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The Private Law State

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Article abstract

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This Article, occasioned by a symposium on Evan Criddle and Evan Fox-Decent's groundbreaking *Fiduciaries of Humanity*, takes stock of the private law state. It offers a qualified defense of private law theorizing about state powers and duties. The defense is that private law provides a set of lawyerly techniques for principled normative judgment in a plural world. The qualification is that private law cannot itself determine the solution to normative problems that it itself contains. Thinking about the state in terms of private law offers a way of recapturing normativity for public law, that is, a way of developing a moral brief against conceptions that place state sovereignty outside the rule of law. This transformation is as much as cultural and political as it is doctrinal and conceptual. The project of the private law state would, therefore, be significantly enriched by a critical engagement with the culture of legal practice and the limits of its political vision.

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THE PRIVATE LAW STATE

*Seth Davis**

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This Article, occasioned by a symposium on Evan Criddle and Evan Fox-Decent's groundbreaking *Fiduciaries of Humanity*, takes stock of the private law state. It offers a qualified defense of private law theorizing about state powers and duties. The defense is that private law provides a set of lawyerly techniques for principled normative judgment in a plural world. The qualification is that private law cannot itself determine the solution to normative problems that it itself contains. Thinking about the state in terms of private law offers a way of recapturing normativity for public law, that is, a way of developing a moral brief against conceptions that place state sovereignty outside the rule of law. This transformation is as much as cultural and political as it is doctrinal and conceptual. The project of the private law state would, therefore, be significantly enriched by a critical engagement with the culture of legal practice and the limits of its political vision.

Quelles sont les obligations légales des États envers les sujets soumis à leur pouvoir? En règle générale, notre instinct est de se référer au droit public pour répondre à cette question, en définissant les pouvoirs et les obligations des gouvernements par le biais du droit constitutionnel, du droit administratif et du droit international, que nous distinguons du droit privé des contrats, de la propriété et de la responsabilité. Cela n'a pas toujours été ainsi, cependant. Récemment, les chercheurs se tournent de nouveau vers des doctrines, concepts et techniques issus du droit privé pour réfléchir aux pouvoirs et aux devoirs des États. Nous sommes dans un moment qui semble particulièrement prometteur en ce qui attrait à la réflexion sur le droit privé et son rapport à l'État. L'émergence de ce « nouveau droit privé », ainsi que de la « nouvelle critique juridique », ont enrichi l'analyse conceptuelle et le débat normatif en droit privé. Dans ce contexte, les spécialistes se sont tournés vers le droit privé pour réfléchir aux pouvoirs et obligations des États en droit public.

Cet article, présenté à l'occasion d'un symposium sur le livre avant-gardiste d'Evan Criddle et d'Evan Fox-Decent, *Fiduciaries of Humanity*, dresse un bilan de cette idée d'État de droit privé. Il offre une défense qualifiée du droit privé théorisant sur les pouvoirs et les devoirs de l'État. C'est une défense qui postule que le droit privé fournit un ensemble de techniques juridiques permettant un jugement normatif fondé sur des principes qui s'accorde aux exigences d'un monde pluraliste. Cette qualification fait la proposition que le droit privé ne peut pas lui-même déterminer la solution aux problèmes normatifs qu'il contient. Penser l'État en termes de droit privé offre un moyen de retrouver la normativité du droit public, c'est-à-dire un moyen d'élaborer un mandat moral contre ces conceptions qui placent la souveraineté de l'État hors de la portée de l'État de droit. Cette transformation est autant culturelle et politique que doctrinale et conceptuelle. Le projet de l'État de droit privé s'en trouverait donc considérablement enrichi par un engagement critique en faveur de la culture de la pratique juridique et des limites de sa vision politique.

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Introduction

Why do we have states? Today most of us agree that state sovereignty involves representative authority. A state represents its people. But there are deep disagreements about what that representative authority is for. Some of us talk about democracy. Others are worried about domination. Still others are focused on the gross domestic product. Most of us are worried about these things and many others. Truth be told, we have many intuitions about what democracy means, what justice is, and why money matters; we know there are objections to these intuitions; and we want our states to be (and to do) many things, some of which are at odds with each other.

What legal duties, then, do states owe those subject to their power? Typically, we look to public law to answer this question. On the domestic plane we define the powers and duties of government through constitutional and administrative law, distinguishing these bodies of law from the private law of contracts, property, and tort, all of which are concerned with the rights and duties of private actors in their relations with one another. And on the international plane we turn primarily to public international law and, depending upon how one defines it, secondarily to private international law.[1]

It was not always this way. In 1927, for example, Hersch Lauterpacht argued in *Private Law Sources and Analogies in International Law* that we might understand the law of nations through private law analogies.[2] To understand treaties, he looked to contract law. For territory, he examined property. Tort law shed light on the law of state responsibility.[3]

The private law state is enjoying something of a renaissance in legal theory, as scholars again look to private law doctrines, concepts, and

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1 "Private international law" has been defined to include not only conflicts of laws and recognition and enforcement of judgments, which bear upon the jurisdiction of a state, but also the system of laws that governs the rights and duties of private actors in their relations that cross territorial borders. See Vincent R Johnson, "International Financial Law: The Case Against Close-Out Netting" (2015) 33:2 BU ILJ 395 (noting various definitions of "private international law" at 402, n 49). See also *Restatement (Third) of Foreign Relations Law* § 101 (1987) (defining "private international law" as law "directed to resolving controversies between private persons, natural as well as juridical, primarily in domestic litigation, arising out of situations having a significant relationship to more than one state").

