

6-2015

Afterword: Office and the Conduct of the Minor Jurisprudent

Shaun McVeigh

Melbourne University Law School

Follow this and additional works at: <https://scholarship.law.uci.edu/ucilr>



Part of the [Law and Philosophy Commons](#), and the [Legal History Commons](#)

Recommended Citation

Shaun McVeigh, *Afterword: Office and the Conduct of the Minor Jurisprudent*, 5 U.C. IRVINE L. REV. 499 (2015).

Available at: <https://scholarship.law.uci.edu/ucilr/vol5/iss2/13>

This Afterword is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Law Review by an authorized editor of UCI Law Scholarly Commons.

Afterword: Office and the Conduct of the Minor Jurisprudent

Shaun McVeigh*

Introduction	499
I. Office and Conduct	500
II. Philosophy as Training in Life, Jurisprudence as a Training in Office.....	503
III. “Jurisprudence As . . .” Exercise	505
IV. Preparation	507
V. Jurisprudence and History Writing	508
Conclusion.....	510

INTRODUCTION

In the foreword to “Law As . . .’ Glossolalia,” Chris Tomlins frames the central topic of the symposium in terms of jurisprudence and the practice of history writing. History writing, he argues, enables scholars to rearticulate different aspects of the ideas, practices, and institutions of law. Considering glossolalia—speaking in tongues and the expression of divine spirit—suggests Tomlins, might allow us to say something about contemporary forms of jurisprudence and history writing or, at least about those genres that remain in touch with the common law tradition.¹

This Afterword follows up the projects presented in the “Law As . . .” symposium as if they articulate a series of jurisprudences that offer a training in the conduct of office or persona of the (minor) jurisprudent. A jurisprudent, here, can be characterised as someone who develops a persona or takes up an office, which cares for the conduct of lawful relations or ways of belonging to law. The training in conduct addressed here is linked—via glossolalia and “speaking in tongues”—to the “government of the tongue” and forms of eloquence. Drawing on Chris Tomlins’s foreword to this symposium, this Afterword wonders too about the

* Melbourne Law School, University of Melbourne. The comments on office and conduct presented here have been developed in collaboration over many years with Shaunnagh Dorsett, Law School, University of Technology Sydney; and Ann Genovese, Melbourne Law School, University of Melbourne.

1. See Christopher Tomlins, *Foreword. “Law As . . .” III—Glossolalia: Toward a Minor (Historical) Jurisprudence*, 5 U.C. IRVINE L. REV. 239 (2015).

training in conduct offered when forms of history writing become forms of minor jurisprudence and a guide to a conduct of lawful life (or a life lived with law). The “government of the tongue” here becomes not an argument about state-managed free speech or censorship but the art of speaking well and of living with law and justice.

I. OFFICE AND CONDUCT

Restoring or assigning an office to the jurispudent today is, perhaps, a little optimistic. The language and the institutional life of office have for a long time provided a point of engagement of public life, but they are rarely treated as capable of generating obligations or distinct styles of conduct or action.² Some offices, like those of state (judge, legislator, governor, soldier), church (bishop, priest), and other public and private corporations, are instituted in formal ways, still often bound by oath to a higher authority. These offices mark the duties, responsibilities, rights, and privileges that are taken up in public life. There are other offices, like those of doctor, engineer, philosopher, poet, artist, or critic, that used to be treated as social or intellectual offices. Today, they might be viewed in terms of vocation, profession, or career. In these offices, if they are still such, it is more likely that evaluative work be assigned to general accounts of normative theory and social management. Office, I think, remains both a central concern of public life and a distinct mode of organising participation in public life.

Within the university, we live and use the language of office but mostly in the context of administrative office and material place. The scholar, historian, jurist, and jurispudent might well benefit from being returned to an office that has purpose (justice and the conduct of a lawful life), a mode and manner of performance, and evaluation of its virtues and vices. The duties, responsibilities, and privileges of the scholar are varied and carried in the languages of religious calling, state education, and commercial activity. The same can be said for the jurispudent as an officeholder or person who cares for the conduct of lawful relations.³ How the obligations of office are understood depends in large part on the authority under which it is created. The civil authority of the state has shaped office in relation to forms of nontranscendent authority, desacralised political association, a plurality of forms of duty, and modes of engaging and creating public life. The authority of the Christian church has shaped office around liturgy and the ceremonial imitation of the life of Christ.⁴ The theologies and jurisprudences that inform such offices and forms of association have been engaged in the formation and transmission of the

2. ANDREW SABL, *RULING PASSIONS: POLITICAL OFFICES AND DEMOCRATIC ETHICS* (2002).

3. PETER GOODRICH, *LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES* (1996); R.C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* (1987).

