

CIVIL PRUDENCE, SOVEREIGNTY AND CITIZENSHIP IN THE JUSTIFICATION OF CIVIL FORFEITURE

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I A LICENCE TO STEAL?

A recent feature film, *Getting Square*,¹ set on Queensland's Gold Coast, reworks the theme of former criminals' endeavouring to become law-abiding citizens. Having served time for bank fraud, Darren ('Dabba') Warrington has become a (relatively) legitimate businessman. The biggest obstacle to his continuing along the straight and narrow is Queensland's proceeds of crime legislation. Officials with formidable commissary powers are preparing to restrain all of his assets that 'relate back' to the bank scam. As his home is searched, Dabba asks whether such assets, if found, would be returned to the bank. The officials reply: '[n]o, they are "forfeited to the Crown"'.²

The fulcrum of this remarkable power of government vis-à-vis citizens' assets is a judicial instrument, 'civil forfeiture',² whereby assets derived from criminal activity are confiscated through civil rather than criminal proceedings. Hailed by police and politicians worldwide as an indispensable crime-fighting tool, civil forfeiture also arouses misgivings. Dabba's reaction – 'can't even do your own

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This paper draws upon research originally undertaken as part of a consultancy on behalf of the Australian Federal Police ('AFP'). A public sector ethicist, Howard Whitton, first brought my attention to civil forfeiture's implications for citizenship. Arie Freiberg generously gave me the benefit of his formidable expertise in Australian civil forfeiture law. (I trust he treats my paper's critical engagement with his work as the tribute it is intended to be.) Ross Grantham advised me on the important adjacent field of private restitution law. For comments on previous drafts and on a version of this material presented at a Griffith University Law School seminar, I am indebted to Ian Hunter, David Saunders and Rob MacQueen.

1 Chris Nyst (director), *Getting Square* (2004).

2 In Australian law, the generic term for this legal instrument is 'civil confiscation' or 'civil recovery'. 'Civil forfeiture' refers more narrowly to proceedings for recovering real or personal criminal property, as distinct from confiscation orders in the form of financial penalties. In American law, civil forfeiture refers to *all* non-conviction as distinct from conviction-based confiscation – there, the contrast is with 'criminal forfeiture'. Following common parlance I treat civil forfeiture as the generic term.

thieving for yourselves, we have to do it for you’ – is widely echoed in the scholarly Anglophone literature on the subject.³

In contrast, this paper explores the possibility of mounting a heterodox defence, a political-ethical rationale. My interest in civil forfeiture has particular regard to its value in understanding the sovereign status of a state like the Australian Commonwealth, and its relation, qua sovereign power, to its citizens. Accordingly, my ‘defence’ leads me to question leading Australian civil forfeiture scholar Arie Freiberg’s contention that it is ‘precipitating a major reconceptualisation of the nature of the modern state’, which erodes the Australian polity’s erstwhile liberal foundations.⁴ I engage in a preliminary study of civil forfeiture. I do not treat (mainly Commonwealth) civil forfeiture law doctrinally.⁵ Rather, I put forward a non-liberal *raison d’être* for civil forfeiture. This is based on a reconstruction of a tradition of jurisprudential, ethical and political thought about political statehood which I term ‘civil prudence’. This tradition will be presented through a sketch of the natural law doctrine of its most consistent early-modern exponent, Samuel Pufendorf. This sketch may have an interest and utility for readers independently of the application I make of it here.

The tradition of civil prudence maintains that a civil state’s overriding prudential duty is the fostering of a certain kind of civil peace and social protection; the kind of prudential ‘minding’ of territory, population, and assets that only a sovereign political entity – to some degree distinct from both ‘the people’ and ‘the government of the day’ – can provide. Fulfilment of that duty will be seen to require *a system and ethic of jurisdictionally differentiated offices*. A civil state requires the delineation of office-based positive purposes and responsibilities – including a duty to protect its capacity to protect – and oversight and restraint of its own agencies.

Legal and political theorists will ask why I do not follow accepted practice and treat these ostensibly familiar ideas (notably, security and separation of powers) as part of the stock-in-trade of liberal, or perhaps conservative, philosophies,

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- 3 See, eg. Leonard Levy, *A Licence to Steal: The Forfeiture of Property* (1996). Levy remains the leading American monograph. For a corresponding popular-journalistic perception, see Dennis Cauchon, ‘Are Seizures “Legalised Theft”?’ , *USA Today* (McLean, Virginia), 18 May 1992, 01A <[http://pqasb.pqarchiver.com/USAToday/accs/56203665.html?dids=56203665:56203665&FMT=ABS&FMTS=ABS:FT&date=May+18%2C+1992&author=Dennis+Cauchon&pub=USA+TODAY+\(pre-1997+Fulltext\)&edition=&startpage=01.A&desc=ARE+SEIZURES+%60LEGALIZED+THEFT%27%3F+%2F%2F+Government+doesn%27t+have+to+prove+guilt](http://pqasb.pqarchiver.com/USAToday/accs/56203665.html?dids=56203665:56203665&FMT=ABS&FMTS=ABS:FT&date=May+18%2C+1992&author=Dennis+Cauchon&pub=USA+TODAY+(pre-1997+Fulltext)&edition=&startpage=01.A&desc=ARE+SEIZURES+%60LEGALIZED+THEFT%27%3F+%2F%2F+Government+doesn%27t+have+to+prove+guilt)> at 23 October 2006.
- 4 Arie Freiberg, ‘Civilising Crime: Parallel Proceedings and the Civil Remedies Function of the Commonwealth Director of Public Prosecutions’ (1988) 21 *Australian and New Zealand Journal of Criminology* 129, 139.
- 5 To my knowledge, there is no full-length black letter monograph on Australian Commonwealth and State civil forfeiture law, though I have benefited from a brief commentary by Richard Jones, ‘*Proceeds Of Crime Act 2002*’ (2002) 152 *New Law Journal* 1394. A model might be the recent study of the British *Proceeds of Crime Act 2002* (UK) c 29 by Trevor Millington and Mark Sutherland Williams, *The Proceeds of Crime: Restraint, Confiscation and Forfeiture* (2003).

especially their (rule-)utilitarian edges.⁶ What *is* unfamiliar – at least to readers unacquainted with the recent rekindling of (mostly) specialised scholarly interest in Pufendorf and his legacy – is the possibility that these ideas might constitute an integral, stand-alone theory or ethic and that they may, therefore, be detachable from such philosophies (their current attachments being the effect of subsequent assimilations).⁷ Civil prudence is also unfamiliar in eschewing reference to the reputedly democratic and liberal foundations of the Australian state. The very idea of setting out to account for civil forfeiture in terms of civil prudence may therefore seem quixotic. And so, if civil forfeiture cannot be justified in terms of the familiar and morally respectable principles of ‘liberal democracy’, is my strategy for defending it bound to be unpersuasive?

By way of a down payment, let me offer three remarks as to why constructing a rationale for civil forfeiture might call for thinking outside the box of liberal democracy,⁸ even at the cost of entering into ostensibly morally uncongenial territory. First, my description of Australian civil forfeiture law and its official rationale suggests that this legal instrument unavoidably solicits reference to a conception of the Commonwealth and its prerogative powers which differs from liberal-democratic conceptions of the state. Rather than shying away from this discrepancy between civil forfeiture and these *bienpensant* conceptions, civil prudence openly acknowledges and constructs a legitimacy for the non-liberal and non-democratic component of modern states: *vis*, their component of civil-sovereign power. If civil prudence is better equipped than liberal political or jurisprudential theories to provide a limited warrant for civil forfeiture law, it is because civil prudence is better able to deal with its sovereignty dimension. Civil prudence, I will argue, can articulate both the delimited core purposes of civil forfeiture *and set limits to its uses* by reference to those purposes; that is, independently of liberal notions of limits to state power. Civil prudence offers a way to register what is wrong both with certain egregious practices of civil forfeiture and with the common law judiciary’s traditionally indulgent attitude towards these practices.

6 In Anglophone analytical moral philosophy ‘101’, *rule*-utilitarianism is conventionally distinguished from *act*-utilitarianism on the basis that in the latter every individual act, in principle, may be subject to assessment in terms of its consequences; whereas in the former, the consequentialist metric is applied to general rules or types of conduct. For a lucid conception of *rule*-utilitarianism as appropriate primarily as a moral calculus for government/public policy decision making – as distinct from the more common conception of utilitarianism (in whatever version) as a general morality governing all spheres of moral decision making, see Robert E Goodin, *Utilitarianism as a Public Philosophy* (1995) chs 1, 2, 4. Goodin’s ‘government house’ conception of utilitarianism is all the more comparable to the civil prudential ethic of state insofar as, like the latter, his version of rule-utilitarianism also entails an office- or role-based division of moral labour. Without pre-empting the results of a rigorous comparison, my hunch is that for all its value Goodin’s ethic will prove to be no substitute for civil prudence. Why? Because, I would argue, supplying as it does a working ethic for government officials, it generally presupposes a sovereign state. Civil prudence, in contrast, is first and foremost an ethic of state sovereignty, an attempt to construct a form of immanent moral authority for a sovereign state. This, at any rate, is the line of thinking I am pursuing in ongoing work on the civil prudence tradition.

7 For a more theoretical companion piece to the present paper, see Jeffrey Minson, ‘Human Imperfection: Civil Prudence, Moral Passion and State Power’ (2007) forthcoming *Law, Culture and the Humanities*.

8 I will comment briefly on the relation between civil prudence and utilitarianism in due course.

A second possible advantage of having recourse to the civil prudential tradition, again in contrast to civil liberties-based versions of liberalism, is that it offers ways of conceptualising limits to civil forfeiture which chime in both with the way state officials actually think and work, and with some targets of unofficial criticism by civil libertarian organisations and academics. My hope is that the civil prudence paradigm might prove serviceable to both officials who administer civil forfeiture law and to some advocates of its reform.

Third, regarding the wisdom of drawing on a non-democratic account of state sovereignty, suffice it to say that historically civil prudence has never entailed per se opposition to democratic politics. Moreover, champions of ‘democratic sovereignty’ as a bulwark against egregious tendencies of civil forfeiture regimes will shortly be reminded of the part played by democratic politics in *exacerbating* those tendencies.

Turning to the paper’s itinerary, after outlining current Commonwealth legislation, I review some criticisms and official rationales pertaining to sovereign-citizen relations, taking a sideways glance at American forfeiture law. In response to these criticisms, and to address some problems with existing rationales, I introduce the *civil prudence* approach, focusing on its jurisprudential dimension. This is then applied in bringing out a) the normative force of the jurisprudential construal of crime proceeds as a ‘civil debt to the Commonwealth’; b) the limits of ‘intuitive’ moral justifications; and c) how current legislation modifies the legal meaning of citizenship.