2 H Lauterpacht, *Private Law Sources and Analogies in International Law (With Special Reference to International Arbitration)* (London: Longmans, Green and Co, 1927).

3 For additional examples of the historical "centrality of private-law concepts to core issues of public law," see Jedediah Purdy & Kimberly Fielding, "Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power" (2007) 70:3 L & Contemp Probs 165.

techniques to think about the powers and duties of states. Public fiduciary theory, for example, looks at the state through the lens of fiduciary law, that body of traditionally private law that springs from equity and enjoins those entrusted with discretionary authority over another's interests to act loyally and carefully.[4] The subject of this symposium, Evan Criddle and Evan Fox-Decent's groundbreaking *Fiduciaries of Humanity: How International Law Constitutes Authority*, applies public fiduciary theory to think through the duties of states under international human rights law.[5] The publication of *Fiduciaries of Humanity* offers an opportune moment to take stock of the private law state.[6]

It is a particularly promising moment in which public lawyers might turn to private law to think about state sovereignty. The emergence of the "new private law",[7] as well as the "new legal criticism",[8] have enriched conceptual analysis and normative debate in private law, offering new (or, depending upon one's perspective, reviving old) ways of thinking about contract law, fiduciary law, property law, and so on. The new private law's insistence that "law is distinct from politics"[9] may promise a corrective to a jurisprudential crisis in public law, which, many commentators worry, is looking more and more like raw politics and the language of power.

There are several objections, however, to looking to private law to solve outstanding problems in public law. One objection is that the rela-

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4 See e.g. Gary Lawson & Guy Seidman, *"A Great Power of Attorney": Understanding the Fiduciary Constitution* (Lawrence, Kan: University Press of Kansas, 2017); Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011); Ethan J Leib & Stephen R Galoob, "Fiduciary Political Theory: A Critique" (2016) 125:7 Yale LJ 1820; Sung Hui Kim, "The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption" (2013) 98:4 Cornell L Rev 845; D Theodore Rave, "Politicians as Fiduciaries"(2013) 126:3 Harv L Rev 671; Evan J Criddle, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking" (2010) 88:3 Tex L Rev 441.

5 Evan J Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (New York: Oxford University Press, 2016) [Criddle & Fox-Decent, *Fiduciaries of Humanity*].

6 In prior work, I have been critical of public fiduciary theory. In particular, I have critiqued the transplantation of doctrine from private fiduciary law to decide outstanding problems in public law. See Seth Davis, "The False Promise of Fiduciary Government" (2014) 89:3 Notre Dame L Rev 1145 [Davis, "False Promise"]. And I have been critical of public fiduciary theory's historical and conceptual role in legitimating colonialism. See Seth Davis, "American Colonialism and Constitutional Redemption" (2017) 105:6 Cal L Rev 1751 [Davis, "American Colonialism"].

7 See e.g. "Symposium: The New Private Law" (2012) 125:7 Harv L Rev 1639.

8 See Robin West, "The New Legal Criticism" (2017) 117 Colum L Rev Online 144.

9 John CP Goldberg, "Introduction: Pragmatism and Private Law" (2012) 125:7 Harv L Rev 1640 at 1663.

tionships involved in private law do not map onto those in public law.[10] Another fundamental objection is that searching for private law solutions to public law problems is superfluous because doing so simply restates those problems in new terms.[11] A third objection is that the possibility of borrowing from private law doctrines or concepts to solve problems in public law is unremarkable and uninteresting, because private law and public law are not distinct categories. Or, to take an altogether different view, perhaps this sort of borrowing is remarkable and interesting not because it determines solutions to problems in public law but because the ideologies of private law lend themselves to legitimating assertions of public power.[12]

In this Article, I want to take stock of the use of private law, particularly fiduciary law, to think about the powers and duties of states. I will offer a qualified defense of private law theorizing about state powers and duties. The defense is that private law provides a set of lawyerly techniques for principled normative judgment in a plural world. The qualification is that private law itself cannot determine the solution to normative problems that it itself contains.

After all, what is true of states is also true of private law: Both are objects of fundamental normative debates. Securing equal freedom and security for everyone through rights is an important reason we have private law. But that is not the only reason. We want markets, and so we have private law. We need some way of coordinating behavior, and so we have private law. We want to identify someone who is responsible for deciding how resources will be used, and so we have private law. We want to have control over our choices (and, if we are being honest, other people's choices too), and so we have private law. And we assign sovereign powers and duties to states for more than one of those reasons too.

As an analytical matter, this Article's main point is that private law theorizing about the state should give up any pretense that it can determine solutions to controversial problems in public law. In particular, this

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10 For discussions of this mapping problem, see e.g. Ethan J Leib, David L Ponet & Michael Serota, "Mapping Public Fiduciary Relationships" in Andrew S Gold & Paul B Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, 2014) 388; Davis, "False Promise", *supra* note 6 at 1170–71.

11 See e.g. Davis, "False Promise", *supra* note 6 ("[t]aken as a modest analogy between private fiduciaries and public officials—both, after all, are delegated power by others—the theory of fiduciary government simply restates perennial problems in public law" at 1205).

12 Public fiduciary theory's conceptual and historical associations with colonialism provide an obvious example of this sort of problem with private law theorizing about state sovereignty.