4. GIORGIO AGAMBEN, *OPUS DEI: AN ARCHAEOLOGY OF DUTY* (Adam Kotsko trans., Stanford Univ. Press 2013) (2012).

Catholic Church and the creation and realignment of political and moral authority with the West.⁵ Minor jurists take up office, if at all, in other places or other ways. Like the work of feminist jurists directed towards creating new personae for public and private life, the minor jurist may also be engaged in crafting new juridical personae capable of acting within and without office.⁶

One link that becomes clearer in joining the conduct of office to jurisprudential writing is that jurisprudence is joined more directly to Greek, Roman, and Christian traditions of philosophy that respond to the question, “How should I conduct a life?” As the historian and philosopher Pierre Hadot has argued, such responses have been ordered around an induction into the “philosophical life” and conducted, in large part, through the practice of spiritual exercises.⁷ Such exercises were directed to creating and transforming not just the self and a vision of the world but ways of living and acting in the world.⁸ At the centre of Hadot’s account of the classical traditions of philosophy is the teaching offered by the philosopher to the pupil.⁹ Philosophy, as Montaigne relates, is not simply a preparation for death, it is a “continual exercise of the soul,” or an exercise of judgement.¹⁰ The importance of philosophy in this account is practical insofar as it assists the living of a philosophical life. Such assistance might be thought of in terms of an ensemble of arts, techniques, and cultivation of forms of intellectual and juridical life. This includes the art of writing as well as reflection.¹¹

5. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

6. EDWARD MUSSAWIR, *JURISDICTION IN DELEUZE: THE EXPRESSION AND REPRESENTATION OF LAW* (2011); Ann Genovese, *Inheriting and Inhabiting the Pleasures and Duties of Our Own Existence: The Second Sex and Feminist Jurisprudence*, 38 *AUSTL. FEMINIST L.J.* 41 (2013).

7. See PIERRE HADOT, *PHILOSOPHY AS A WAY OF LIFE: SPIRITUAL EXERCISES FROM SOCRATES TO FOUCAULT* 264–74 (Arnold I. Davidson ed., Michael Chase trans., 1995) [hereinafter HADOT, *PHILOSOPHY AS A WAY OF LIFE*]; PIERRE HADOT, *WHAT IS ANCIENT PHILOSOPHY?* 253–70 (Michael Chase trans., Harvard Univ. Press 2002) (1995) [hereinafter HADOT, *WHAT IS ANCIENT PHILOSOPHY?*]. Hadot characterises these spiritual exercises in terms of a “way of life.” Foucault’s re-formulation through a range of texts is “care of the self.” Here, the term “conduct of life” is used to tie philosophical exercises in with the exercises of *persona* required to occupy office or public life. With due recognition of the difficulties of naming any such tradition, the continuing engagement of “spiritual exercises” and the formulation of might be labelled, for now, as a “conduct of life tradition.” For a fuller discussion, see Genovese, *supra* note 6, and Ann Genovese & Shaun McVeigh, *Nineteen Eight Three: A Jurisographic Report on Tasmania v Commonwealth*, *GRIFFITH LAW REV.* (forthcoming 2015), available at <http://dx.doi.org/10.1080/10383441.2015.1022891>.

8. For an account that gives more emphasis to the commitment to reason, see JOHN M. COOPER, *PURSUITS OF WISDOM: SIX WAYS OF LIFE IN ANCIENT PHILOSOPHY FROM SOCRATES TO PLOTINUS* 18–20 (2012). See also JUDITH BUTLER, *GIVING AN ACCOUNT OF ONESELF* (2005).

9. See HADOT, *PHILOSOPHY AS A WAY OF LIFE*, *supra* note 7, at 56–65.

10. Pierre Force, *Montaigne and the Coherence of Eclecticism*, 70 *J. HIST. IDEAS*, 523, 529 (2009) (citing MICHEL DE MONTAIGNE, *Of Pedantry*, in *THE COMPLETE WORKS OF MONTAIGNE: ESSAYS, TRAVEL JOURNAL, LETTERS* 125 (Donald Frame ed. & trans., 1958)).

11. HADOT, *WHAT IS ANCIENT PHILOSOPHY?*, *supra* note 7, at 22–34 (discussing forms of life). Foucault characterises the formation of the self both in terms of “care of the self” and the writing of the self. Michel Foucault, *Writing the Self* (1983), reprinted in *FOUCAULT AND HIS INTERLOCUTORS* 234, 238 (Arnold I. Davidson ed., Ann Hobart trans., 1997).