II CIVIL FORFEITURE AND ITS CRITICS

A Basic Aspects of Commonwealth Legislation⁹

The *Proceeds of Crimes Act 2002* (Cth) (*PoCA 2002*) aims to deprive criminals of the *instruments* and (directly or indirectly derived) *profits* of criminal activity. At its core are three sorts of civil orders issued by the Director of Public Prosecutions: *restraining* orders (seeking to prevent disposal of putative criminal property); *forfeiture* orders; and *pecuniary penalty* orders (disciplinary ‘mulcts’) calculated on the basis of benefits derived from criminal activity. Forfeited assets or proceeds of their sale go into the Commonwealth’s general revenue.

The unmistakable purpose of conceiving the possession of criminally tainted assets as unlawful under civil law is to render the burden and standard of proof for criminal guilt inapplicable to forfeiture proceedings. To prevent confiscation, the subject of civil recovery orders must prove to a balance of probabilities standard that the restrained assets were either unlawfully obtained or put to unlawful uses which their owners could not have foreseen or prevented.

Strengthening its predecessor, the *Proceeds of Crimes Act 1987* (Cth) (*PoCA 1987*), *PoCA 2002* prohibits use of restrained crime proceeds on legal

9 I neglect the Australian States’ contribution to the evolution of civil forfeiture law. See Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act, 1987*, Report No 87 (1999) [2.10]–[2.19] (‘ALRC Report’). For an example, see below n 45.

representation, and targets (inter alia) terrorist assets; public officials' superannuation benefits;¹⁰ literary proceeds of crime;¹¹ and provides for (rebuttable) forfeiture of all assets of those convicted of serious (and in some instances ordinary indictable) offences.¹² 'Asset-directed' forfeiture orders as well as 'person-directed' actions are also authorised in some circumstances. New correlative law enforcement intelligence gathering capabilities include permission to waive professional privilege where defence counsel possesses information pertaining to criminal assets.¹³ The overarching change, though, is the overturning of the earlier statute's requirement of a criminal conviction to trigger forfeitures.¹⁴ Supplementing the conviction-based scheme, the new Act provides for civil proceedings to be run before, or in parallel with, a criminal prosecution.

Turning to criticisms and justifications, the paper's theoretical agenda requires taking brief account of debates around American forfeiture law and its history. By Australian standards, American law in some respects seems inordinate, providing for individual law enforcement agencies to retain a proportion of the assets they confiscate and, at least, until recently, allowing scant protection for

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- 10 See Arie Freiberg and Monica Pfeffer, 'The Deferred Wages of Sin: Confiscating Superannuation Benefits' (1993) 17 *Criminal Law Journal* 157.
 - 11 *Proceeds of Crime Act 2002* (Cth) s 20. On the original American literary proceeds legislation, see, eg, Stephen Clark, 'The Son of Sam Laws: When the Lunatic, the Criminal and the Poet Are of Imagination All Compact' (1983) 27 *Saint Louis University Law Journal* 207. For the Australian context, see Arie Freiberg 'Confiscating the Literary Proceeds of Crime' (February 1992) *Criminal Law Review* 96.
 - 12 *Proceeds of Crime Act 2002* (Cth) ss 17, 18. See comment n 108 below.
 - 13 In addition, judges and magistrates may now authorise orders to be issued for search warrants, surveillance devices, improved access to bank records and 'orders to produce'. 'Production orders' require that certain materials such as financial records be given to a police officer waiting outside the premises: *Proceeds of Crime Act 2002* (Cth) s 8.
 - 14 *Proceeds of Crime Act 1987* (Cth) s 14(1). Notice how it anticipated non-conviction-based forfeiture, insofar as the definition of 'conviction' triggering forfeiture was expanded to include, for example, verdicts of guilty but discharged without conviction. For critical comment on this aspect of the earlier legislation, see Arie Freiberg 'Criminal Confiscation, Profit, and Liberty' (1992) 25 *Australian and New Zealand Journal Criminology* 44, 51–2.

innocent parties.¹⁵ Perhaps, not surprisingly, contrary to the situation in Australia, American civil forfeiture law provokes significant civic opposition.¹⁶

B Criticism: ‘The Monster that Ate Jurisprudence?’¹⁷

In Australia, despite Freiberg’s and his collaborators’ extensive, insightful, critical and comparative historical analyses of many aspects of Australian legal developments, scholarly interest in civil forfeiture law has, to date, been remarkably limited. All Australian studies with which I am acquainted are critical, the main emphasis falling on civil forfeiture’s alleged impacts upon civil liberties. The pre-eminent concern is the waiving of the presumption of innocence by resorting to civil proceedings and their evidentiary norms. There are also worries about reduced entitlements to legal representation. Here, the focus is on threats to the confidential client-lawyer relationship (via waiving of professional privilege), and to the right to counsel of choice and to effective counsel (via restricting defendants’ access to restrained funds).¹⁸ Concerns have been expressed about the abrogation of the sub judice principle through improper information sharing across parallel civil and criminal proceedings.¹⁹ The distinction between pecuniary and criminal penalties is seen as sophistical and doubly unjust: criminal activity is punished prior to conviction; yet, upon conviction, pecuniary penalties are not taken into account in sentencing.²⁰ Pecuniary penalties can, in turn, be presented as illustrating a more pervasive

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- 15 See *Comprehensive Forfeiture Act of 1984*, Pub L 98-473, 98 Stat 431 (1984). The Act provided for so-called *equitable sharing* of assets amongst the federal and local agencies involved in their seizure (with a loose proviso that they be redeployed or reinvested only for law enforcement-related purposes). A similar conflict of interest is built into a related arrangement, known as ‘adoptive forfeiture’ whereby local or state law enforcement agencies may secure for themselves a share of confiscated assets by turning the actual processing of forfeitures over to federal agencies. In consequence, where ‘liberal’ state legislation provides for social uses of seized assets (eg, for drug rehabilitation programs), local law enforcement agencies have an incentive to subvert the intent of their own state governments: Levy, above n 3, 144–60. In *Caplin and Drysdale, Chartered v United States*, 491 US 617 (1989), the United States Supreme Court placed its imprimatur upon government agencies striving to maximise civil confiscations for revenue raising purposes alone. I am indebted for this reference to Arie Freiberg (personal communication). A start in rebutting the shocking indifference to innocent third party interests displayed in 20th century American federal legislation and case law has been made in the *Civil Asset Forfeiture Reform Act of 2000*, Pub L No 106-185, 114 Stat 202.
- 16 See Leon Felkins, *Position Paper of Forfeiture Endangers American Rights Foundation* (2002) Forfeiture Endangers American Rights Foundation <<http://www.fear.org/fposit.html>> at 23 September 2006. Australian civil liberties organisations periodically post warnings about civil forfeiture: see, eg, Australian Civil Liberties Union, *Your Rights 2002 – Big Brother and Free Speech Issues* (2002) <<http://www.angelfire.com/folk/aclu/bigbrother2002.htm>> at 18 October 2006.
- 17 Columbia District Appeal Court Justice David Sentelle used this locution to describe the American *Racketeering Influenced and Corrupt Organisations Act*, 18 USC §§ 1961–68 (1970) cited in Freiberg, ‘Criminal Confiscation’, above, n 14, 44.
- 18 For a classic American civil liberties defence of the accused’s right to a ‘Rolls Royce’ lawyer, see Richard Mass, ‘Forfeiture of Attorney’s Fees: Should Defendants Be Allowed to Retain the Rolls Royce of Attorneys with the “Fruits of Crime”?’ (1988) 39 *Stanford Law Review* 663.
- 19 See Justice Deane’s critical opinion in *Hammond v Commonwealth* (1982) 152 CLR 188. See also Freiberg, ‘Civilising Crime’, above n 4, 131–2. The due process concerns for a fair criminal trial include worries about prejudicial publicity that may be unavoidably attendant upon some pre-conviction forfeitures.
- 20 Freiberg, ‘Criminal Confiscation’, above n 14, 51.

indifference to culpable intent, proportionality or mitigation in determinations of guilt and penalties. Such abridgements of due process entitlements are allegedly multiplied through a pattern of successive legislative amendments to existing forfeiture regimes, forever extending the scope and severity of forfeiture measures. This list of concerns could be readily extended.

These practical criticisms demonstrate that whilst some civil libertarian concerns, for example, over safeguards for innocent third parties, have been or could be further accommodated in current legislation,²¹ others go to the fundamentals of civil forfeiture's *modus operandi*, which many critics view as an unconstitutional abuse of sovereign power. One set of criticisms sees civil forfeiture law as an irrational residue of the archaic and medieval history of forfeiture law that violates liberal-democratic constitutional liberties. Conversely, civil forfeiture may also be seen as all too rational, treating it as a product of modern 'economic rationalism', and as prejudicial to liberty in an adjacent but different sense.

The leading account of civil forfeiture's irrational sovereignty dimension remains Jacob Finkelstein's genealogy of the American law's standard civil forfeiture procedure: namely, actions in rem.²² On the basis of the form and nomenclature of these actions (*United States of America v One 1963 Cadillac Coupe de Ville Two-Door, Motor and Serial Number 63J002241, 8-cylinder*,²³ etc), respondents are juristically construed as 'guilty things'.²⁴ Since parties with proprietary interests in the restrained property are not joined to the action, their possible innocence (including the question of *scienter*)²⁵ is immaterial. Unsympathetic to bipartisan federal legislative attempts in the 1990s to address a spate of resulting injustices, the United States Supreme Court continues to uphold an almost unbroken series of precedents affirming the irrelevance of third party interests and *scienter*.²⁶ *Bennis v Michigan*,²⁷ for instance, upheld the forfeiture of an automobile, which was jointly owned by a husband and wife (the plaintiff),

21 See, eg, *Proceeds of Crime Act 2002* (Cth) Pt 2.2. Sections 55 and 56 provide for protecting other interests in a confiscated asset. Section 48 permits the court to take into account 'hardship that may reasonably be expected to be caused to any person' occasioned by the operation of forfeiture orders.

22 See Jacob Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Wrongful Death, and the Western Notion of Sovereignty' (1973) 46 *Temple Law Quarterly* 169. Despite its vintage, and for all its frequent citation, the essay's core polemical argument – including a demonstration that mid-20th century American forfeiture law was much harsher than its Soviet counterpart – has been neglected, as has its underlying concept of 'Western' sovereignty: see, eg, Mark Weinberg, 'The *Proceeds of Crime Act 1987*: New Despotism or a Measured Response?' (1989) 15 *Monash University Law Review* 201. Weinberg treats Finkelstein as a purely factual source for 'the respectable statutory pedigree' of Australian legislation: at 203 (emphasis added).

23 250 F Supp 183 (Mo, 1966).

24 Cf *United States v One Ford Coupe Automobile*, 272 US 321 (1926).

25 See *Calero-Toledo v Pearson Yacht Leasing Co*, 416 US 663 (1974). This case is a *locus classicus* with respect to the irrelevance of innocent third party interests and *scienter* (did the owner have reasonably foreseeable foreknowledge about, or take precautions against, criminal use of his or her assets?). *Scienter* is the Latin word for guilty knowledge.

26 Levy, above n 3, 60. Levy considers that the Supreme Court's opinion in *Boyd v United States*, 116 US 616 (1885) turned on the criminal character of the (ship)owner as 'a civil sapling missed by a judicial bulldozer'.