Article focuses upon two related objections to the private law state. The first is the problem of indeterminacy, which concerns whether looking to private law can "dictate" solutions to outstanding problems in public law.[13] There is of course an extensive literature on whether legal rules and principles can dictate the terms of their application, and the reasons to think they cannot are not only linguistic, but also institutional and political.[14] The problem of indeterminacy that I want to focus upon here arises from the borrowing of private law concepts and doctrines to address public law problems. Private law thinking about the state cannot, I will argue, determine the solution to normative problems that private law itself contains. The second objection concerns the problem of normative fit. The objection here is that private law is not a good fit for the normative problems that arise in public law. This lack of fit may arise because there are relevant normative considerations in public law contexts that do not arise in private law contexts, or vice versa. Or it may arise because the norms of private law are at odds with the normative considerations that are relevant to solving public law problems.

This Article argues that there is something like an inverse relationship between the problem of indeterminacy and the problem of normative fit. The more that one incorporates private law doctrines to decide public law cases, the greater the problem of normative fit. And the more that one looks not to private law doctrines, but instead to concepts or norms drawn from private law, the greater the problem of indeterminacy. As a result, private law theorizing cannot dictate solutions to outstanding problems in public law.

Instead, we should see private law thinking about the state as drawing upon a "mindset—a tradition and a sensibility about how to act in a political world."[15] Private law is not the language of raw power, even when

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13 See Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 (identifying "features of the fiduciary character of sovereignty [that] dictate that states bear robust fiduciary obligations" at 27).

14 See e.g. Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1 (arguing that legal doctrine "is indeterminate" but explaining why "legal results may be predictable" where judges and lawyers share a "legal culture" that includes common "understandings of proper institutional roles and the extent to which the status quo should be maintained or altered" at 14–22).

15 Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization" (2009) 8:9 Theor Inq L 9 at 9 [Koskenniemi, "Constitutionalism as Mindset"]. In developing my arguments, I am indebted to Ralf Michael's discussion of "private law as style" and the relation of that style to Martti Koskenniemi's work on public international law. See Ralf Michaels, "Private Lawyer in Disguise? On the Absence of Private Law and Private International Law in Martti Koskenniemi's Work" (2013) 27:2 Temp Intl & Comp LJ 499 at 501–02. I am also indebted to Hanoch Dagan's forthcoming work on fiduciary law as a plural category,

it is deployed in the service of the powerful. It is a lawyer's language, one that speaks in terms of universals even as it addresses particular disputes. Speaking of the state in terms of private law offers a way of recapturing normativity for public law, a way, as Criddle and Fox-Decent put it, of "transform[ing] the raw power of the sociological state into a form of legal authority."[16] This transformation, I want to suggest, is as much cultural and political as it is doctrinal and conceptual. The project of the private law state would, therefore, be significantly enriched by a thorough engagement with the culture of legal practice and limits of its political vision.

In the course of making these points, this Article distinguishes four ways in which we might look to private law to think through what states owe those subject to their power. Part I of this Article sketches the most limited way in which we might look to private law: We might in some cases define the state as a subject of private law. Sometimes this approach may make sense; the state might be a subject of private law when it owns property, enters into contracts, or manages another's property. We might therefore apply private law doctrines to solve problems arising when the state acts in these capacities. But as Part I will discuss, treating the state as a subject of private law is open to a powerful objection, namely that the state is never in the normative position of a subject of private law. This is the problem of normative fit.

Part II assesses a doctrinal approach under which we might analogize public law to private law. We might, in other words, define the state like a subject of private law even when the state acts in a uniquely public capacity. That would entail transplanting doctrines from private law to public law. This sort of transplantation makes sense, however, only to the extent that analogical reasoning establishes a normative correspondence between the state and subjects of private law. And, as Part II shall argue, posited correspondences tend to break down rather quickly under inspection.

Part III turns to consider a conceptual approach, one that looks to concepts rather than doctrines from private law. The aims of this conceptual approach are to identify problems in public law that have gone unnoticed and to imagine new solutions to perennial problems in public law. Here, the problem of indeterminacy begins to loom large. Whatever else might

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which contrasts fiduciary law as a category for thinking about public law problems with fiduciary law as a category for deciding public law cases by transplanting private law doctrines. See Hanoch Dagan, "Fiduciary Law and Pluralism" in Evan J Criddle, Paul B Miller & Robert H Sitkoff, eds, *The Oxford Handbook of Fiduciary Law* (Oxford: Oxford University Press [forthcoming in 2019]) [Dagan, "Fiduciary Law and Pluralism"].

16 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 47.

be gained by this sort of conceptual borrowing, private law concepts cannot dictate doctrinal solutions to outstanding problems in public law. The most generative mode of conceptual reasoning, Part III will argue, is dialectical: It involves rethinking powers and duties in private law and public law together. Criddle and Fox-Decent's *Fiduciaries of Humanity* can, without too much mischief, be read in a dialectical mode: Its core argument is as much a claim about the nature of fiduciary duties as it is a claim about the fiduciary nature of a state's duties.

In particular, as Part IV discusses, Criddle and Fox-Decent offer an account of fiduciary law steeped in moral philosophy. They look to fiduciary law not simply for doctrines or concepts, but for a moral brief against alternative visions of state sovereignty that emphasize power and political calculation. This fourth mode of private law thinking about the state looks to the political morality of private law. This mode of thinking should be understood as a cultural and political project as much as a doctrinal or conceptual one. And this project would be enriched by a thorough engagement with the culture and institutional dimensions of legal practice and a frank exploration of the limits of the lawyer's mindset about politics, or so this Article shall conclude.

I. The State as a Subject of Private Law

This Part sketches the state as a subject of private law. We might define the state as a subject of private law when it owns property, enters into contracts, acts as a private fiduciary would, etc. This limited application of private law does not address the political disputes that arise when we consider the state's powers and duties as a uniquely public actor. It is also subject to a powerful objection that there are unique normative considerations that mean we should not ever define the state simply as a subject of private law.