In Roman and then Renaissance and early modern thought in Europe, such exercises, practices, and arts were turned to the training in the conduct and practice of office. In addition to discharging the duties of office, the holder of an office offers training, to self and others, in how to form an official life. Considered as a training in conduct, a central question of the contemporary office of jurispudent can be cast as “how can I (or others) conduct a lawful life?” The response, from within jurisprudence traditions, has not always been expressed in terms either of “spiritual” or “worldly” exercises, but a significant part of the tradition has done so.¹²

One important site for the development of the persona of the jurispudent lies with the cultivation of “eloquence.” Most visibly marked through Renaissance legal humanist scholarship, the Ciceronian elevation of eloquence and persuasion in the *studia humanitatis* has provided an important model of the scholar-jurispudent’s engagement with forms of office and public life. If dignity (and later, decorum) were related to the obligations of office, then eloquence in its various forms directs attention to the persona.¹³ Humanist eloquence (*elocutio*) and its rhetorically inflected ethics provided the forms of propriety, ritual, and ceremony that carried the conduct of office.¹⁴ Eloquence might have been treated as a matter of persuasion, but it was also the means by which the good life was instituted and transmitted. For humanist scholars such as Alciatus, *elocutio* set the humanist scholar apart from dignity and office. It also opened the site and means of training that give shape to conduct and set office and its limits in place.¹⁵ It also gave the jurispudent and justice their character. Within the legal humanist tradition, it was eloquence that determined conduct and set the limits of office.

The jurisprudence of legal humanists and the elevation of eloquence beyond office have hardly been passed down uncontested. The exegetical and interpretative practices of the Roman law glossators and exegetes established a discipline or training in conduct that has formed the basis of modern civil law legal science and the office of the modern jurist.¹⁶ The early modern civil jurispudents, for example, cast the plural offices of public life under a single civil authority.¹⁷ Their work drew

12. DONALD R. KELLEY, *RENAISSANCE HUMANISM* (1991); see also Shaunnagh Dorsett & Shaun McVeigh, *The Persona of the Jurist in Salmond’s Jurisprudence: On the Exposition of ‘What Law Is . . .’*, 38 VICT. U. WELLINGTON L. REV. 771 (2007).

13. This paragraph draws on the work of Piyel Haldar in Piyel Haldar, *The Tongue and the Eye: Eloquence and the Language of Office in Some Renaissance Emblems*, in *GENEALOGIES OF LEGAL VISION* 152 (Peter Goodrich & Valérie Hayaert eds., forthcoming July 2015). See also Jeffrey Minson, *In the Office of Humanity*, 14 CROMOHS 1 (2009) (reviewing STÉPHANE TOUSSAINT, *HUMANISMES ANTIHUMANISMES, I, HUMANITAS ET RENTABILITÉ DE FICINE À HEIDEGGER* (2008) (Fr.)), available at http://www.cromohs.unifi.it/14_2009/minson_toussaint.html.

14. Peter Goodrich, *Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language* 4 OXFORD J. LEGAL STUD. 88 (1984).

15. Haldar, *supra* note 13; see also Robert W. Cape Jr. *Cicero and the Development of Prudential Practice at Rome*, in *PRUDENCE: CLASSICAL VIRTUES, POSTMODERN PRACTICE* 35 (Robert Hariman ed., 2003).

16. BERMAN, *supra* note 5.

17. IAN HUNTER, *RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY* (2001).

on a variety of styles of juristic thinking as well as police science and a reformed protestant natural law in order to establish a training in the service of the state. In light of such strong accounts of office and jurisprudence, revivals of humanist legal scholarship have often struggled to establish forms of authority sufficient to address their chosen forms of lawful life.¹⁸ However, the open-ended invitation of the “Law As . . .” symposia to pursue ways of bringing life to law (if not always law to life) is one that can be recognised in many of the formulae of a historically inflected legal humanism.

II. PHILOSOPHY AS TRAINING IN LIFE, JURISPRUDENCE AS A TRAINING IN OFFICE

One question, then, that might be asked is “what account of training in conduct of jurists (as university scholars) involved a training in conduct moving from ‘Law and . . .’ to ‘Law as . . .’”? What I want to do here is note first that a large number of contributors to the “Law As . . .” symposia have addressed the issues of training in conduct, although not necessarily as the central topic of their research. The differences of genre, style of argument, and subject matter make it difficult to make any typological generalisation about training in conduct offered in ways of living with law. I want first to recast Chris Tomlins’s introductory comments on minor jurisprudence as a training and then address some specific practices presented in “‘Law As . . .’ Glossolalia.”