27 516 US 442 (1996).

and in which the husband had been caught in flagrante with a prostitute. In apparent confirmation of many critics' tendency to invoke comparisons with medieval animal prosecutions, some 20th century jurists even attributed substantive agency to guilty things: 'a certain personality, a power of complicity and guilt in the wrong'.²⁸

For Finkelstein, the origins of civil forfeiture can be traced back to conceptions of guilt in the Old Testament. According to him, the older, Mosaic prototype of the guilty thing is the ox in the Old Testament story, which gored a man to death and, as a consequence, was slaughtered, with its flesh declared unfit for consumption.²⁹ To God, every loss of human life, accidental or otherwise, is an offence requiring reparation, but only to God.³⁰ Since no material value may be placed on a human life, compensation to relatives for its loss is precluded. A second origin of civil forfeiture is the medieval royal forfeiture statutes and writs known as *deodands* ('gifts to God' consequent upon subjects' accidental or negligent deaths) and attainder (forfeitures expropriated from the civil dead: suicides, traitors, outlaws and murderers).³¹ Incorporating Mosaic notions of tainted property, no-compensation-irrespective-of-harm, things-as-loci-of-culpability, *deodand* and attainder add two further ingredients: *forfeiture* to earthly, monarchical political authority and treatment of offending chattels as a source of revenue.

Right up to its abolition in 1846, American *deodand* law was in regular use (latterly in suits relating to railway accidents).³² Finkelstein insinuates an underlying continuity between medieval and modern forfeiture,³³ a continuity which hinges on a bipolar concept of Western sovereignty. Under 'traditional' (medieval) sovereignty, lowly Christian subjects, albeit theoretically sacred in God's sight, have no status outside a feudal relation of servitude.³⁴ Under the 'modern', liberal-democratic form of sovereignty, supposedly vested in the people, citizens are supposed to be bearers of inalienable constitutional rights. To deny innocent citizens standing is to trample over modern Americans' constitutional rights. In so doing, argues Finkelstein, American civil forfeiture

28 See *J W Goldsmith, Jr – Grant Company v United States*, 254 US 505 (1921). Even a defender of civil forfeiture, Richard Seamon, believes the fiction to be a problem: Richard H Seamon, 'Not Now Does Not Mean Not Ever: The Supreme Court's Refusal in *Bennis v Michigan* to Abandon the "Guilty Property" Fiction of Forfeiture Law' (1997) 48 *Southern California Law Review* 389, 390.

29 See Holy Bible (King James version), *Old Testament, Exodus*: 21; Finkelstein, above n 22, 229.

30 Natural and social eventualities all being part of God's design, no distinction can be made between physical and moral intentional causation.

31 See Arie Freiberg and Richard Fox 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6 *Australian Journal of Legal History* 1; Weinberg, above n 22, 201–18; Finkelstein, above n 22, 170–97.

32 In Australia, *deodands* were abolished in 1849; civil death and its disabilities (the last residue of attainder), not until 1981.

33 Finkelstein, above n 22, 251.

34 *Ibid* 271. The serf is valued, he suggests, only insofar as he is seen as an 'indirect reflection' of the Christian community's transcendent value: at 271. Not all medieval accounts of sovereignty and political subjectivity hinge on this sacralised and rigidly hierarchical image of political community: see, eg, Janet Coleman, 'Dominium in Thirteenth and Fourteenth Century Political Thought and its Seventeenth Century Heirs: John of Paris and John Locke' (1985) 33 *Political Studies* 73; Cary Nederman, 'Balancing the Body Politic: the Diversification of Organic Metaphors in Medieval Thought, 1300–1500' (2004) 2 *Pensiero Politico Medievale* 1.

law effectively returns American citizens to a modern equivalent of serfdom. ‘*The deodand never died*’, it became a ‘*reipublicaedand*’, a ‘gift’ to a republic asserting untrammelled sovereignty over its citizens.³⁵ For all his insights and erudition, I will suggest that Finkelstein’s hypothesis that civil forfeiture represents a revival of pre-modern sovereignty is deeply flawed.

In Australia, even in the absence of a widely distributed constitutional culture, human rights-based liberal-democratic principles undeniably have a place in contemporary civic, political and judicial arrangements. Yet, from its inception, the Australian political system has also been conceptually and normatively shaped by the ‘artificial reason’, in Coke’s phrase, of the common law. This entails a rather different construction of the Commonwealth’s authority and its civil libertarian limits to the abstract principles of liberty at the core of philosophical versions of liberal constitutionalism.

If I am not mistaken, what might be termed a certain ‘common law constitutionalism’ informs Freiberg’s depiction of civil forfeiture law as the creature of a recent ‘civilising’ of crime, whereby civil remedies have come to be annexed to criminal actions. In keeping with its reputation as ‘the monster that ate jurisprudence’, the law cannibalises pre-existing separations of powers between agencies and between civil and criminal courts. These longstanding jurisprudential demarcations, argues Freiberg, are the riverbed on which our system of limited government has been built. Their erosion, for example via the co-mingling of civil and criminal jurisdictions in parallel proceedings, is said to entail not simply a breach of discrete legal safeguards, but a major reframing of the state:

[T]he core issue is a political [not] a legal one, and that is whether the various agencies of the Commonwealth should be regarded as complementary parts of the one entity or whether the traditional view, that the agencies of the government are separate and distinct ‘emanations’, should prevail.³⁶

In the supposed ‘traditional view’, the emphasis in the criminal justice system is on protecting liberty and the innocent by establishing an ‘obstacle course’ to criminal investigation, arrest, conviction etc in the form of independent, sometimes adversarial, offices. What, for Freiberg, is structuring the ‘re-conceptualisation’ of the state is the ‘new managerialising’ of government. Criminal justice as an ‘obstacle course’ yields to an economic-rationalist ‘assembly line’ model, in which justice and equity take second place to revenue raising, efficiency and order/security.³⁷

In my opinion, this construction of separation of powers reprises the view that the state derives its authority from the common law rather than the other way

35 Finkelstein, above n 22, 251, 290.

36 Freiberg, ‘Civilising Crime’, above n 4, 139. Under this rubric of ‘civilising crime’ Freiberg includes (inter alia) hybridisations of criminal and civil procedure, the blurring of the division of powers, ‘diversion’ of offences away from formal court actions, ‘quarantining’ of individuals deemed dangerous instead of, or following, criminal proceedings.

37 See Arie Freiberg, ‘The Tectonic Plates of the Justice System – Responding to Pressure Points or Collision Course?’ (Research Paper, Institute of Public Administration, Victoria, 2002). My disagreement with Freiberg cannot detract from the value of his idea of seeking links between civil forfeiture and changes in techniques of government.

around.³⁸ The ‘separate’ office of defence counsel, with its privileges and immunities, is one such ‘emanation’. This term nicely evokes the semi-sacred, guild-like independence of officeholders deemed necessary to satisfy the system’s goal of procuring due process and substantive *justice* (equity, uniformity, proportionality). Consider how, on this view, parallel proceedings violate this goal. Where ‘orders to produce’ documentation relevant to restrained criminal assets are issued to their possessor’s defence counsels, in the criminal trial, the associated waiving of professional privilege in the name of efficient policing dilutes the defence counsels’ proper justice-oriented adversarial role. Instead (that is, instead of maintaining their former status as separate ‘emanations’) they are harnessed into cooperative relations with law enforcement agencies, as ‘complementary parts of the one [single sovereign state] entity’.³⁹ Albeit by a different route to Finkelstein, Freiberg arrives at a similar conclusion: namely, that civil forfeiture evinces a tendency to reinstating despotic sovereign authority. I agree that ‘economic-rationalism’ has had adverse effects in the criminal justice system. (American law enforcement agencies’ legislative licence post-1984 to hold onto confiscated criminal property may be a paradigm case.) I remain unpersuaded, however, that it is the key structural (and essentially amoral) driver of contemporary civil forfeiture regimes, and, above all, that the latter augur a shift towards a re-conceptualisation of sovereign statehood.

C Defences

Defences of civil forfeiture commonly combine ‘functionalist’ reasoning with ‘reparative’ morality. ‘Functionalist’ reasoning means simply that the justification takes the form of depicting civil forfeiture as a necessary legal instrument for achieving socially desirable criminal justice policy goals. Deterrence is one such goal, but perhaps the most telling of these functionalist purposes is that of *incapacitation*: civil forfeiture is needed to erode serious crime’s Croesus-like ‘capital base’⁴⁰ (little affected by criminal convictions or seizures of assets at the point of arrest). Conviction-based forfeiture cannot prevent illicit wealth from being laundered, used to finance further criminal

38 My reading of Freiberg as a common law constitutionalist more than a human rights-based critic of civil forfeiture is indebted to Haig Patapan, ‘The Forgotten Founding: Civics Education, the Common Law, and Liberal Constitutionalism in Australia’ (2005) 14 *Griffith Law Review* 91. He argues that in the Australian context, the traditional common law jurisprudential view that the civil state is founded upon and answerable to the ‘artificial reason’ of the common law was best elaborated by Dixon CJ: Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240. See also Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (2nd ed, 1977). Today, political theorists and constitutional lawyers alike are apt to bracket off the longstanding and continuing impact of common law constitutionalism on Australia’s political development, along with the resulting, relatively insignificant, role of liberal-democratic philosophy in that development.

39 Freiberg, ‘Civilising Crime’, above n 4, 139.

40 Freiberg and Fox, ‘Fighting Crime with Forfeiture’, above n 31, 5. I have no up-to-date figures, but a one decade old and admittedly conservative estimation of bulk money laundering and more broadly ‘illicit source monies’ put these at around \$3.5 billion; this, remember, is but one component of crime proceeds. See also John Walker Consulting Services, *AUSTRAC – Estimates of the Extent of Money Laundering in and through Australia* (1995) <<http://www.austrac.gov.au/publications/moneylaundestimates/index.html>> at 23 October 2006.

activities, diversified into otherwise legitimate business dealings,⁴¹ or frittered away on pointless judicial appeals. Under *PoCA 1987*, between arraignment and conviction, accused persons had ample opportunity to dispose of tainted assets;⁴² hence, the rationale for non-conviction-based forfeiture and its arsenal of commissioner, investigative and analytical powers. Surveillance, physical searches, ‘asset betterment’ analysis, and ‘orders to produce’ facilitate garnering evidence (at the upper end of the civil threshold of proof) of discrepancies between suspects’ lifestyle and legitimate sources of income, or linking suspects’ assets (if not suspects themselves) to unlawful activity.⁴³

Apropos of Finkelstein’s critique of *in rem* forfeiture proceedings, it could be said, from a functionalist perspective, that today they are but a convenient legal fiction, reflecting their origins in private legal actions, which require nominating an ‘adversary’. In the Australian context, the main historical locus of *in rem* (‘administrative’) forfeiture actions is customs legislation and related case law. The core rationale for such actions is not symbolic but incapacitation in the Commonwealth’s interest: for example, illegal fishing vessels threaten Australia’s fishing industry.⁴⁴ Equally, some of civil forfeiture law’s patterns of increasing scope and severity are explicable as countering criminals’ evolving tactics for evading forfeiture proceedings permitted under a prior legislative regime.⁴⁵

The policy goals of incapacitating and deterring crime possess a normative connotation – most people do not need to ask why crime should be treated as a bad thing. (We will come to the civil prudence paradigm’s answer to that question in due course.) However, the incapacitating and deterrent *effects* of civil forfeiture law are not incontestable.⁴⁶ Might there be further normative bases on

41 This of course was a driving concern of the first modern Anglophone civil forfeiture legislation in the United States: see *Racketeering Influenced and Corrupt Organisations Act*, 18 USC §§ 1961–68 (1970).