A. Private Law Applied to the State

Typically, we define private law as the body of law that specifies the rights and duties of private parties in their relationships with one another.[17] Private law thus includes property law, contract law, fiduciary law, and tort law. Subjects of private law include owners, parties to contracts, fiduciaries who manage property or otherwise act on behalf of beneficiaries, and private persons who tortiously wrong others. Public law, by contrast, is concerned with the powers and duties of the state, including what

[17] See Goldberg, *supra* note 9 at 1640.

it owes to private parties subject to its power.[18] Public international law, for example, has traditionally concerned the powers and duties of states in their relations with one another while over time it has come to encompass human rights that limit state authority.[19]

Notwithstanding the typical divide between private and public law, we might define the state as a subject of private law when it acts in a typically private capacity. Like a private entity, a state may own property, enter into agreements, manage property on behalf of a private party, and so on.[20] In those cases, we might define the state as a subject of private law and specify its rights and duties by reference to the doctrines of private law.[21]

Courts sometimes do just that, in fact. Courts may look to property law to define the state's right to exclude others from land it owns.[22] They may insist that the state is as bound as private parties would be when it enters into a contract.[23] Or they may hold the state responsible for the tortious wrongs committed by its agents, just as a private corporation would be responsible for the same.[24] In each of these cases, courts seem to reason, the state is a subject of private law because it is acting in a typically private capacity.

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18 *Ibid*.

19 See e.g. Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015) (arguing that international law "performs an ongoing distribution of sovereignty among those collectivities it recognizes as States" and "also produces an array of adverse consequences that international human rights ... seeks to rectify" at 30); Mathias Reimann, "From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum" (2004) 22:3 Penn St Intl L Rev 397 (contrasting "classic model" of international law with model that would include international human rights law in public international law at 399–400).

20 See Seth Davis, "Implied Public Rights of Action" (2014) 114:1 Colum L Rev 1 at 17 [Davis, "Implied Public Rights"].

21 See Goldberg, *supra* note 9 at 1640, n 1.

22 See e.g. *Camfield v United States*, 167 US 518 (1897) ("the government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale" at 524).

23 See e.g. *Salazar v Ramah Navajo Chapter*, 567 US 182 (2012) (holding that government is "as much bound by [its] contracts as are individuals" at 191, citing *Lynch v United States*, 292 US 571 at 580 (1934)).

24 In the United States, however, "[o]nly one state has enacted legislation providing that governmental defendants are liable in tort on the same terms as private tortfeasors." Lawrence Rosenthal, "A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings" (2007) 9:3 U Pa J Const L 797 at 804.

The state may also by definition be a fiduciary when it manages property as a private fiduciary might. Under U.S. law, for example, the federal government manages property on behalf of American Indians.[25] The Indian trust doctrine holds that the government is a fiduciary for its Indian beneficiaries.[26] U.S. courts have defined the government's duties to manage Indian property by reference to private fiduciary law's doctrines of loyalty and care.[27] In this sense, the government is a fiduciary by definition.

B. The Problem of Normative Fit

There is, however, a powerful objection to defining the state as a subject of private law. U.S. courts have, for example, sometimes refused to refer to private fiduciary law when defining the federal government's duties as a manager of property for Indians' benefit. In *United States v. Jicarilla Apache Nation*, the U.S. Supreme Court declined to apply private fiduciary law to force the United States to disclose information about trust management to an Indian Nation that had sued it for trust mismanagement.[28] The Court rejected the idea that the United States government was by definition a private fiduciary. Instead, the Court reasoned, the government had uniquely public responsibilities that precluded treating it as a subject of private fiduciary law.[29]

This objection to defining the state as a subject of private law can be understood in one of two ways. One version of the objection is that it is incoherent to subject the state to private law because the state always acts on behalf of the public. The state therefore never acts in a typically private capacity. A second version of the objection is that it is undesirable to subject to the state to private law. Even if it might be coherent to claim that the state is acting in a typically private capacity, it need not follow that private law applies to the state, or, at least, applies to the state in the same way that it would apply to a similarly situated private party. Indeed, it might be undesirable to impose private law duties upon the state because those duties will inevitably conflict in practice, if not in theory, with the state's achievement of its uniquely public aims.

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25 See e.g. *Cobell v Norton*, 240 F (3d) 1081 at 1099 (DC Cir 2001) [*Cobell*].

26 *Seminole Nation v United States*, 316 US 286 at 296–97 (1942).

27 See *Cobell*, *supra* note 25 (defining duties of federal government "in traditional equitable terms" at 1099).

28 564 US 162 at 187 (2011).

29 *Ibid* at 182–83.

This sort of objection has had force in the case law. In the U.S., for example, the common law of property bars adverse possession claims against the government.[30] Contract law does not always allow a state to bind itself through a contract in a way that a private corporation might.[31] Nor does tort law consistently treat the state or its agents the same as it would treat private tortfeasors.[32] Doctrines of sovereign immunity and the like, moreover, limit the availability of private law remedies against the state.[33]

Thus, private law itself is divided as to whether (and, if so, when) the state can be subject to it. Even if one can coherently define the state as a subject of private law in some cases,[34] it is not hard to see cases in which defining the state's powers and duties by reference to private law would lead to undesirable conflicts with the state's public responsibilities. The idea that the state-as-owner manages public lands for the public trust is a powerful example of the problem.