In his brief account of minor jurisprudences, Tomlins draws out two modes of engagement with the minor jurisprudence.¹⁹ One, drawing on the work of Panu Minkkinen, emphasises a *philosophy* of law that takes as its central concern the relation between Being and right (correctness); these concerns are linked to the end of philosophy and justice. The other, represented in the work of Peter Goodrich, is characterised in terms of the social criticism of the institutions of law and, it might be added, the engagement of law as the social bond.²⁰

Minkkinen’s philosopher (inducted through the study of the Greek and German philosophical canon) shapes questions of philosophy around man’s relation to Being or to the world, subject to a unifying philosophical reflection. The task of the philosopher is one of attunement to the experience of the authenticity and inauthenticity of being and the transformative event that breaks through the conditions of experience (hence, the interest in interpreting Kafka’s writing as somehow beyond all genres of literature and law). In his central formulations, Minkkinen articulates Being as desire that “reaches out” toward a something (or a nothing) that is non-appropriable.²¹ The question of law (or jurisprudence) arises in

18. JEFFREY MINSON, *QUESTIONS OF CONDUCT: SEXUAL HARASSMENT, CITIZENSHIP, GOVERNMENT* (1993).

19. Tomlins, *supra* note 1, at 241, 246.

20. PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* (1995).

21. PANU MINKKINEN, *THINKING WITHOUT DESIRE: A FIRST PHILOSOPHY OF LAW 3* (1999).

the response to the non-appropriable, in the fall from contemplation into practical reasoning: correctness. If the “‘true’ thing” cannot be attained, as Minkkinen writes: “it might as well be ‘correct’” or, in sociopolitical terms, right.²² The training in remaining sensitive to the “thrownness of man” and the cultivation of a disposition to treat justice aporetically, is hermeneutic and recognisably part of a tradition of “spiritual exercise” (one writes to learn the correct relationship to justice or to correct others). One corollary of this way of engaging the way of life of the philosopher might be that to be a good jurist or lawyer, it is first necessary to be a good philosopher. The search for justice can be a spiritual exercise.²³

Tomlins and Minkkinen worry that Peter Goodrich’s approach to law is insufficiently, incorrectly, metaphysical.²⁴ While Goodrich and Minkkinen share a number of sources of instruction (Lacan and Nietzsche), Goodrich, however, does not model the persona of the jurist on the philosopher but on the seventeenth century humanist scholar. Goodrich’s training in conduct proceeds not by reading the philosophical tradition but through a more diffuse account of humanist erudition and eloquence.²⁵ While Goodrich shares with Minkkinen a sense that the induction into a lawful life is to be framed in terms of conducting yourself in relation to Being and a relationship to justice, what is more interesting to Goodrich is to pose that training in terms of a common law tradition of rhetoric, casuistry, emblematics, and philology rather than Roman and German legal science. Whether a rhetorician-jurisprudent can be inducted into a philosophical life, or whether he or she would want to be inducted into one, has long been a matter of dispute.

Aside from an induction into different legal traditions, perhaps a difference in training can be found in the projects that Minkkinen and Goodrich establish for students. Both Minkkinen and Goodrich find the life of the jurist lacking and, in many respects, poorly conducted. They both argue that one reason for this is that critical jurists and jurisprudents cannot sort out their relationship to law. For Minkkinen, drawing on Max Weber, one solution depends on how the jurist lives with the twin restrictions of limited opportunities of delivering solutions to social and political problems and limited ways of occupying their office.²⁶ These limits are to be met with Nietzschean affirmation. For Goodrich the issue is more one of training oneself and other jurisprudents to occupy, or reoccupy, an expanded office of the scholar. This task, as it happens, should also be met with the same

22. *Id.*

23. See PIERRE HADOT, *THE PRESENT ALONE IS OUR HAPPINESS: CONVERSATIONS WITH JEANNIE CARLIER AND ARNOLD I. DAVIDSON* 109 (Marc Djaballah & Michael Chase trans., 2011).

24. See Tomlins, *supra* note 1, at 241.

25. See PETER GOODRICH, *LEGAL EMBLEMS AND THE ART OF LAW: OBITER DEPICTA AS THE VISION OF GOVERNANCE* (2014).

26. Panu Minkkinen, *The Legal Academic of Max Weber’s Tragic Modernity*, 19 *SOC. & LEG. STUD.* 165 (2010), available at <http://ssrn.com/abstract=1423442> (drawing Heidegger and Weber into alignment in asking the question: how do we act responsibly in according with the form of life (office) that we are in?).