42 See Ian Temby, ‘The *Proceeds of Crime Act*: One Year’s Experience’ (1989) 13 *Criminology Law Journal* 24. A typical dodge involved placing funds in a trust, which was then emptied out either by employing ‘Rolls Royce’ lawyers who eked out the judicial process, or as a means of laundering the assets. The lawyer and client would later redistribute the funds amongst themselves. The ALRC Report documents the failure of the conviction-based regime, in the *Proceeds of Crime Act 1987* (Cth) (‘*PoCA 1987*’), to recover significant crime proceeds, especially by comparison with the higher recovery rates accomplished in state jurisdictions (NSW and Victoria) which had already enacted non-conviction-based forfeiture regime: ALRC Report, above n 9, [4.107], [4.125].

43 See ALRC Report, above n 9, [4.44], [4.51], [4.53]. My information concerning threshold of proof derives from an interview with policy and management staff of the AFP.

44 On the practicalities underlying the administrative forfeiture actions associated with customs laws, see Freiberg and Fox, ‘Fighting Crime with Forfeiture’, above n 31, 39; ALRC Report, above n 9, [16.28].

45 Aided by the ready availability of sophisticated technologies, a wide range of crime detection and prevention, it has been argued, is subject to a ‘co-evolutionary’ pattern of adaptive action and counteraction on the part of both law enforcement agencies and their criminal ‘prey’: see, eg, Paul Eklblom, ‘Can We Make Crime Prevention Adaptive by Learning from Other Evolutionary Struggles?’ (1999) 8 *Studies on Crime and Crime Prevention* 27. Eklblom notes that the evolutionary analogy has been used to represent certain law enforcement policies (like equipping United Kingdom police on the beat with firearms) as *inadvisable* on account of their escalating consequences.

46 See Arie Freiberg and Richard Fox, ‘Evaluating the Effectiveness of Australia’s Confiscation Laws’ (2000) 33 *Australian and New Zealand Journal of Criminology* 239; Levy, above n 3, 206–9.

which a state's duty to attempt to confiscate criminally tainted assets might be founded?

The most common answer is that it is a duty of 'reparation', variously conceived. Profits of crime must be 'repaid'. In part, as a foil to my proposed rationale, let us first consider one attempt to furnish a reparative rationale for the in rem form of a civil confiscation order. Countering criticism that its supposition of guilty property is simply irrational and archaic,⁴⁷ Paul Schiff Berman argues that legal actions against (in)animate 'guilty things' perform the symbolic-cathartic function – through a 'narrative of status degradation' – of enabling a community to make itself clean and whole following a breach of its normative boundaries.⁴⁸ In rem actions 'exist as much to heal the community as to punish the owner'.⁴⁹ To illustrate its contemporary pertinence, he revisits the universally denounced *Bennis v Michigan* case. Forfeiture of the automobile was precipitated by a community campaign against prostitution in a local area, which had become a magnet for outsiders. Acting 'responsively' on behalf of this community, local police seized the automobile under a municipal ordinance providing for confiscation of 'public nuisances', thereby enabling the community to symbolically cleanse itself by taking this punitive-confiscatory action against an instrument of vice.⁵⁰

Berman's point is not that communitarian-symbolic reparation necessarily outweighs concern for civil liberties, merely that it has a *place* in the repertoire of civil forfeiture law's rationales. Civil forfeiture belongs to that set of laws which govern by fostering community participation in articulating social norms.⁵¹ This civic-communitarian reparative ethos is a stranger to Australian forfeiture law, though whether the latter's cultural and political overlay is altogether free of the ethos is less clear.⁵²

D A Basis in Jurisprudential Principle?

Berman's moral rationale is reparative, partly in the sense of *symbolically repairing a breach in a community's moral boundaries*, partly in *punitively exacting a 'payment' for a perceived injury*. A more mainstream example of reparative moralising in this second sense forms part of the jurisprudential 'basis in principle'⁵³ for civil forfeiture offered by the Australian Law Reform

47 Paul Schiff Berman, 'An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions against Objects' (1999) 11 *Yale Journal of Law and the Humanities* 1, 3, 7–17. This criticism, he argues, involves historical anachronism and ignorance of cultural anthropology.

48 *Ibid* 4–5, 18–31, 37–8.

49 *Ibid* 44.

50 *Ibid* 38–42.

51 *Ibid* 45.

52 Did not a similar ethos underpin the demolition of the café which was the main site of the 1996 Port Arthur massacre? 'In a sense it was being punished for being a party to the murders. Like the animals and inanimate objects that had been punished in previous centuries, the café had been turned into an object of wrath and retaliation, a "symbolic ransom" to the injured. Its "innocence", like that of its owner, was irrelevant to its fate': Freiberg and Fox, 'Fighting Crime with Forfeiture', above n 31, 4.

53 ALRC Report, above n 9, [1.24], [1.27], [4.146], [4.151].

Commission ('ALRC') Report into civil forfeiture which paved the way for *PoCA 2002*.⁵⁴

Underpinning the Act's 'political determination to deprive criminals of the benefits of their crimes',⁵⁵ the Report's primary principle stipulates that no one may become 'unjustly enriched' as a consequence of 'unlawful [that is, not just illegal] conduct'.⁵⁶ The 'unjustness' of crime proceeds is a function of their being acquired 'at the expense of other individuals and society in general'.⁵⁷ This 'unjust enrichment' principle is an improvisation on a central concept in Australian private restitution law (unjustly benefiting at another party's expense) in order to fill a gap in public law (unjustly benefiting from criminal activity).⁵⁸

The meaning of this principle in the context of civil forfeiture is not entirely clear. Deferring consideration of its moral-reparative core, it is apparent that not all crime proceeds are accrued 'at the expense of other individuals', whilst compensating victims is not amongst the main purposes of confiscation.⁵⁹ Moreover, in what sense does unjust enrichment occur 'at the expense of society in general'?

A clue is supplied where, in a 'supplementary' principle, a tainted asset is conceived as 'a civil debt to the Commonwealth'.⁶⁰ Unjustly acquired at society's expense, crime proceeds ought to be placed at the disposal of the Australian people through the good offices of the people's representative, the Commonwealth. Moreover, as part of the Report's justification of its recommendation for a non-conviction-based regime, more light is cast on the moral meaning of the unjust enrichment principle in a 1990 speech by the then New South Wales ('NSW') Premier Nick Greiner. Introducing Australia's first such regime into that state's legislature, Greiner asserted that to 'restore' ill-gotten gains to the community '[i]t is not only the profits of a discrete transaction *but the proceeds of a life of crime that will be confiscated*'.⁶¹ Whilst its possible meanings will require some unpacking, in this striking exhortation to incapacitate an antisocial *lifestyle*, we glimpse how civil forfeiture bears on the ethical and legal meaning of citizen status.

54 The Report disarmingly draws attention to its own want of rigour due to a 'truncated consultation' process imposed by the Commonwealth Government: *ibid* [1.11]–[1.23].

55 Jones, above n 5, 1396.

56 ALRC Report, above n 9, [2.65].

57 *Ibid* [1.61], [2.61], [4.14], [4.64]. Two further 'primary' principles, seemingly of little independent theoretical interest, are specified in the ALRC Report. The first pertains to forfeiture of property which is instrumental to the commission of crimes. The second stipulates that law enforcement agencies ought to be provided with additional powers of investigation necessary to achieving the objectives justified by the first two principles: at [2.61].

58 See Keith Mason and John W Carter, *Restitution Law in Australia* (1995); Ross Grantham and Charles Rickett, *Restitution: Commentary and Materials* (2001).

59 ALRC Report, above n 9, [2.77].

60 *Ibid* [4.15], [4.17], replicating formulations inserted into sections 20 and 26(9) of *PoCA 1987*. Cf the 'relating back' provision in the *Comprehensive Forfeiture Act of 1984*, Pub L 98-473, 98 Stat 431 (1984): '[a]ll right, title and interest in property vests in the United States upon the commission of the act giving rise to forfeiture'.

61 ALRC Report, above n 9, [4.111] (emphasis in original).

For all its value, the ALRC Report begs many questions. Chiefly, by taking refuge in the constitutional mythology of popular sovereignty, it dodges the question of the political-ethical foundation for civil forfeiture law's sovereign claim over citizens' assets. To remedy this situation, I turn to the neglected philosophy and ethic of civil prudence.

III CIVIL (JURIS)PRUDENCE

Prudentia civilis was one of the names given to a distinctive way of training future officeholders in the problems, purposes and techniques of civil government in the era of European 'Absolutist' state-building.⁶² Civil prudence eclectically drew on and adapted many traditions, disciplines, genres and schools, including rhetorical-humanism, natural law, Stoic and Epicurean moral philosophies, anti-rationalist Protestant theology, *raison d'état*, comparative political history and police science.⁶³ Samuel Pufendorf was civil prudence's most uncompromising natural law representative.⁶⁴

As various commentators have emphasised, the polemical foil against which Pufendorf's natural law political ethic of state was developed was the theory and practice of the 'confessional state'. This concept, now widely deployed by historians of early modern European political thought and allied institutional development, refers to the interlacing of state-building or political centralisation and 'confessionalisation' during the 1600s. Stressing the structural and temporal parallels rather than differences between the so-called Reformation and Counter-Reformation, historians of 'confession-formation' have drawn attention to systematic attempts to use the powers of the new forms of polity and government to unify, socially discipline and reshape territorial populations around one of the three main increasingly doctrinally differentiated and competing social groups, that is the Catholic, Lutheran and Calvinist 'confessions'. These politico-religious projects of 'confessionalisation' frequently included forced conversions of groups not part of the dominant confession. The main locus for the formulation of the theory and socio-spiritual programmes of confessionalisation, and the so often catastrophically incendiary salvational goals they set for

62 Gerhard Oestreich, *Neostoicism and the Early Modern State* (1983), 162–65. Martin Loughlin engages in a comparable exercise relating to roughly the same body of thought, under the overlapping rubrics of 'public law', 'political right' or 'political jurisprudence'. Resonating with the present paper's theme, Loughlin's starting point is that Anglophone common law jurisprudence, with its belief in the common law as the foundation of state legitimacy, is prone to 'duck' the question of the autonomous 'political authority structure' of the state: Martin Loughlin, *The Idea of Public Law* (2004) 3.

63 For discussion on the 'eclectic' nature of civil natural law, see Timothy Hochstrasser, *Natural Law Theories in the Early Enlightenment* (2000) 11–30; Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (2001) 77–80. Throughout, Hunter offers useful accounts, in particular of the epicurean moral philosophies, theological, political history and natural law ingredients of civil philosophy.

