offices, with their respective institutionally imposed tasks of behavior—there they are. Gates' words bluntly imply that the military's acceptance of gays' right to serve their country without hiding their sexual orientation hinged on the armed services' nondemocratic subordination *to* the federal administration, and *of* their members.

Still, his observations were made in a democratic forum and repeal of "don't ask . . ." was voted into existence. In light of this came, and in the shadow of present-day conservative disgust for the state, how in terms of civil prudence might we conceive the impacts of democracy on the civil state and vice versa?

The shadow cast on state-democracy relations by U.S. conservative forces looks dark, from many perspectives. A majority of them are committed to evermore "state-skeptical" versions of the American neo-liberal project to roll back the New Deal.<sup>141</sup> Hitherto bipartisan federal government powers and responsibilities vis-à-vis monetary policy, the states, basic environmental protections, national frontiers, social provision, and more, are threatened. To this prospect add the factor of its grassroots participatory-democratic support, deploying *modi operandi* borrowed from the left to insert itself into the GOP, state legislatures, school government boards, and to practice ugly forms of direct action directed at voter suppression and the undocumented.

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137. Elisabeth Bumiller, *Top Brass and McCain Square Off over Gays*, N.Y. TIMES, Dec. 3, 2010, at A16.

138. *Id.*

139. *Id.*

140. *Id.*

141. I use "neo-liberalism" in the stripped-down conceptual-historical sense of an intellectual circle (around Hayek and friends) and its international seeding-effects constructed in *THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* (Philip Mirowski & Dieter Plehwe eds., 2009). A detailed and conceptually innovative study of the neoliberal movement in the United States by one of the contributors to that collection is KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009).

Does contemplating these forces give pause to those committed to critique of the state and democratization? It is difficult to oppose this hard-right agenda without articulating the difference a civil government can make to the possibility of reanimating the hyphenation between a dynamic commercial and social-solidaristic state—even if a civil state as such is not identifiable with this social democratic cause. While there exist some effective public philosophies and rhetorics along those lines,<sup>142</sup> these do not go to the more disjunctive, discomfiting planes of the state/democracy interface. So here is a silhouette of some civil prudence-oriented historical and theoretical understandings of that.

Contextual history oriented to civil prudence emerged as a more or less rhetorically inflected study of matters of normative concern about threats to civil peace and sociability. The “fact-values” about democratic life that jump out when seen through a civil prudential lens were ethical concomitants of its procedural aspects, from Parliaments to protest groups. As I have argued elsewhere, these miscellaneous practical dimensions of democracy include mechanisms for (de-)selecting a governing personnel—and hence giving the governed a measure of control over their leaders<sup>143</sup>—and the mundane disciplines of democratic participation. Some disciplines are built into institutional arrangements like a quorum (to protect us from ourselves). Others involve cultivation of civil-ethical dispositions required to responsibly run a committee, a rally, a pressure group, or a legislature. This array of participatory discipline calls into play—without bringing the state into it—many of the office-based ethics of political responsibility that a civil ethic of state entails: like the adaphoristic bearing required to chair a meeting.<sup>144</sup> But here the focus is on civil-ethical dimensions of democratic practices more directly implicated in the state.

In a civil prudential spirit, Giuseppe Di Palma offers a descriptive understanding of democracy, as a “pool of specifics” with “history and geography behind it” in the form of practices and procedures that political actors borrow and improvise to form a governing regime. No doubt on account of his realist allergy to abstract idealizations of democracy, Di Palma makes no mention of its ethical concomitants, as well as more elevated ethos. And yet he is more moral than he knows where he underlines the role of democratic forms in establishing “setting up government in diversity as a way of defusing conflict.”<sup>145</sup> His de-idealization

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142. An example is the subtitle of HOLMES & SUNSTEIN, *supra* note 79 (“Why Liberty [including negative liberty] Depends on Taxes”).

143. Independently of the concept of a self-governing community of citizens, democracy may be understood “in a minimal sense, as any kind of effective and formalized control by citizens over leaders or policies.” Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 98 (John Elster ed., 1998).

144. MINSON, *supra* note 5, at 190–219; Janice Besch & Jeffrey Minson, *Participatory Policy Making, Ethics, and the Arts*, in *CITIZENSHIP AND CULTURAL POLICY* 52 (Denise Meredith & Jeffrey Minson eds., SAGE Publ’ns Ltd. rev. ed. 2001) (2000).

145. GIUSEPPE DI PALMA, *TO CRAFT DEMOCRACIES: AN ESSAY IN DEMOCRATIC TRANSITIONS* 15 (1990)



and disaggregation of democracy are good to think with if we are to understand how democracy played a part both in moving away from a state of orders, estates, and powerful communal blocs of solidarity to a security and social state; and also in preserving those orders.