Nietzschean commitment as Minkkinen's office holder. (Nietzsche himself occupied the office of university scholar with ambivalence.)²⁷

For many of the contributors to the "Law As . . ." symposia, the resources for the cultivation of the persona of the scholar and of the means of occupying the office of jurisprudent and/or humanist scholar are best met by drawing on traditions of Greek metaphysics inherited through nineteenth and twentieth century French and German philosophy. Minor jurisprudences, it has been suggested here, can also be understood as taking up an inheritance of a training in a form of life.²⁸ Recognition of this inheritance and its ways of life does not put an end to questions of the responsibility of office or the conduct of a lawful life.²⁹

III. "JURISPRUDENCE AS . . ." EXERCISE

It is clearly the case that along with the training in conduct offered by Kantian and Neo-Kantian thought, versions of Heideggerian training in conduct have been significant and influential in the faculties of humanities and law in America, Europe, and elsewhere.³⁰ However, these are not the only genres of training in conduct of office that are available or addressed in the "Law As . . ." symposia. I would like to address, briefly, some of these accounts.

Pierre Hadot has remarked that while Ludwig Wittgenstein was not a historian, it was his account of language games and the links he made between logic and mystical experience (the experience of wonder before the existence of the world) that allowed him to engage historically with the fragmented character of ancient philosophy as understood as a training in a way of life.³¹ Constantine Fasolt takes up Wittgenstein's approach to a way or form of life in his essay *History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law*.³² The substantive point of departure of his essay is "the history of law [and thus the legal historian] furnishes a kind of knowledge that is essential for maintaining justice."³³ His concern is that without the writing of good legal history, law would be left to the dead or to tyrants. One reading of Fasolt's essay is that it provides a philosophical grounding of the writing of legal history by explaining how law, language,

27. FRIEDRICH NIETZSCHE, *UNTIMELY MEDITATIONS* (Daniel Breazeale ed., R.J. Hollingdale trans., 1997).

28. See also Ian Hunter, *The Mythos, Ethos, and Pathos of the Humanities*, 40 *HIST. EUROPEAN IDEAS* 11, 18–23 (2013).

29. Marianne Constable also makes this point in working through her account of law as language. See MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* (2014); Marianne Constable, *Speaking Imperfectly: Law, Language, and History*, 5 *U.C. IRVINE L. REV.* 349, 361 (2015).

30. See generally Hunter, *supra* note 28.

31. HADOT, *supra* note 23, at 132–35; Pierre Force, *Teeth of Time: Pierre Hadot on Meaning and Misunderstanding in the History of Ideas*, 50 *HIST. & THEORY* 20 (2011), available at <http://hdl.handle.net/10022/AC:P:11190>.

32. Constantin Fasolt, *History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law*, 5 *U.C. IRVINE L. REV.* 413, 418–438 (2015).

33. *Id.* at 418.

judgement, and justice are intertwined. Another, not so different reading, is that Fasolt, like Hadot, treats Wittgenstein as providing a philosophical training in a way of life. Fasolt turns Wittgenstein's teaching or training to the development of the persona of the historian.

Fasolt's argument is shaped by how to understand meaning: judgement, agreement, and the relation between language and reality.³⁴ This is considered through Wittgenstein's formula: "It is not only agreement in definitions, but also (odd as it may sound) agreement in judgements that is required for communication by means of language. This seems to abolish logic, but does not do so."³⁵

While this formulation can be treated as part of Wittgenstein's inquiry into meaning, it can also be treated as a "spiritual exercise" designed to maintain a proper relation to language and, it might be imagined, to those with whom communication is sought. It is agreement in language that gives us a form of life. Whether such agreements in language are formulated as techniques of transcendence or not is a matter of historical investigation.

Wittgenstein's philosophical writings, Michael McGhee has argued, should be thought of as a series of exercises aimed at allowing for the cultivation of a certain "coolness" or self-possession (*sōphrosunē*) which might also be a way of describing Fasolt's ambition for the persona of the legal historian.³⁶ The ability to draw distinctions between knowing what people were saying and what they were doing in the past requires judgement and forms of political community. The office of historian, asserts Fasolt, requires us to say something about the past and claim that it is true.³⁷ The specific obligation of the legal historian is to judge the dead in relation to a law, which itself passes judgement on that which is just and unjust. Legal historians also have to take responsibility for such judgements. A failure to do this adequately is a failure of office and an injustice. The training the Fasolt has briefly drawn from Wittgenstein, then, is in part one engaged in the formation of a self; it is necessary to cultivate a philosophical coolness. It is, in part, a cultivation of the persona of the legal historian as someone who is able to judge (with courage) and, in part, an ordering of the office of legal historian as concerned with relations of law, justice, and political community.³⁸

34. *Id.* at 425.

35. *Id.* at 423 (citing LUDWIG WITTGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN [PHILOSOPHICAL INVESTIGATIONS], at xiv (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Wiley-Blackwell 4th ed. 2009) (1953)).