It is therefore an error to read too much into cases that treat the state as a subject of private law when it acts in a typically private capacity. Such decisions do not stand for the different and broader proposition that the state is (or is like) a subject of private law when it acts in a uniquely public capacity. Some arguments for a private law approach to the state have not attended to this distinction, and thus have read the case law for more than it is worth.[35]

II. Public Law as Private Law

In short, defining the state as a subject of private law is not going to resolve most of the questions we might raise about the powers and duties

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30 See e.g. *Sandmaier v Tahoe Dev Group, Inc*, 887 A (2d) 517 at 518–19 (Me Sup Jud Ct 2005).

31 See e.g. Daryl Levinson & Benjamin I Sachs, "Political Entrenchment and Public Law" (2015) 125:2 Yale LJ 400 (discussing the split in U.S. federal case law concerning ability of government to bind itself in matters involving its sovereign capacity to make and enforce laws at 422–23).

32 See e.g. *Riss v New York (City)*, 240 NE (2d) 860 (NY Ct App 1968).

33 The public fisc, after all, must be protected. See *Texas (Department of Transportation) v Sefzik*, 355 SW (3d) 618 at 621 (Tex Sup Ct 2011). But see Mark R Brown, "The Demise of Constitutional Prospectivity: New Life for *Owen*?" (1994) 79:2 Iowa L Rev 273 (questioning this justification for sovereign immunity at 300–01).

34 *Cf* Davis, "Implied Public Rights", *supra* note 20 (arguing that one can coherently think of state as acting in a typically private capacity at 5–6).

35 See Davis, "American Colonialism", *supra* note 6 (developing this objection with respect to public fiduciary theory that draws upon Indian trust doctrine of U.S. law at 1775–78).

of states. Even if it is sometimes coherent and normatively appealing to define the state as a private law subject when it acts in a typically private capacity, the vast majority of legal questions about state powers and duties arise when the state acts in a uniquely public capacity. We might, however, find doctrinal answers to these questions by *analogizing* the state to a subject of private law even when it makes and enforces public law and public policy. We might, in other words, treat public law *as* private law when searching for doctrinal solutions to outstanding problems in public law.

A. Analogizing the State to a Subject of Private Law

Some examples of public fiduciary theory have traded on analogies in this way. For instance, we might analogize politicians to corporate fiduciaries because both occupy an office that allows them to self-deal at the expense of others.[36] To be more concrete: Much like corporate directors engaged in self-interested transactions, politicians face a conflict of interest when they control a redistricting process that will determine who their voters are.[37] If the analogy holds, courts should draw upon corporate fiduciary law to review politicians' redistricting decisions. Where political incumbents entrench themselves, courts should strictly scrutinize their decisions. But where politicians cleanse the taint of self-interest by delegating the decisions to disinterested decisionmakers, courts should, as they do in corporate law, take a hands-off approach.[38]

This analogy between politicians and fiduciaries is rhetorically powerful. Politicians indeed face a conflict of interest when they try to select who their voters will be, just as corporate directors indeed face a conflict of interest when they try to strike a self-interested deal. And so, perhaps the solution to the first problem, one that sounds in public law, is to be found by incorporating private law's solution to the second problem.

B. Problems with the Analogy

Upon inspection, however, the analogy does not hold. There are two sorts of problems. The first has to do with the analogy itself. The second has to do with its doctrinal implications.

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[36] See Rave, *supra* note 4 (arguing that "conflict of interest faced by incumbent legislators in redistricting is a familiar agency problem," one that "is present in corporations all the time" at 676).

[37] *Ibid*.

[38] *Ibid* at 677–79.

The first problem is that the posited correspondence between politicians and fiduciaries breaks down too easily. I have addressed the problems with this sort of analogy at length elsewhere.[39] In a nutshell, "For whom is a congressional representative a fiduciary? The voters who elected her? Everyone who resides within her district? We the People?"[40] Similarly vexing questions arise if the question is whether a state legislator is a fiduciary.[41]

The point is not that these questions are unanswerable. Instead, the point is that any answer will rest on controversial premises that threaten to overwhelm the analogy's power to resolve the doctrinal problem it is designed to solve. As Sung Hui Kim has argued, this sort of analogy is "ultimately [a] rhetorical [act] that can be justified only by looking to some underlying policy or purpose of the law that is to be applied and extended."[42] As a rhetorical act, an analogy between public law and private law may be effective. But that does not mean that the analogy establishes the sort of correspondence that would justify transplanting doctrine from private law into public law.

Second, the normative implications of even meaningful correspondences may be indeterminate. Even assuming that politicians are like corporate fiduciaries in a meaningful sense, it does not necessarily follow that legal doctrine should treat them similarly. The normative implications of the analogy are indeterminate for a few reasons. The most important is what I have called the "interdependence of justiciability, rights, and remedies."[43] Private law has developed rights and duties as part of a complex structure of legal rules that includes doctrines of justiciability and remedies. There is no reason to assume that the substantive content of rights and duties remains the same when transplanted to a doctrinal context that involves different rules of justiciability and remedies.[44] Nor, for that matter, is it safe to assume that institutional solutions will take root when transplanted from private law to public law. The safe harbor of

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39 Davis, "False Promise", *supra* note 6 at 1162.

40 *Ibid*.

41 *Ibid* ("[a] state legislator participating in a redistricting decision could be considered a fiduciary for those who voted for her, her district, her state, or the nation as a whole" at 1197).

42 Kim, *supra* note 4 at 893.

43 Davis, "False Promise", *supra* note 6 at 1199.

44 This point is an application of Richard H Fallon Jr, "Asking the Right Questions About Officer Immunity" (2011) 80:2 Fordham L Rev 479 (arguing that "analysis goes wrong at the outset if it assumes that the substantive content" of rights is "fixed" and can be transplanted notwithstanding differences in remedies, defenses, and justiciability doctrines at 479–80).