64 My exposition mainly draws upon three natural law texts by Samuel Pufendorf: a) *On the Duty of Man and Citizen* (Michael Silverstone trans, James Tully (ed), 1991) [trans of: *De officio hominis et civis juxta legem naturalem libri duo*]; b) *On the Law of Nature and Nations in Eight Books* (first published 1668, 1934 ed); c) *On the Natural State of Men* (Michael Seidler trans and ed, first published 1668, 1990 ed). For scholarly commentary on Pufendorf, my greatest single debt is to Ian Hunter.

government, were so-called ‘moral theologies’ and allied metaphysical natural law philosophies. In the German states, institutionally, these theologies and metaphysics were chiefly housed in the theology faculties of the proliferating universities founded as part of the process of confessional state-building. An intellectual civil war came to be waged between proponents of metaphysico-theological natural law and proponents of the anti-metaphysical (though by no means anti-theological) civil philosophical versions of natural law, pre-eminently in Germany influenced by Pufendorf, who for their part had their main institutional home base in law faculties.⁶⁵

Complementing Pufendorf’s opposition to states’ being used to secure the triumph of the higher truth supposedly exclusively embodied in one church and its doctrines, is his opposition to what might loosely be termed feudal political arrangements and conceptions of rule. Apart from serfdom, a crucial manifestation of these was the tangle of overlapping political and legal jurisdictions which in the 17th century characterised not only the Austro-Hungarian Empire but to an extent even supposedly independent and sovereign states like France.⁶⁶

Pufendorf’s natural jurisprudence has been read as a concerted effort to formalise the lessons of the remarkable juristic improvisation which broke the back of two centuries of European religious warfare, the Westphalian Peace in 1648.⁶⁷ According to David Boucher, Pufendorf faced the problem of how the

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- 65 On the anti-‘salvific’ character of Pufendorffian natural law, see Hunter, above n 63, chs 1, 2, 4; Timothy Hochstrasser, above n 63, 105 (for discussion of the concepts of ‘confessionalisation’ and ‘confessional state’). See also Heinz Schilling, ‘Confessional Europe’ in Thomas A J Brady, Heiko A Oberman and James D Tracy (eds), *Handbook of European History 1400–1600: Late Middle Ages, Renaissance and Reformation, Volume 2: Visions, Programs and Outcomes* (1995) (for German literature); Jonathan C D Clark, *English Society 1688–1832* (2000) 26–34 (for Britain). For a clear introductory pan-European synthesis of the historical literature on confessionalisation, see Ronnie Po-Chia Hsia, *Social Discipline in the Reformation: Central Europe 1550–1750* (1989) 1–5, 53–72. A brief example of the kind of confessionalising metaphysical natural text criticised by Pufendorf is the politic of Johannes Althusius. Locating ultimate political and legal authority in an idealised image of the people rather than in the prince of a territory – and defining this sovereign political community as a simultaneously spiritual material and moral communion of the faithful (‘universal symbiotic communion’) – the Protestant political metaphysician Althusius develops a moral theory of the state and, on that basis, a political programme for the spiritual training and disciplining of a confessional state’s population. See Johannes Althusius, *Politica* (abridged translation of *Politics Methodologically Set Forth and Illustrated with Sacred and Profane Examples*) (Frederick S Carney transl and ed, 1995) 55, 70–6 [trans of: *Politica methodice digesta, atque exemplis sacris et profanes illustrata*] detailing spiritual disciplining of the population by ‘presbyters’ (a Protestant equivalent of bishops).
- 66 Certainly, in his natural law texts, Pufendorf’s attitudes to feudal conceptions of rule seem, as we shall now see, to have found expression less in polemic choices than in choices of vocabulary. By contrast, in France, precursors of Pufendorf’s jurisprudence self-consciously and polemically elaborated norms of sovereign statehood as alternatives to feudal lordship – ie, private patrimonial property-based forms of political domination. See Charles Loyseau, *A Treatise of Orders and Plain Dignities* (first published 1610, 1994 ed); Loughlin, above n 62, 76–7 (‘French scholars ... like Bodin and Loyseau defined sovereign power as a phenomenon directly opposed to the exercise of feudal power’). For a similar view, see also Blandine Kriegel, *The State and the Rule of Law* (1995).
- 67 On the *post-factum* nature of Pufendorf’s theorisation, see also David Saunders, ‘Within the Orbit of this Life: Samuel Pufendorf and the Autonomy of Law’ (2002) 23 *Cardozo Law Review* 2173; Craig Carr and Michael Seidler, ‘Pufendorf, Sociality and the Modern State’ (1996) 17 *History of Political Thought* 354, 378.

structural attributes, including relations to political subjects, and inter-relations of the various political units comprising post-Westphalian Europe, should be conceptualised – including their normative contours.⁶⁸ Notably, the autonomy characteristic of modern sovereign political entities, for instance a monopoly of the power to tax the inhabitants of a given territory, could not readily be articulated in the Roman law-based terminology of political community associated with feudal, Christian and civilian ‘civil science’ – *universitas, societas, dominium, imperium*. A *societas*, for instance, had no impersonal and continuing corporate standing, whilst a *universitas* could only be specified by the higher legal authority which created it.⁶⁹ What conception of state sovereignty could be used to challenge, say, Papal-imperialist taxation and juridical prerogatives within late-medieval European polities?⁷⁰

According to the Pufendorffian conception of ‘state’, the state’s overriding function was to ensure the security of its populace. A crucial means to this end was to accept that heresy could not be extirpated and, hence, to institute a regime of religious toleration, subject to churches confining themselves to practices which did not jeopardise civil peace. Within this envelope of security, guaranteed by a sovereign state indifferent to questions of ultimate moral or spiritual truth, might then be built a more expansive worldly ‘sociality’ (physical and economic wellbeing, education etc).⁷¹ As guarantor of security, the civil state’s authority must be ‘supreme’, not in the sense of being able to act without restraint, to do absolutely anything they like, but in the Bodinian sense of not having any (earthly) superior or equal.⁷² Pufendorf accordingly repudiates the investiture of sovereignty in the ‘community’ of Christian souls – arguably the historical prototype of popular sovereignty, resistance and participatory democracy theories. Yet, again like Bodin, Pufendorffian sovereignty is also delimited, not only by its mundane, anti-perfectionist (non-salvation-oriented) purposes, but also through a *self*-restraining form of institutional design and associated ethic. These, however, are best approached via Pufendorf’s characterisation of human nature, which also sheds light on the *moral* character of his civil state.

68 See David Boucher, ‘Resurrecting Pufendorf and Capturing the Westphalian Moment’ (2001) 27 *Review of International Studies* 557.

69 Ibid 566. On scholastic civil science, see also Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (1990). As Kelley shows, these ways of thinking should not be thought of as archaic, many of them were, suitably modified, destined to have a flourishing ‘afterlife’ in the social science, and in political and legal theory.

70 For an incisive survey of these papal-imperial powers on the eve of the Reformation, see also Diarmid MacCulloch, *Reformation: Europe’s House Divided, 1490–1700* (2004) 3–52, 43 (on fiscal and juridical powers of the papal ambassadorial ‘nuncios’).

71 Hunter, above n 63, 156, 367. The civil state fosters inter-communal toleration not via a natural right to religious liberty, but by withdrawing from the supervision of churches (as long as they act peaceably) whilst stripping them of substantive political or legal power.

72 See Jean Bodin, *On Sovereignty: Four Chapters from ‘The Six Books of the Commonwealth’* (Julian Franklyn ed, 1992). ‘To have a companion is to have a master ... without whose support and consent he [the sovereign] can do nothing’: at 59.

Pufendorf's depiction of humans 'in the natural state'⁷³ is far from the Hobbesian image of generalised antisocial warfare. Humans are needful of others, possessed of some practical empirical intelligence (but *not* of a godlike, redemptive capacity for non-empirically grounded rational insight into truth), and capable of social virtue (cooperativeness, sympathy).⁷⁴ But these capacities cannot be depended upon to save them from their destructive passions, including propensities to moral and religious extremism. Pufendorf reminds us of the neglected obverse of the state as protector; namely, citizens' *incapacity* for sustained individual or collective self-governance, absent the backing of a sovereign state. Citizens' moral incapacity to be their own collective political foundation is the source of the ethical gravitas attaching to the civil state's purposes – security and worldly sociality.⁷⁵ The state supplements human beings' moral gap. Pufendorf *is* Hobbesian insofar as fear is what basically impels the setting up of civil states, or acquiescence in civil orders. However, his normative conception of the state provides a *via media* between the amoral prudence of the Hobbesian power-state and political prudence understood as the wise application of principles supposedly grounded in reason.

How does Pufendorf's image of man inform the self-binding institutional design of his state? In relation to the classic conundrum of who guards the guards, Pufendorf's mistrustful moral anthropology precludes theoretical reliance on a virtuous 'guardian' class (or rational citizenry). 'Governors' and governed alike need protecting from themselves.⁷⁶ The normative instrument through which Pufendorf's civil state theoretically binds itself is its construction as a system of *impersonal and jurisdictionally delimited offices*.⁷⁷

73 See especially Pufendorf, *On the Natural State of Men*, above n 64. See also Pufendorf, *On the Duty of Man and Citizen*, above n 63, 34, 35.

74 See Pufendorf, *On the Duty of Man and Citizen*, above n 64, 132–3; Pufendorf, *On the Natural State of Men*, above n 64, 112–30. Hunter sums up Pufendorf's rejection of the ubiquitous theological image of man as *homo duplex*: 'a figuration of man as a pure intelligence', who is subject to a temporary 'impure embodiment in the empirical, prudential world', whilst retaining a scintilla of redemptive godlike understanding. Such an image, according to Hunter, is found recycled rather than displaced today as the 'secular' opposition between reason, potentially enabling us to transcend causal or normative nexuses (to display rational autonomy), and natural or social passions, indicative of our 'fallen' bodily nature: Hunter, above n 63, 371. By contrast, in Pufendorf's natural law, 'disregarding the question of whether he was originally different, we will always presuppose a creature tainted with depravity': Pufendorf, *On the Duty of Man and Citizen*, above n 64, 10, 132–3. See also Pufendorf, *On the Natural State of Men*, above n 64, 112–30.

75 Compare the image of political society, as seen from the standpoint of the sovereign state, as 'an association of invalids' who all look to the state to cure their common illness, presented by Michael Oakshott, *On Human Conduct* (1975) 308. This argument is not intended to downplay human capacities for intelligent organisation inside a framework of basic political order.

76 Robert Dahl, *Democracy and its Critics* (1989) 65–79. Dahl considers an autonomy-based democratic theory of sovereignty as necessitated by the inadequacy of appeals to the virtues of guardians. Civil prudence challenges trust in guardianship and Dahl's idealistic alternative.

77 For a modern restatement of this view of the state, which is uncomfortable about assigning normative status to state reason, see Raymond Geuss, *History and Illusion in Politics* (2001) 47–52.