36. Michael McGhee, *Wittgenstein's Temple: Or How Cool is Philosophy?*, in PHILOSOPHY AS A WAY OF LIFE: ANCIENTS AND MODERNS—ESSAYS IN HONOR OF PIERRE HADOT 241 (Michael Chase et al. eds., 2013).

37. Fasolt, *supra* note 32, at 457.

38. The sense in which such formulations belong to metaphysical tradition is hard to assess. See JOHN W. COOK, WITTGENSTEIN'S METAPHYSICS (1994). Fasolt draws his account in that direction by tying his consideration of office to Aristotle's account of polity.

IV. PREPARATION

The accounts offered above all draw on traditions of European metaphysics in order to formulate their accounts of the cultivation of the persona of philosopher, historian, and jurist. Such philosophical, historical, and jurisprudential projects themselves can be written about in terms of intellectual, political, jurisprudential, and social histories. While metaphysics as first philosophy often carries within it a claim to form beyond history, Pierre Hadot has convincingly shown that a history can be written of how to accede to, or succeed in living, a philosophical or lawful life.

In “‘Law As . . .’ II, History As Interface for the interdisciplinary Study of Law,” Jeffrey Minson’s account of the dignity of the civil state explicitly links the cultivation of a persona for public life to office-based accounts of civil state and the cultivation of a number of desacralised personae.³⁹ In doing so, he draws attention to the sorts of training in conduct offered through the rhetorical traditions of training in public life. These skills are put to work in occupying the offices of the modern state, including that of the University.⁴⁰ As matter of political and moral thought, some of these realities relate to the conditions of civil peace and commonwealth and others to the sorts of moral anthropology that might be appropriate to a civil prudence. Minson organises his moral anthropology around human fallibility and imperfection. In such accounts, sociality might be viewed as the realisation of human imperfection rather than the quest for perfection.⁴¹ The concern of the state is not to perfect human life but to govern the conduct of citizens in matters of civil order. Minson’s account of living with the state emphasises both the plurality of offices that are occupied by a person at any one time (artist, citizen, employee, friend, householder, jurist, jurist, jurist, orator, philosopher, and so forth) and the different forms of ethical and rhetorical conduct—the two are linked—appropriate to each. In this account, the cultivation of personae is a plural activity that accepts, as did Weber, that people require plural personae, both within and without office, as they go about their business of engaging in the world.⁴² The object of a civil prudence might be to enliven the persona available to those who occupy office rather than a training in formation of a unified persona fit for transcendence.

The training in conduct presented in Bonnie Honig’s article *The Laws of the Sabbath (Poetry): Arendt, Heine and the Politics of Debt* is somewhat different.⁴³ Like Minson, Honig is concerned with the conduct of life, and both take the view that ethical and rhetorical performance are closely linked. Whereas Minson’s repertoires

39. Jeffrey Minson, *How to Speak Well of the State: A Rhetoric of Civil Prudence*, 4 U.C. IRVINE L. REV. 437, 440 (2014).

40. MINSON, *supra* note 18, at 3–15.

41. Minson, *supra* note 39, at 452.

42. *Id.*

43. Bonnie Honig, *The Laws of the Sabbath (Poetry): Arendt, Heine, and the Politics of Debt*, 5 U.C. IRVINE L. REV. 463 (2015).

of conduct are addressed to thinking creatively within office, Honig seeks to establish the repertoires of resilience and preparation for political life, which include modes of “rebellion, poetry, Sabbath-power, rights-claiming, and mockery of [those very same] powers.”⁴⁴ In so doing, she writes of the exemplary figure of the “pariah.” The transformations Honig has to hand are extreme: that from the “dog with dog’s ideas” to a “man with man’s emotions.”⁴⁵ The power of transformation is affected by the Sabbath and, by analogy, forms of strike such as the loan strike.⁴⁶

Rather than follow the detail of Honig’s argument, I want to touch on the training in conduct that is presented. Much of this essay is written in relation to Hannah Arendt’s essay *The Jew as Pariah: A Hidden Tradition*. Honig suggests that Arendt misses something of what is interesting in Heine’s poetry by focusing so forcefully on “a standard of action or pariah consciousness.”⁴⁷ Honig instead looks at the preparation: the Sabbath in not a place of passive inactivity; it is the ceremony and ritual of the Sabbath that enables the dogs to become humans. The Sabbath is a state of exception where all divisions disappear through the intensification of everyday life rather than its interruption. This intensification of the everyday is in part a teaching of resilience.⁴⁸

To explain the intensification of everyday, Honig turns to the work of the psychoanalyst, Donald Winnicott and his understanding of how babies relate to and use objects (especially mothers). In Winnicott’s account, it is through object use that it is possible to learn mastery and come to understand permanence of objects.⁴⁹ The use is that of destruction and the lesson that of love (the object survives to be loved (or not) and/or autonomy (the object is destroyed and the baby learns autonomy (or not)). The lesson Honig draws from this ties preparation and play to the fantasy and permanence of objects. Transitional objects, Sabbath events or public things, establish places from which resilience can be learnt. (Although Honig writes here about the resilience of the self and persona of the conscious pariah (in the hidden tradition), this might also be one way of thinking about the training in the conduct of lawful relations within the common law tradition.)