Delaware corporate law, for instance, allows directors to cleanse the taint of self-interest by delegating decisions to disinterested reviewers. By analogy, we might think that incumbent politicians can cleanse the taint of the same sort of self-interest by delegating redistricting decisions to commissions. But even if the substantive analogy holds—even if politicians are like corporate directors—it is doubtful that the institutional solutions—redistricting commissions versus disinterested reviewers—will operate in analogous ways.[45]

Incorporating private law doctrines into public law by analogy, then, makes sense only to the extent that there is a meaningful correspondence between the state and private law subjects *and* some reason to be confident that the jurisdictional and remedial settings are sufficiently similar for the analogy to have resolving power. Because the posited correspondences tend to break down rather quickly, and because it is often unclear that transplanted doctrine will function in a different institutional setting, there are significant conceptual and functional limitations to incorporating private law doctrines to decide public law cases. Little normative purchase is to be gained, and much analytical clarity is to be lost, by transplanting private law doctrines in order to decide public law cases.

III. Private Law Concepts and Public Law Problems

Another way of looking to private law takes a different sort of tack. Rather than looking to private law doctrines, this approach draws upon private law concepts to think through problems in public law.[46] Conceiving of the state in private law terms may offer a systematic framework for approaching questions about state sovereignty. Criddle and Fox-Decent's *Fiduciaries of Humanity* is a groundbreaking example of this approach.

Here, the question is whether there is something to be gained by restating public law problems in terms of private law. Taking *Fiduciaries of Humanity* as a jumping off point, this Part considers that question. It argues that we should not overstate the power of the fiduciary concept to resolve outstanding problems in public law. Private law concepts cannot

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[45] As Nathaniel Persily has put it, "it is almost impossible to design institutions to be authentically nonpartisan and politically disinterested." Nathaniel Persily, "Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders" (2002) 116:2 Harv L Rev 649 at 674.

[46] As Hanoch Dagan has suggested, for instance, fiduciary law might be a "category for thinking" about public law. See Dagan, "Fiduciary Law and Pluralism", *supra* note 15. See also Hanoch Dagan, "Doctrinal Categories, Legal Realism, and the Rule of Law" (2015) 163:7 U Pa L Rev 1889 (contrasting "categories for deciding" cases with categories of thinking about legal problems at 1910).

themselves determine the solution to normative problems that private law itself contains.

This Part begins by distinguishing ad hoc conceptual borrowing from the more thoroughgoing conceptual borrowing that this Part assesses. It then summarizes Criddle and Fox Decent's conceptual approach, identifying some of the ways in which it provides an overarching framework for analysis and critique. Against that backdrop, this Part argues that Criddle and Fox-Decent overstate the capacity of the fiduciary theory of government to dictate solutions to outstanding problems in public law. This Part will conclude by arguing that this sort of conceptual analysis is most generative when it is dialectical, that is, when it involves rethinking outstanding problems in private law and public law together.

A. Ad Hoc Conceptual Borrowing Distinguished

At the outset, it is obvious that there is more than one way to look to private law concepts in thinking about public law. It's worthwhile to draw a distinction between ad hoc conceptual borrowing on the one hand and an attempt to offer a systematic account of state powers and state duties by looking to private law concepts. This Article focuses upon systematic accounts of state sovereignty that look to private law.

One can elaborate a problem in public law through ad hoc conceptual borrowing from private law. Private law and public law are not hermetically sealed boxes in theory, in practice, or in legal education. Lawyers learn transversal forms of reasoning and argument. There are sets of arguments that recur throughout the law, such as rights arguments, arguments about efficiency, arguments about institutional competence, and arguments about the administrability of rules versus standards.[47] And, unsurprisingly, there are concepts that recur throughout law as well.

Consider, for example, the concept of good faith in the law. There are good faith requirements sprinkled throughout private law and public law.[48] But, surprisingly, as David Pozen has explained, the concepts of

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[47] See Joseph William Singer, "Normative Methods for Lawyers" (2009) 56:4 UCLA L Rev 899 (discussing various forms of normative argument in law at 904, 916, 922, 925). See also JM Balkin, "The Crystalline Structure of Legal Thought" (1986) 39:1 Rutgers L Rev 1 at 2–3; Pierre Schlag "Rules and Standards" (1985) 33:2 UCLA L Rev 379 at 380; Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685 at 1685.

[48] See e.g. David E Pozen, "Constitutional Bad Faith" (2016) 129:4 Harv L Rev 885 ("[a]cross 'radically disparate contexts,' the presence of bad faith or the absence of good faith may be invoked as a basis for substantive liability or special remedies" at 890, citing Lawrence Ponoroff & F Stephen Knippenberg, "The Implied Good Faith Filing Re-

good faith and bad faith rarely appear by name in American constitutional law.[49] Even so, a careful excavation of American constitutional law reveals a constitutional norm against bad faith, or so Pozen argues.[50] To identify and elaborate this norm it may be useful to look to the concepts of good faith and bad faith as they arise across various domains of private law, which need not entail importing doctrines from those domains into public law.[51]

This sort of conceptual borrowing does not require a rigorous account of private law's significance for public law. Nor does it entail a systematic framework for thinking about public law through the lens of private law. Its success rests instead in its potential to generate a new perspective on a particular problem in public law.

B. Fiduciaries of Humanity?

Fiduciaries of Humanity reflects, by contrast, a much more thoroughgoing approach to conceptual borrowing from private law. The book is best understood as providing a framework for analyzing what's entailed by a particular conception of state sovereignty under international law. What's entailed, according to Criddle and Fox-Decent, is a fairly robust set of duties to respect human rights and to foster human security.