Diverging from both medieval-Christian concepts of office (for example, as property held of a personal superior)⁷⁸ and prevailing contemporary concepts (a role occupied by integral moral ‘individuals’),⁷⁹ Pufendorf reworks Cicero’s conception of moral personhood as a plurality of instituted offices and associated ‘role-personae’.⁸⁰ Through his distinction between *sovereignty* and *government*,⁸¹ this system of offices admits federalist and/or democratic dimensions of government, or hybridisations of public and private agencies, and not least an independent judiciary, without diluting sovereign power.⁸² Through their role-personae public office-bearers create what a modern political ethicist has recently called ‘internal moralised boundaries’ between (and *within*) official and extra-official obligations.⁸³

This persona-based concept of conscientiousness is a predicate not only of public officials but also of *citizens*. The primary mark of civil citizenship is limited subordination to political authority. Such compliance may entail not just passive obedience but an ethically demanding capacity to *pluralise conscience*. A priest whose conscience and obligations derive from his church’s interpretation of scripture, argues Pufendorf, is also obliged in his *civic* ‘person’ (or, as we would say, capacity) to comply with the laws of constitutional governments.⁸⁴ By implication, in this perspective, ethics of office may be breached in two ways. Take the case of a senior clergyman who violates his legal obligations, say, hypothetically, by seeking – in good conscience – to ‘heal’ the troubled soul of a subordinate church official who has engaged in child abuse by pastoral care, rather than reporting their breach of the law to the police. In this instance, the breach of civic obligation on the part of the senior clergyman has to be understood not (or not entirely) as a case of *malfeasance* – as per the more commonsense understanding of non-fulfilment of a public obligation, as self-interest overriding altruistic concern for the public good. Rather the conduct is better understood as instantiating a second way of breaching obligations: namely, in Herman Finer’s fine neologism, *overfeasance*, the substitution of the

78 This overlaps with Roman and canon law concepts of office: cf Loughlin, above n 62, 79–80, 154. Boucher’s discussion, above n 68, suggests grounds for doubting that Pufendorffian concept (and, more generally, modern statist conceptions of office) can be sourced to an age-old dialectical tension in Western thought between *universitas* and *societas*.

79 For a systematic Kantian argument against the possibility that ‘agent-relative’ office-based ethics can ‘mint permissions’ for actions which philosophic reason would prohibit, see Arthur Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (1999) 257 ff.

80 Pufendorf, *On the Law of Nature and Nations in Eight Books*, above n 64, i.i.11, 10–11 (‘[o]ne and the same man may sustain several persons together’).

81 Pufendorf, *On the Duty of Man and Citizen*, above n 64, 139–45. Here, sovereignty is defined as a ‘moral personality’ or office, which may be fulfilled by different forms of government – monarchy, aristocracy, democracy.

82 On ‘self-binding’ arrangements by which states at once ‘hobble’ their actions whilst strengthening their overall efficacy, see Stephen Holmes, *Passions and Constraint* (1995) 109, 113. By this reasoning, it becomes moot as to when self-imposed contracts which limit a state’s freedom of action, eg, as part of an International Monetary Fund aid package, should be deemed a *restriction* on a state’s sovereignty or, to the contrary, (as argued in *X v SS Wimbledon* [1923] PCIJ (Ser A) No 1, 25) an *exercise* of it.

83 Patrick Dobel, *Public Integrity* (1999) 139. I think Dobel is mistaken in sourcing his account of public offices and their personae back to Thomas Aquinas.

84 Pufendorf, *On the Law of Nature and Nations in Eight Books*, above n 64, i.i.11, 10–11.

promptings of a ‘higher’ Christian conscience for the more limited obligations attaching to the office of citizen.⁸⁵ Far more than citizens, public officials in a civil state are obliged to practice what may be termed jurisdictional discipline, renouncing moral as well as immoral temptations to override the law, to take it into their own hands.

So what concept of *criminal law and justice* emerges from this way of modelling the civil state? Norms of justice, *and by extension, the regulation of criminal justice agencies themselves*, must be internally related to the practices and procedures which a state needs to preserve or strengthen itself qua social protector. Anticipating Hume, Pufendorf conceives justice as an *artificial* set of imposed conventions and discretionary judgments: ‘an appropriate fitting of [legal] actions to persons’.⁸⁶ In keeping with this de-transcendentalised conception of justice, Pufendorf rejects the idea that penal sentencing should be conformed to a transcendent logic of intrinsic proportionality. According to Dieter Hüning, Pufendorf inaugurates ‘a new concept of injury’, rejecting the traditional natural law view of injury as ‘an act contrary to the human conditions of living together based on the teleological idea that nature itself is an appropriately arranged order’.⁸⁷ Pufendorf’s world is an irredeemably broken and patched one.

Most pertinent to civil forfeiture is his discussion of sovereignty over property. This does not generally imply that a sovereign enjoys a general patrimony over subjects’ assets, such that they possess them merely at the sovereign’s pleasure. Rather, three heads of ‘non-absolute’ sovereign power to appropriate or otherwise regulate subjects’ acquisitions are set out: sumptuary law (‘tempering’ excessive private expenditures on luxuries deemed detrimental to the welfare of the state); taxation powers; and ‘transcendental propriety’ over subjects’ ‘goods and fortunes’, by which he largely means *eminent domain*. Here, Pufendorf refers by way of illustration to the sovereign’s entitlement to resume privately owned dwellings ‘for the safety of the state’, notably in order to expand a city’s fortifications against a threat of siege. But he also proceeds to discuss under this rubric of ‘transcendental propriety’ the state’s ‘supreme’ entitlements and duties

85 Ibid. On ‘overfeasance’, see Herman Finer, ‘Administrative Responsibility in Democratic Government’ (1940) 1 *Public Administration Review* 335, 337–8. Finer defines overfeasance as ‘where a duty is undertaken beyond what law or custom oblige or empower; overfeasance may result from dictatorial temper ... or sincere, public spirited zeal’: at 338.

86 Pufendorf, *On the Duty of Man and Citizen*, above n 64, 31. Hume’s subsequent and more famous ‘rule-utilitarian’ conception of justice as an artificial ‘scheme’ arguably owes much to Pufendorf.

87 Dieter Hüning, ‘Is Not the Power to Punish Essentially a Power that Pertains to the State? – The Different Foundations of the Right to Punish in Early Modern Doctrines’ (Paper presented at the Conference on European Natural Law Theories in the Early Enlightenment, 1650–1750, Institute for Historical Research, University of London, London, 2–3 September 1999).

to preserve *property* within its territory, restraining sovereigns and citizens from alienating parts of a state's territory to foreign powers.⁸⁸

In summary, Pufendorffian sovereignty is supreme yet constrained by its worldly purposes and through a system of jurisdictionally distinct offices. Pufendorf gives natural and positive law the same end: that is, sociality. He grounds the 'office' of law in the sovereign's protective duty; that is, in a civil state's internal norms, rather than in a conception of higher, moral justice understood in terms of philosophical or divine reason.⁸⁹ Further, his construction of political authority conforms to neither the medieval-dominium-based nor the liberal-democratic rights-based poles of Finkelstein's historical typology of sovereignty.⁹⁰ Crime remains an offence against the sovereign, but a sovereign of a different kind, the impersonal moral persona of the state. With its emphasis on human incapacity for sustained self-governance outside the envelope of a civil state, civil prudence brings out the ethical gravitas of the functional/instrumental dimensions of criminal justice, which other perspectives consign to an amoral domain of mere practical necessity. Inter alia, instrumentalisation for security purposes imposes a moral obligation to restrict the purchase of authority on individuals to functionally appropriate responses to external behaviours which jeopardise civil peace. These functional imperatives preclude, or at least set limits to, actions by authorities intended to express symbolically national or local community will (such as those sympathetically described and analysed by Berman).

There are evidently overlaps between Pufendorffian civil prudence and those liberal philosophies of government which place the importance of pluralism and tolerance above that of (equal) liberty.⁹¹ The difference from mainstream liberal philosophies which put liberty first is that *religious liberty for Pufendorf is a concomitant effect of de-sacralising law and politics, not the ultimate reason for doing so*; his accounts of separation of powers are accordingly different too.⁹² Civil prudence also shares common law liberalism's eschewal of fundamental principles. The difference is that civil prudence insists on law's political 'outside'. That is, more consistently at any rate than common law theory, civil

88 Pufendorf, *On the Law of Nature and Nations in Eight Books*, above n 64, viii, 2, 3, 7, 8. For the earlier English edition, see Samuel Pufendorf, *Of the Law of Nature and Nations* (Basil Kennet trans, 1717 ed) [trans of: *De jure naturae et gentium libro octo*]. One reason why 'transcendental propriety' (the term used in the Kennet translation) might be a more useful lexical choice is that the contemporary meaning of eminent domain seems narrower than the range of meanings which Pufendorf attributes to this power. Boucher sees these forms of supreme title as laying down '*the moral conditions of property ownership*': Boucher, above n 68, 563 (emphasis added).

89 This is a general theme argued by Saunders, above n 67.

90 See Finkelstein, above n 22, 251.

91 For the way this distinction between equal autonomy and pluralism/tolerance-based versions of liberalism is drawn (to the advantage of the latter) as a way of demarcating lines of jurisprudential argument, see Stephen D Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* (2001). A liberal political theorist with many affinities to civil prudence, eg, via his espousal of Bodinian statism, is Stephen Holmes: see above n 82.

92 For an illustration of the multiple meanings of separation of powers arguments see Bernard Manin, 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debates of 1787' in Biancamaria Fontana (ed), *The Invention of the Modern Republic* (1994) 27.

prudence insists that the establishment of legal norms depends on a sovereign state's capacity to establish a 'normal' (that is reliably stable and secure) situation within its territorial jurisdiction. In consequence, it would have to reject as fiction common law representations of criminal justice offices (such as Freiberg's) as possessed of a guild-like autonomy from the sovereign system of state offices they serve.

Finally, as hinted back in Part I, mention should be made of overlaps and disjunctures between Pufendorffian civil prudence and certain statist oriented rule-utilitarian thinking. Overlaps there are aplenty, especially around the political need for pluralisation and subordination of agency. Prudence, civil peace and security all suggest that civil prudence has a place for consequentialist calculation. A particularly important point of disjunction, which goes to the very spirit animating civil prudence, derives from Pufendorf's image of man. It is very difficult to square adherence to utilitarian philosophy with the latter's partly, but not entirely, religious-based scepticism about human beings' capacity to reason in an effective and responsible manner about the kind of morally controversial issues around which much of politics revolves. Pufendorf is here on all fours with a figure like Hume, also not a consistent utilitarian, or closer to the home of contemporary constitutional thought with an anti-rationalist polemic like Paul Campos's *Jurismania*.⁹³ How is a single principle philosophy oriented to highly general objectives like happiness, maximising social goods and the like to be restrained from assuming the prerogative of dictating to the state what it ought to be doing on the basis of its supposedly supra-institutional rational principle? Pufendorf himself was insistent that even though our compliance with natural law principles of sociality was beneficial to us, the fact of our common imperfect nature was the core reason for trying to act sociably.⁹⁴

IV CIVIL PRUDENCE AND CIVIL FORFEITURE

We have seen that the core moral justification for civil forfeiture is generally thought to be reparation, ultimately to the national citizenry, for 'unjust enrichment'. Part of the task of this third section of the paper is to query the intuitive self-evidence of this notion of unjust enrichment, and to explore the civil forfeiture-citizen nexus. However, the first task is to use the resources of the civil prudence perspective to disambiguate the ALRC's version of the unjust enrichment principle, and to expose the neglected statist-ethical sources of value support for civil forfeiture, which lie, undisclosed by the Report, in its concept of civil indebtedness.