V. JURISPRUDENCE AND HISTORY WRITING

As Chris Tomlins has noted, a significant part of the work of the “‘Law As . . . ? III’” symposium has been conducted in the shadow of the relation between jurisprudence and history writing. This topic could also be viewed as the central topic of several traditions of philosophy, law, and history. All accounts of

44. *Id.* at 481.

45. *Id.* at 469.

46. For another jurisprudence that considers metamorphosis and shape shifting as a matter of the actualisation of Law, see C.F. BLACK, *THE LAND IS THE SOURCE OF THE LAW: A DIALOGIC ENCOUNTER WITH INDIGENOUS JURISPRUDENCE* (2011).

47. Honig, *supra* note 43, at 481.

48. *Id.*; see also Bonnie Honig, *The Politics of Public Things: Neoliberalism and the Routine of Privatization*, 10 *NO FOUND.* 59 (2013).

49. D.W. WINNICOTT, *PLAYING AND REALITY* 86–94 (1971).

historiography and jurisprudence, no doubt, have their ways of personifying and training the jurispudent and historian, although whether or not such persona are met in the figure of the legal historian is an open question. The final engagement here with conduct of office will be restricted to two brief comments: the first relates to the difficulties of thinking across genres of jurisprudence and history, and the second addresses some of the welcome limits of jurisprudence and history. One feature that is striking about the contributions to the “Law As . . .” symposia is their easy eclecticism and the sense that the formation of a persona and the transformation of law are to be related. These concerns might be gathered under the heading of judgement of office: the consideration of the virtues and vices of office, the means and ends of conduct, and the character of the scholar and the minor jurispudent (and legal historian).

In many ways, Kunal Parker’s essay *Law ‘In’ and ‘As’ History: The Common Law in the American Polity, 1790–1900* provides a counterpoint to redemptive or transcendental histories of law by addressing the exhaustion of contextualist historiography.⁵⁰ For Parker, disputes about “contextualist” history and internal and external accounts of history themselves have a history, which is usually told from a modernist position of the ascendancy of contextualist, antifoundationalist history writing. In this essay, he examines the historiography of the common law tradition prior to the period when contextual or external history became predominant (O.W. Holmes is treated as the exemplary jurist-philosopher-historian). In Parker’s analysis, the histories of common law thought written by people within the common law tradition are far from contextual; they have purpose and direction and do dissipate into context. This, for Parker, is not so much the problem of knowledge and method but of treating the practice of history writing as a form of conduct.

In Parker’s account, the common law thinkers of the early nineteenth century were happy to work both within a common law account of legal form as existing from “time immemorial,” and as well contributing to foundational and teleological histories of law. It is not the case that the modern contextualist historians do not notice or write of such forms of temporality (Parker has). It is more that the historiography of critically inclined contextual legal historians (and the training provided to meet and sustain such accounts) generally addresses different problems to those that confronted legal historians of the eighteenth and nineteenth centuries.⁵¹ The anti-metaphysical and anti-sectarian aspects of modern contextual history writing require historical contextualisation (rather than, say, philosophical recuperation). More importantly for Parker, it is, in part, the writing of histories of the common law that hold on to an “internal” account of law that also provides a

50. Kunal M. Parker, *Law “In” and “As” History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587 (2011); see also Kunal M. Parker, *Repetition in History: Anglo-American Legal Debates and the Writings of Walter Bagebot*, 4 U.C. IRVINE L. REV. 121 (2014).

51. David S. Caudill, *Law, Science, and the Economy: One Domain?*, 5 U.C. IRVINE L. REV. 393, 402 (2015); see also BRUNO LATOUR, *AN INQUIRY INTO MODES OF EXISTENCE: AN ANTHROPOLOGY OF THE MODERNS* (Catherine Porter trans., Harvard Univ. Press 2013) (2012).

point of engagement with the politics of law as a question of the conduct of research.⁵²