Criddle and Fox-Decent describe the state as a cosmopolitan fiduciary whose duties under international law run not only to its citizens, but also to humanity. States' fiduciary duties are not exhausted by the treaty promises they make. Nor are those duties encapsulated by a public trust arising from the state's undertaking to act as its citizens' agent. As cosmopolitan fiduciaries, states may not gratuitously kill enemy combatants, lock detainees away in legal black holes, or refuse refugees asylum without a compelling reason, or so Criddle and Fox-Decent argue.[52]

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quirement: Sentinel of an Evolving Bankruptcy Policy" (1991) 85:4 Nw UL Rev 919 at 970–71).

49 Pozen, *supra* note 48 at 886.

50 *Ibid* (suggesting that this norm "could be considered the ultimate underenforced norm in the American legal system" at 897).

51 Compare *ibid* at 892–93 (defining "bad faith" by looking to, among others, formulations of the concepts of good faith and bad faith in fiduciary law and contract law) with *ibid* at 912 ("while the oath suggests that officeholders have a fiduciary relationship of some sort to the Constitution and the American people, the distinctive nature of this relationship complicates any attempt to import principles of good faith from fiduciary law").

52 *Fiduciaries of Humanity*, *supra* note 5 at 178, 224, 279.

Theirs is the sort of state in which Kant would have settled, perhaps in the home that Hobbes built.[53] Criddle and Fox-Decent are concerned when the state acts as a judge in its own case (the problem of unilateralism),[54] when the state has the capacity arbitrarily to interfere with its subjects' choices (the problem of domination),[55] and when the state treats someone as a means to its own ends (the problem of instrumentalization).[56] In their fiduciary state, the courts, the legislatures, executive officials—and the police too[57]—act as agents for the citizenry and as trustees for humanity.[58]

Criddle and Fox-Decent aim to explain what powers and duties are entailed by international law's recognition of a state's sovereign authority. The "central concerns of state sovereignty" under contemporary international law, they assert, are "human security and human rights."[59] From

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53 *Ibid* at 22–25, 29.

54 With Hobbes, their starting point is a prohibition on unilateralism, from which they derive principles such as that no one should be a judge in her own case. *Ibid* at 24, n 105.

55 *Ibid* at 103.

56 *Ibid* at 104 (distinguishing non-instrumentalization from non-domination).

57 The allusion is to Charles Dickens, by way of TS Eliot's working title for the "Waste Land". See Charles Dickens, *Our Mutual Friend* (Oxford: Oxford University Press, 1952) at 198; Audrey R Rodgers, "'He Do the Police in Different Voices': The Design of *The Waste Land*" (1983) 10:3 College Literature 279.

58 The turn towards fiduciary law to think about state sovereignty has a deep and troubled history. It stretches back to Plato, Aristotle, and Cicero, runs through Puritan political theology, appears not only in Locke, but also in the *Federalist Papers*, and reappears, albeit as side notes, in the work of Maitland, Mills, and Rawls. See Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 13–14. Its troubled history includes the fiduciary conception of colonial rule, which legitimated European expansion by reference to the idea that colonial powers were "guardians" for colonized peoples. For example, Francisco de Vitoria, the "father" of international law, found fiduciary ideas flexible enough to conclude that Indigenous Peoples had natural rights to their lands and that Spanish expropriation of those lands was justified in the name of fiduciary duty. See RP Boast, "The 'Spanish' Origins of International Human Rights Law: A Historiographical Review" (2010) 41:2 VUWLR 235 (noting but disputing accounts that treat Vitoria as one of the "fathers" of international law at 248); Davis, "American Colonialism", *supra* note 6 at 1775 (discussing Vitoria's fiduciary conception of Spanish colonial authority).

59 *Ibid* at 3. It's worth noting some of what's left out of the picture of state sovereignty in *Fiduciaries of Humanity*. What if, for example, we want to understand state sovereignty in international investment law? Can we understand that field by assuming human security and human rights are the central concerns? Or might we begin where the cases are: "There is a tendency in the case law ... to treat investor protection as: (a) both an end in and of itself, rather than as a means to an end, and as an absolute goal rather than a qualified one; and (b) a uniform concept that can be applied to settle controversies in relations between investors and states in general." Anthea Roberts, "Triangular Treaties: The Extent and Limits of Investment Treaty Rights" (2015) 56:2 Harv Intl LJ 353 at 375. And so we see tribunals speaking of state sovereignty in terms of global wel-

fiduciary law they derive the general principle that a state's sovereign authority depends upon its mandate to serve those subject to its power. Thus, in a deft move, they argue that duties, not just powers, "are constitutive of state sovereignty under international law," much as duties of loyalty and care arise from and are constitutive of private fiduciary relationships.[60]

This move goes a long way towards striking the principal target of *Fiduciaries of Humanity*: the "conception of state sovereignty as exclusive jurisdiction."[61] The exclusive jurisdiction conception has little or no place for the rule of international human rights law. Instead, it treats a state's authority within its own borders as beyond the reach of higher law.[62]

Sovereignty, understood as a fiduciary relation, is not absolute authority. International human rights law, international humanitarian law, and international refugee law have whittled away at the so-called "Westphalian" conception of state sovereignty, and Criddle and Fox-Decent aim above all to explain those areas of law. They do so by looking to various private fiduciary relationships, deriving from them a common structure: "the law entrusts one party (the fiduciary) with discretionary power over the legal or practical interests of another party (the beneficiary)."[63] Just as