It will be recalled that translating the originally private law principle of unjust enrichment into public law posed the question of how to specify *the subject of the injury* affected by profiting from crime. Crime proceeds were conceived by

93 Paul Campos, *Jurismania: The Madness of American Law* (1998).

94 See Pufendorf, *On the Law of Nature and Nations in Eight Books*, above n 64, II.iii.18, 213–14. See also Hunter, above n 63, 179. For more extended treatment of Pufendorf's insistence on differentiating his account from utilitarianism, see Kari Saastamoinen, *The Morality of the Fallen Man: Samuel Pufendorf on Natural Law* (1995) 119–28.

the Report as depriving the Australian community of wealth which forfeiture law restores to it via the Commonwealth, its representative or trustee. The question is whether this conception comports with the notion of crime proceeds as a civil debt to the Commonwealth. Is the latter derivative of the former, as the ALRC Report implies?

A Sovereignty and Civil Indebtedness

There is a frequent discrepancy between theoretical constitutional talk of government as a merely fiduciary power (a trust held on behalf of the sovereign people) and constitutional government's practical oscillation between evasive silences and moments of candour concerning the locus and scope of ultimate political authority. The latter is most conspicuously evinced in the continuing deployment of the concept of the Commonwealth-as-Crown. In legal and administrative discourse, the Crown refers to a sovereign office that is not as such a democratic entity.⁹⁵ It is this *office*, it seems to me, not the self-governing Australian citizenry, which is the effective referent of the term 'society' in the Report's gloss of the unjust enrichment principle. If I am right, then substituting 'society' for 'sovereign state' and presenting the *core* of civil indebtedness as an ancillary principle is a work of democratic *recoding* of an 'ademocratic' conception of the supreme political authority. We can suggest that some such recoding is needed to parlay an intricate and powerful criminal justice capability through a parliamentary legislative process.

Nonetheless, despite its concessions to the rhetoric of democratic sovereignty, the Report affirms 'the need to vindicate the rights of the Crown'⁹⁶ which is *obliged* (not just entitled) to 'claw back' (or 'disgorge') and preserve *all* confiscable assets.⁹⁷ In what, if any, non-Hobbesian sense can crime proceeds be said to *rightfully belong* to the Australian state?

The ALRC Report's references to the Commonwealth's right and obligation respecting crime proceeds are consistent with a persistent theme in Australian public law and administration whereby the Commonwealth's duty to protect the public good is treated as paramount. This is what I think is lost sight of in Freiberg's common law constitutionalist scenario of sovereignty and law as independent 'emanations' corroded by a new despotism. What about Australia's long history of government appointment of senior judicial and law enforcement officers and of centralised police services? In the words of the *Australian Constitution*, such arrangements are dedicated not to a moral ideal of justice but to what it repeatedly terms the 'peace, order and good government of the Commonwealth'.⁹⁸ Included under this rubric is a prominent role for

95 See, eg, Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (1989).

96 ALRC Report, above n 9, [16.41].

97 *Ibid* [2.77], [2.87].

98 *Australian Constitution* s 51.

‘preventative police’ and for law enforcement agencies’ interventions prior to or independent of criminal legal processes.⁹⁹

In keeping with this constitutional remit, part of the Australian Federal Police’s mission has been described as ‘the protection and safeguarding of the Commonwealth’s interests’, *including its assets*.¹⁰⁰ A civil prudential pedigree for such Crown prerogatives is Pufendorf’s notion of a sovereign state’s ‘transcendental propriety’ over its citizens’ goods and fortunes, which, as we saw, prefigures the contemporary public law concept of eminent domain. A further comparison might be drawn with the common law right of the Crown to *bona vacantia*, the ‘ownerless goods’ of those who die intestate.¹⁰¹ But for my purposes the most potent contemporary analog to ‘transcendental propriety’ is ‘radical title’. Fee simple absolute proprietors may sell their realty to a foreign citizen, but not, for instance, grant rights over it to foreign powers.¹⁰² By extension, might not the Commonwealth’s proprietorial claim to criminal assets be viewed as implicitly resting on a parallel assertion of Commonwealth paramourcy: *a radical title over personal property*?

On this view, crime proceeds rightfully belong to the state, *irrespective of where their possession is currently located*. A citizen is not entitled to retain secure possession of assets which can be proven to a civil standard to ‘relate back’ to criminal activity. Let us see (simplifying a complex matter) how this civil-statist logic plays out in respect to the distinction between pecuniary penalties and criminal sanctions. Imprisonment and fines deprive you of what is legally and morally ‘yours’ – your physical liberty, a portion of your wealth. By contrast, crime proceeds are deemed, in the words of the ALRC Report, ‘something to which there was no entitlement *ab initio*’.¹⁰³ They are not the de jure property of their de facto possessor. On this reasoning, judges have, at least, a prima facie good reason not to be required to take pecuniary penalties into account in determining financial sanctions following criminal conviction. Contrary to Freiberg, to make such a distinction is not straightforwardly an act of ‘perjury’.

99 *Australian Constitution* ss 51, 24, 28, 52. On the persistent centralising and preventative features of Australian law enforcement, see Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994).

100 ‘Protecting and safeguarding the Commonwealth’s interests’ is one of three functions assigned to the AFP, alongside investigating crimes against the Commonwealth and policing of the ACT. See a document prepared by the Australian Federal Police Association as a contribution to current debates about security: Australian Federal Police Association, *Australia’s National Security Response: Time to Bring Order to the Law* (2002) 9 <http://www.afp.gov.au/Senate/committee/legcon_ctte/completed_inquiries/200204/asio_2/submissions/sub144b.rtf> at 31 October 2006. The document quotes from a speech made in 1979 by the Commonwealth Minister for Administrative Services, introducing the Australian Federal Police Bill 1979 (Cth), which originally established the AFP as a statutory body. This language echoes the definition of the AFP’s functions in s 8 of the *Australian Federal Police Act 1979* (Cth). Section 41 includes in its definition of ‘interests’: ‘a legal or equitable estate or interest in the property’ and ‘a right, power or privilege in connection with the property’.

101 Butterworths, *Halsbury’s Laws of Australia*, (at 23 September 2006) 395 Succession, ‘2 Intestacy’ [395-1970]. I thank Professor Ross Grantham for alerting me to the pertinence of *bona vacantia* for my argument.

102 See Geuss, above n 77, 29.

103 See ALRC Report, above n 9, [4.1].

More generally, the assertion of ‘radical title’ over citizens’ ‘goods and fortunes’ is warranted by the Commonwealth’s sui generis responsibility qua civil state for governing the country. It is easy to forget the ethical weight of the responsibility for raising and protecting the public treasure, and the uncivil consequences of incapacity to do so.

B A Self-Evident Moral Entitlement?

I have suggested that the ALRC Report errs, if not misleads, where it treats the concept of civil indebtedness to the Commonwealth as a ‘supplementary’ principle. To the contrary, I have argued in the previous section that this concept predominates over and determines the meaning and force of the more palatable moral-justificatory principle of unjust enrichment. Yet, is there not an elemental moral core of that principle which is independent of its civil (juris)prudential construction? Surely, it goes without saying that criminals should be deprived of ‘ill-gotten’ gains? It is simply unfair for a person to be deprived of their hard-earned wealth by a fraudster or burglar. However, absent a sovereign state capable of enforcing the law, *is* it self-evident to all members of all moral communities that ethically ‘crime’ ought not to be allowed to pay? Think, for example, of coastal communities in under-governed states who have lived – in moral comfort at least – off the gains of smuggling. Even within Australia, a settled law-state, as late as 1988, in the absence of a stronger claim by another party, criminals *were* regarded by the courts as legitimate proprietors of crime proceeds absent an evidentiary link to a definite offence.¹⁰⁴ Is it, therefore, overstating matters to state that the subsumption of unjust enrichment under the public law concept of civil indebtedness to the Commonwealth in effect nullified the common law view that in a limited sense crime *was* allowed to pay? It cannot be assumed that the moral belief that crime should not be allowed to be a profitable enterprise is self-evident, or that this belief is *consistently* expressed in the criminal justice system.

Still, these considerations do not suffice to eliminate the impression of moral self-evidence associated with unjust enrichment. Interestingly, reparation for wrongdoing was one of the several ‘prima facie duties’ forming the normative core of William Ross’s early 20th century pluralist version of the venerable line of neo-Platonic philosophical thought known as ‘intuitionism’.¹⁰⁵ Recently, the subject of a minor revival in contemporary Anglophone moral philosophy,¹⁰⁶ Ross’s theory presents the duty of reparation as something we immediately know for certain. Even though we need not come to know it on the basis of a logical inference from some other datum, Ross insists that our intuition of this putative fact of moral life is an rational one. Here, clad in secular clothes, I suggest, is the theological image of man repudiated in Pufendorf’s moral anthropology. This is man imagined as *homo duplex*, an embodied, and hence limited, yet nonetheless

104 *Gollan v Nugent* (1988) 166 CLR 18.

105 William David Ross, *The Right and the Good* (Philip Stratton-Lake (ed), first published 1930, 2002 edition) 21.

106 See especially Robert Audi, *The Good in the Right: A Theory of Intuition and Intrinsic Value* (2004).

supra-empirical intelligent spirit capable, like God, of bringing things into existence merely by thinking them. A common sense view of reparation here seems to rest on anything but commonsense metaphysical assumptions.

Accordingly, a civil (juris)prudential response to the intuitionist view of reparation might be to counter-pose Friedrich Nietzsche's equally plausible but less sunny view of reparative ethics. Nietzsche's 'genealogy of morals' presents punitive reparation as deeply implicated in the moral meaning of guilt in general. Moral guilt, he argues, originates in archaic responses to an injury to someone's person or status. The responses take the form of a socially reinforced, enraged wish (and a vindictive sense of entitlement) to inflict pain and humiliation on its perpetrator. Concomitantly, the 'doer', often irrespective of individual responsibility, is conceived as standing in a quasi-contractual relation of 'guilty indebtedness'.¹⁰⁷ The irrelevance of *mens rea* is only one of several pointers to the relevance of Nietzsche's genealogy to the (pre-)history of *in rem* forfeiture.