The second set of examples points briefly to the ways certain historical practices are treated as making visible the virtues of the office of the legal historian. At issue is not methodology as such, but the maintenance of a relation between the technology or craft of history writing and conduct of office. A list of these might include aide memoires on the repertoires of history writing: make visible the conduct and conflicts of law; examine and write histories of law with the recognition that there is more than one law;⁵³ establish relations of authority and inheritance of legal forms;⁵⁴ attend to the times of law;⁵⁵ address the subjectivity of scale;⁵⁶ maintain a relationship between history writing and historiography, jurisprudence writing and jurisography;⁵⁷ engage the state rhetorically not theologically;⁵⁸ or, more simply, maintain the tools of your science. Treated as methodological statements, there is not much to say (except perhaps to apologise to a number of scholars for presenting a travesty of their scholarship). However, as Pierre Hadot has noted, the fragmentary form of such points of advice, reflection, and exercises provides the focal points for the consideration of the conduct of office.⁵⁹

CONCLUSION

In writing about the contributors to “Law As . . .” as participating, if only briefly, in the office of minor jurispudent, I have given emphasis to reporting forms of training in conduct, rather than provide a critical reflection or forms of disciplinary critique. In part, this reflects the genre of the afterword: reporting

52. See also Shai J. Lavi, *Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter*, 4 U.C. IRVINE L. REV. 297 (2014). Like Parker, Lavi questions our contemporary understanding of our legal system (those who live within a common law tradition) and reconsiders the ways in which “secularization” is understood. *Id.* at 315–16. Lavi argues that suffering pain has become meaningless in the secular ordering of life. *Id.* at 319. At the same time, however, the painless death has become a source of meaning and emblem of modern bloodless sacred killing or better a bloodless emblem of what was once sacred killing. *Id.* at 323. For Lavi, one task of the historian is to maintain the visibility of this relation.

53. Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97 (2014).

54. Michelle A. McKinley, *Standing on Shaky Ground: Criminal Jurisdiction and Ecclesiastical Immunity in Seventeenth-Century Lima, 1600–1700*, 4 U.C. IRVINE L. REV. 141 (2014) (joining histories of slavery in Peru to practices of record keeping and care of archive); see also Prabha Kotiswaran, *Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law*, 4 U.C. IRVINE L. REV. 353 (2014) (treating labor and migration regulation as framing forms of lives of sex workers).

55. Renisa Mawani, *Law As Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65 (2014) (re-configuring rival temporalities of law: time as a technique of government, history writing).

56. Kotiswaran, *supra* note 54, at 379–80; Mariana Valverde, *The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks*, 4 U.C. IRVINE L. REV. 325 (2014).

57. Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, 5 U.C. IRVINE L. REV. 365 (2015).

58. Brook Thomas, *Reconstructing the Limits of Schmitt's Theory of Sovereignty: A Case for Law As Rhetoric, Not As Political Theology*, 4 U.C. IRVINE L. REV. 239 (2014).

59. HADOT, *supra* note 23, at 191–95.

provides a way of engaging materials as part of a practical activity of training in conduct without forcing too much unity on the sorts of projects that have appeared in the “Law As . . .” symposia. In part, it offers a way of limiting the question of training in the conduct of living with law to a limited range of concerns with the “government of the tongue.” The office of minor jurispudent that emerges is still, no doubt, housed within the university; the various styles of training in conduct of office do, in significant ways, require the formation of a self and the cultivation of a persona that address concerns apart from office.

The Afterword presented here has taken its cue from the provocation of conducts of life in terms of glossolalia. The engagement with glossolalia within church traditions has rarely been uncontested. For the Christian protestant Pentecostal churches, speaking in tongues takes on the signs of the presence and gift of the Holy Spirit. For Saint Paul, the concerns with glossolalia and Holy Spirit merge with concerns about the translation of the true spirit in tongues and of false possession.⁶⁰ In the “Law As . . .” symposia, the concern with the spirit of the law has been more with the enchantment, disenchantment, and re-enchantment of jurisprudence through the practices of history writing and the recasting of the concerns of lawful life.

If the office of the minor jurispudent has duties in relation to the “government of the tongue,” however, it is not so much the direct expression of the spirit of law or justice, but one divided or split between the intervention in the present by asking questions of the past and the setting of the scene for “new laws.” The offices of jurispudent clearly establish a broad range of duties and few of the personae taken up by anthropologists, jurispudents, historians, rhetoricians, philosophers, and political economists who care for the conduct of lawful relations would find commonality only in a single persona or way of life. For this reason, I have proceeded by emphasising both the plurality of personae of office and the forms of exercise and training undertaken in their formation. However, to leave a symposium or three symposia only in this way is also a neglect of office, since a symposium enacts, as it should, another obligation of the scholar: the conduct of intellectual friendship.

60. KIRSOPP LAKE, *THE EARLIER EPISTLES OF ST. PAUL: THEIR MOTIVE AND ORIGIN* 204, 244 (1911).