Democratic arrangements as a way of diffusing conflict reminds us of the civil peace-based rationale of majority rule (with all its strengths and weaknesses), as a technique for supporting a paramount decisional apparatus in the absence of consensus.<sup>146</sup> But it also reminds us of the ways in which representative democracy has also had to come to terms with various older, pre-democratic social and political relations, and of how parallel our lobbyist-saturated legislative houses are to royal courts, how democracy gave patronage a new lease of life. This bifocal perspective on what representative government and democratic culture does and does not displace is taken up by the neo-Weberian Wilhelm Hennis. In connection with democracy's relation to "pre-modern" social relations Hennis emphasizes links between the notions of political representation and "entrusted office." For him the heart of representative democracy is not popular sovereignty and will, but administrative office.<sup>147</sup>

Surely, it will be objected, the notion of democratically accountable administrative office solicits reference to the people in whose name it operates. True, but let us recollect a crucial mark of the concept of trusteeship, be it political or familial. A recent study of Roman law concepts of guardianship and their political/constitutional afterlife—from Accursius to Hobbes—reminds us that, on the one hand, an abiding condition of a beneficiary of a trust is their limited capacity for self-agency, yet on the other, though incapable of exercising dominium, the ward in Roman law was deemed the dominus, who might theoretically therefore sue for the dismissal of the guardian in the event of the latter's egregious misuse of his tutelary office. Daniel Lee's argument yields not only a plausible origin of the tension between modern constitutionalists' insistence both on vesting constitutive sovereign authority in the will of the people and that powers of government must be divided, constrained, and not directly exercised by the people themselves.<sup>148</sup> It also—by virtue of the brittleness of the analogy—brings out the commitment to the non-empirical (metaphysical and/or fairytale-like) stance necessary to sustain this conception of democracy as popular self-government. The fact in that a representative democratic regime electors have a measure of control over their leaders does not have that conception of democracy as its condition of possibility.

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146. See GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 131, 225–27 (1987).

147. WILHELM HENNIS, *POLITICS AS A PRACTICAL SCIENCE* 27–45 (Keith Tribe trans., 2009).

148. See DANIEL LEE, *CIVIL LAW AND CIVIL SOVEREIGNTY: POPULAR SOVEREIGNTY, ROMAN LAW AND THE CIVILIAN FOUNDATIONS OF THE CONSTITUTIONAL STATE IN EARLY MODERN POLITICAL THOUGHT* (2010).

A general civil prudential implication of these sketchy remarks is that we are not obliged to consider the public law dimension of state/democracy relations, as does Martin Loughlin, in terms of a reflexively mediated dialectic between the state's governmental authority and the people invested with constitutive sovereignty in modern constitutions and popular discourse. Democracy, like the state, has to be grafted onto many older types of social and political relations as well as new ones. *Vox populi* is one among a range of opinions and powers that a regime has to contend with, and adjust to. From a civil prudential point of view the people are no more sovereign, no more "constitutive" of the state than the super-rich. What I take from Hennis's historical perspective on democracy is that there is no essential dyadic polarity to be held in tension or reconciled.

That perspective on democracy is partly underwritten by civil prudence's bleak anthropology. The familiar arguments for and against there being nondemocratic hedges against representative democracy in the form of "ephorate"—like agencies, like the Federal Reserve, are inchoately indexed to divergences about how reckless or foolish legislators can be (in several states anti-Sharia laws are on the books), on the need for distrusting what even the best intentioned people will do with power and resources. As well, the psychological inflection of the civil prudential anthropology suggested earlier highlights links between democracy and narcissism. I would not give unqualified support to psychoanalyst Elisabeth Roudinesco's generalization that democracy is bound to a concept of freedom such that it amounts to "a guarantee for the ego"; still, she has a point.<sup>149</sup> The politician seeking elected office has to an extent to be a flatterer of the ego, pandering to the electors' intelligence, and, especially in the United States, to their sense of their own and the nation's essential goodness and destined preeminence over the world.

One way we have available to relate ourselves to democracy is the pluralization of moral personhood associated with office-bearing. This suggests the possibility of an institutionally based perspectivism, asking ourselves how diverse cultures of democracy, office-holders, types of activists, see and relate themselves to a state, and vice-versa for the diverse offices of law-states.<sup>150</sup> People placed in different institutional seats might then be better able to understand both the ugly faces of democracies—like the egregious conflict of interest involved in devolving the sovereign prerogative of mercy for capital offences to state governors—and their undoubted benefits. I have suggested that civil prudence is a role ethic all the way down. It follows that it is an ethic for a civil state and hence primarily for officeholders supposed to exercise governing power on its behalf. But they had better not forget its democratic characteristics, just as civic advocates

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149. ELISABETH ROUDINESCO, JACQUES LACAN & CO.: A HISTORY OF PSYCHOANALYSIS IN FRANCE, 1925–1985, at 224 (Jeffrey Mehlman trans., Univ. of Chi. Press 1990) (1986). Her remarks are precautionary to *support* the democratic aspect of Lacanian psychoanalytic training.

150. See generally, e.g., ANDREW SABL, RULING PASSIONS: POLITICAL OFFICES AND DEMOCRATIC ETHICS (2002).

of social support had better not forget the popular as well as plutocratic conservative loathing of their cause and the civil sovereign state that is its precondition.

As it stands, this reconstruction of civil prudence is full of unassayed aporias, moral costs, obscurities, and lacunae. But I have tried to get across to readers my sense that in civil prudence we are looking at something like an unidentified star in politico-moral space, a tradition that lies outside the box of conventional theoretical options. I would also like to think that this Article's sample of civil statist thought gives the lie to images of the idiot-state, such as surfaces in Alain Badiou's speculation that "it is not possible for the State to serve as a way in to the investigation of politics, at least not if politics is a thought. . . . because the state itself does not think."<sup>151</sup> So to be "intelligent," an alternative political process depends on its being "subtracted" from the state.<sup>152</sup> Is that what my disgusted fellow symposiast wishes for?

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151. BADIOU, *supra* note 3, at 87–88.

152. *Id.*