How does this difference of intellectual opinion about the wish for reparation for injuries received bear on the question of the moral basis of civil forfeiture? Without pretending to adjudicate this disagreement, from the standpoint of civil prudence, with its emphasis on human beings' destructive and aggressive tendencies, it might be conceded that an urge to be revenged, to hurt etc is an inseparable 'moral remainder' underlying the ethico-rhetorical appeal of the unjust enrichment principle. If so, then we would do well to remember this ugly emotive dimension of moralising talk about reparation in the context of the politics of civil forfeiture law, meaning, the way politicians are wont to parlay the advantages of such laws to the public. How much does democratic political rhetoric about the need for a tough response to crime in general, and profits of crime in particular, work by invoking and intensifying this malicious or aggressive edge of the desire for reparation? Let me hark back to my introductory remarks aimed at addressing concerns about deploying a non-democratic conception of state sovereignty. An important part of what the civil prudence ethic of state is all about is the need for a state to set limits to the uncivil consequences of communities' and individuals' moral zealotry. It is difficult to see the advantages of a conception of sovereignty which invests ultimate moral authority in the people as a bulwark against excesses of civil forfeiture because it is possible to argue that democratic politics is complicit with such excesses. We will have occasion to illustrate this point in turning now to consider some implications of the shift to a non-conviction-based regime for the moral and legal obligations of *citizenship*.

C Civil Forfeiture and Citizenship

Normative political theory largely adopts the imaginary viewpoint of a self-governing community of rational citizens. The norms of a polity are what a

107 Friedrich Nietzsche, *The Birth of Tragedy and on the Genealogy of Morals* (Francis Golfing trans, first published 1887, 1956 edition) 194–8 [trans of: *Die geburt der tragoedie and zur genealogie der moral*]. Previous historians of morals are said to have neglected the fact that the original philological source of the concept of moral guilt (*schuld*) lay in the material term *schulden* (to be indebted).

community so constituted might collectively agree should be the arrangements by which they are governed. Unsurprisingly, then, civic ethics places more weight on expanding or enhancing citizens' (or communities') active political deliberation and participation than on legal citizenship. Normative political theorists habitually define legal citizenship by means of a contrast with ethical citizenship, as a passive status, entailing a bundle of minimal legal obligations and entitlements, in return for various entitlements (protection, welfare). That is, the legal citizen's law-abidingness has neither ethical significance nor complexity. By contrast, the *étatiste* optic of civil prudence is more alert to the complex ethical demands involved in letting legal processes take their course. It resists religious (and rationalist) claims to moral pre-eminence over civil obligations that can fuel vigilantism and the thirst for revenge. It represents the distinction between non-enforceable ethico-civil obligations and legal ones as a moveable threshold, a politically imposed convention, the meaning and value of which depends on its perceived implications for civil peace, sociality and good government in changing historical circumstances.

Previously, in regard to former NSW Premier Greiner's statement that a non-conviction-based regime would empower authorities to confiscate 'the *proceeds of a life of crime*', I suggested that we might read this statement as implying something about civil forfeiture's impacts on people's citizenship status. Behind this formulation, lies an assumption that a non-conviction-based regime, in going beyond the prosecution of discrete criminal acts and confiscation of proceeds linked to them, realigns a prior demarcation between citizens' private-ethical and public-legal obligations and immunities. It creates a *new threshold* for what is to count as a law-abiding citizen.

Recalling our opening fictional example, *Getting Square*, it is precisely the self-image of the ex-criminal now living the life of a law-abiding citizen – with all its assumptions about where the line between the lawful citizen and the criminal – that is so rudely interrupted when the civil forfeiture agency investigates Dabba Warrington's affairs. Particularly, under a non-conviction-based regime, former criminals may be running a legitimate business or even putting their wealth to philanthropic use. Nonetheless, that they are drawing down on crime proceeds marks them as not having ceased to live 'outside' the law, and, hence, as a legitimate subject of law enforcement investigation.

That said, an ethic of civil prudence will counsel authorities to remember that a vital historical restraint on criminal justice agencies was that aspect of the secularisation of states that is manifest in the distinction between crime and sin, between conduct that counts as a legal offence and conduct which is merely morally abhorrent. It is one thing to target the proceeds of a life of *crime* in the quantitative sense of investigating spending behaviour incompatible with a suspect's official income or otherwise indicative of a pattern of criminal activity. It is a quite different matter to enforce a *moralistic disqualification of a lifestyle*. Think of the *Bennis v Michigan* case, where, at the behest of a moral community, authorities punished the innocent by confiscating an instrument of *sin*, with no connection to the serious criminal activity which civil forfeiture was invented to

incapacitate.¹⁰⁸ Is it an equally uncivil use of civil forfeiture law to confiscate an *entire* business and *all* of its profits where these originally relate back to ‘tainted’ assets? This is a harder call. No transcendent standard of proportionality need be accepted as necessarily precluding such an outcome. By the same token, however, it would seem imprudent, in Pufendorf’s phrase, an ‘inappropriate fitting of actions to persons’, were authorities to bring about a situation where someone quietly running a business is forced into penury (and back into ‘the life’).

V CONCLUSION: CIVIL FORFEITURE AND ‘THE STATE WE’RE IN’

A modern rendition of Pufendorf’s ethic of civil prudence was used to bring out the forgotten political ethic which undergirds the jurisprudential concept of civil indebtedness that is pivotal to the Commonwealth’s proceeds of crime legislation. I suggested that the possessory claim by the Australian state over citizens’ unlawfully acquired assets, which is entailed by the civil indebtedness concept, is neither based solely on superior force – legalised theft – nor an ethic of state according to which it is merely a trustee of the sovereign Australian people. Rather, it is based on a civil prudential ethic, according to which the state as social protector has a basic right to repossess illegally possessed assets and use them for governmental purposes.¹⁰⁹ Some will undoubtedly reject this non-democratic ethic. Others will say, quite rightly, that more needs to be done to justify my resort to this ethic by comparing its explanatory insights with those purportedly furnished by other theoretical approaches.¹¹⁰ If my argument stands up though, perhaps a key lesson of this civil forfeiture case study is to make visible the civil prudential state we are in. Albeit sometimes functioning

108 Yet is it inappropriate to discredit all (legislatively sanctioned) uses of civil forfeiture to incapacitate non-serious (ordinary indictable) crime – offences attracting less than a one year prison sentence? Let us revisit the recent Australian legislation on this matter: see *Proceeds of Crime Act 2002* (Cth) ss 17, 18 (s 17 applies to indictable offences and s 18 applies to serious offences). In s 17(2), it is stated that ‘all or specified property’ of a person suspected of an indictable crime may be the object of a restraining order. However, under s 17(3), the court may refuse to grant the restraining order in relation to an indictable offence as opposed to a serious crime if it is judged not to be in the public interest. Evidently, it lies within judicial discretion to prevent using the law to restrain all assets of people suspected of less than serious crimes. Whilst it seems problematic that a law justified as necessary to combat serious crime would be applied to ordinary indictable offences, a pattern of petty/indictable crime may generate crime proceeds of considerable pecuniary value. Is it in the interests of good government the criminal be allowed to keep it?

109 There is much to be said for ideas such as giving greater priority to restoring the fortunes of victims of crime and for directing ‘drug money’ towards drug rehabilitation programmes. But these are second-level questions of government and democratic politics. The justification I am trying to make operates at the more basic level of state sovereignty.

110 Can, for instance, a civil-prudential argument be mounted against a possible civic-republican attempt along Braithwaitian lines to justify a civil forfeiture regime as part of a system of restorative justice, and against the concomitant assumption that a more deeply democratic constitution can best preserve such a regime from corruption? How might some utilitarian approaches to civil forfeiture compare with the civil prudential one? I am grateful to two anonymous reviewers for these suggestions, which I shall endeavour to follow up in further work.

interstitially as a ‘shadow theory’,¹¹¹ civil prudence *is* part of the normative conceptual architecture of civil forfeiture law.

The ethic did not await civil forfeiture (or pace Freiberg, economic rationalism) to lodge itself in the conceptual contours of the state, and it does not represent a new conceptualisation of Commonwealth statehood. It offers a way of repudiating perceptions of civil forfeiture law as a despotic ‘licence to steal’. It is subject to certain *immanent* limits, not based on independently grounded moral principles, yet normative nonetheless. Alluding to these internal limits, the ALRC Report contends that

while ... civil recovery of unjust enrichment acquired as a consequence of unlawful conduct is clearly supportable in principle, identification of the particular conduct that should be the subject of such recovery is another matter ... forfeiture of property should be permitted *only to the extent that it can be shown to be essential to public order and good government*.¹¹²

My ‘defence’ is a double-edged sword intended to serve as a resource for both practitioners and (some) critics. For instance, the pattern of increasing legislative scope and severity is not *entirely* explicable as functional responses to an evolving criminal environment (in keeping with the ethos of ‘public order and good government’). The moral reparation component of justifications for civil forfeiture is not all sweetness and light; it has a vengeful edge, which democratic politicians are apt to incite. ‘Internalist’ critical counsel is needed.

Civil prudence may be peculiarly well-equipped to meet this need, to place corrective pressure on civil forfeiture policies and practices. It draws attention to normative rationales which have built-in limits, and which perhaps lie closer to the grain of the mentality of good government shaping civil forfeiture than do civil libertarian criticisms. This comparison is complicated by the institutionalisation of civil liberties concerns, for example, in the committee stages of the legislative process. For instance, regarding the implications of *PoCA 2002* for legal representation, restraints on the use of tainted assets for hiring a counsel of choice may be challenged on civil prudential no less than on civil libertarian grounds. If government-appointed counsel lacks the *competencies* needed in cases involving complex transactions, or where prosecutors can make selective use of these restraints to exclude competent defence counsel, this can be depicted as running contrary to the good government of the judicial process, which is after all committed to locating and convicting the actual offender.¹¹³ In this way, we can make sense of the way a civil state can accommodate civil liberties concerns without supposing that civil liberties ultimately define all limits to criminal justice powers.

The adversarial dimension of the judicial system is susceptible to justification independently of a civil liberties perspective via the linkage between good government and an office-based differentiation of functions and responsibilities, which makes decision making contestable, whilst permitting firm and binding

111 See Dahl, above n 76, 3. Dahl refers to political theory’s ‘half-hidden premises, unexplored assumptions, and unacknowledged antecedents’: at 3.

112 See ALRC Report above n 9, [4.161]–[4.162] (emphasis added).

113 For this argument see Mass, above n 18, 664.

decisions to be made. Similarly, civil prudence suggests an empirical-ethical assessment of restrictions on civil liberties associated with parallel proceedings, such as the waiving of professional privilege. The touchstone is one of jurisdictional discipline – how much care has been taken to *box in* whatever trimming of due process entitlements are prerequisites to effective civil confiscations? Are there associated arrangements in place which expose and ‘punish’ law enforcement criminal justice agencies’ failure to exercise such care? For instance, suppose that a criminal trial is contaminated by information gathered through civil proceedings, which criminal proceedings lack powers to compel defendants to produce. Are arrangements in place to ensure that the trial founders or that a guilty verdict is deemed unsafe on appeal, thereby providing a clear negative incentive to criminal investigations to lock in restraints on the uses of civil forfeiture powers? To the extent that such arguments might be mobilised by both practitioners and interested citizens, they suggest that a civil prudential *defence* of civil forfeiture law may sometimes be also the best form of *attack* on its excessive forms.