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fare, not security or human rights, with a focus on "state sovereignty and the state's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow." *El Paso Energy International Company v Argentina* (2006), ICSID Case No ARB/03/15 (International Centre for Settlement of Investment Disputes). This is a picture of states as market managers, builders of "framework[s]" whose duty is to maintain "flow[s]" of capital. See John Holloway, "Global Capital and the Nation State" (1994), 18:1 Capital & Class 23. Though it pushes the point farther than I would, we might reply to Criddle and Fox-Decent that "human welfare, not human rights", is or should be the central concern of public international law. See Eric A Posner, "Human Welfare, Not Human Rights" (2008), 108:7 Colum L Rev 1758 at 1758. We need not go that far to see that the conceptual entailments of a welfarist understanding may differ substantially from those of a human rights understanding. (Consider, for example, debates about collective rights to economic development versus individual human rights.) Whether a welfarist account makes better sense of the concept of state sovereignty under international law cannot be answered by stipulating that human rights and human security are sovereignty's central concerns.

Looking to fiduciary law, in any event, cannot determine whether we should think about state sovereignty in terms of human rights, global capital, or human welfare. Private law techniques cannot themselves determine the solution to problems of division that private law itself contains.

60 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 3.

61 *Ibid*. See *infra* Part III.C.

62 *Ibid* at 5 (discussing Jean Bodin, *Les Six Livres de la République* (Paris: Arthème Fayard, 1986)).

63 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 18.

the features of a fiduciary's authorization dictate duties of loyalty and care, so too does "the fiduciary character of sovereignty dictate that states bear robust fiduciary obligations to protect and care for their people."[64] Thus, unlike the exclusive jurisdiction conception, the fiduciary conception explains duties arising under international human rights law, international humanitarian law, and international refugee law.

C. The Problem of Indeterminacy

In Criddle and Fox-Decent's rich account, fiduciary concepts and norms operate in several ways at different levels of analysis. They argue that the fiduciary theory of government has the capacity to resolve a number of outstanding problems in international public law, including questions concerning the foundations of the state's authority, the distinction between a state's moral duties and its legal duties, and the scope and content of a state's duties under international law. This subpart argues that *Fiduciaries of Humanity* overstates the power of the fiduciary conception as such to resolve these sorts of problems, particularly its capacity to prescribe particular doctrines in international law.

1. The Foundations of the State's Authority

One of the most attractive features of the fiduciary theory of government is the possibility that it can avoid problems that have bedeviled consent theories of government. A familiar liberal account of the foundations of a state's authority looks to popular consent. The brief against consent theory is long and longstanding and need not be repeated here.[65] Fiduciary theories of government look to trust rather than consent and thus may avoid the problem that very few of us meaningfully consent to the authority that states claim over us.

In Criddle and Fox-Decent's account, international law entrusts authority to states.[66] International law prescribes a set of criteria for recognition of states as sovereigns. The multilateral processes of state recognition "transform[] the raw power of the sociological state into a form of legal authority that is exercised by the juridical state."[67] The raw power of

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64 *Ibid* at 27.

65 See e.g. Fox-Decent, *supra* note 4 ("[t]he fundamental problem consent theories face is that few individuals have ever explicitly consented to anything like the vast authority states claim" at 117).

66 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 ("[i]nternational law entrusts states with authority based upon their assumption of public powers held for the benefit of their people" at 50).

67 *Ibid* at 47.

the sociological state might derive from popular consent, from conquest, from claim of divine right, etc. But in any event, the state's legal authority derives from its recognition under international law.

The state's legal authority, in short, is founded on entrustment, not on consent. And it is law itself that does the entrusting.

For the fiduciary conception to have this sort of resolving power, one has to reject a contractarian account of private fiduciary law. The contractarian account of fiduciary law holds that fiduciary relationships arise from consent. They are a type of contractual relationship. Contracting parties will not provide rules for every potential conflict between them, either because they do not foresee all potential conflicts or because the transaction costs of specifying rules for every potential conflict are too high. Fiduciary law, the contractarian account holds, fills the gaps in contracts where one party hires the expertise of another on the "obvious condition" that she not be "at the mercy of an agent" she cannot monitor.[68]

Fiduciary law scholars are divided as to whether fiduciary authority necessarily arises from consent. Criddle and Fox-Decent's paradigmatic case, the relationship between a parent and a minor child, obviously does not involve consent: Children, after all, do not choose to be born. The parent-child relationship is not contractual, but is it so clear that "fiduciary relationships are not contracts"?[69] Some American courts have opined that "[t]he relationship between a parent and a child does not per se give rise to the establishment of a fiduciary relationship."[70] Perhaps the same is true of the relationship between the state and those subject to its authority. To the extent that private fiduciary law and theory are divided, they cannot by themselves resolve the question whether the state's authority may be founded on something other than consent.

2. The Distinction Between the State's Moral Duties and Its Legal Duties

Another virtue of the fiduciary account, Criddle and Fox-Decent argue, is its ability to sort between a state's moral duties and its legal duties. The fiduciary account can specify, for example, that human rights are indeed *legal* rights, and not (just) moral rights or political rights.[71] A state's "obli-

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68 Frank H Easterbrook & Daniel R Fischel, "Contract and Fiduciary Duty" (1993) 36:1 JL & Econ 425 at 426.

69 Scott FitzGibbon, "Fiduciary Relationships are not Contracts" (1999) 82:2 Marq L Rev 303 at 305.

70 *Cooper v Cavallaro*, 481 A (2d) 101 at 104 (Conn App Ct 1984). See also Davis, "False Promise", *supra* note 6 ("the parent-child relationship is not an established fiduciary relationship" at 1160).

71 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 107.

gation to refrain from instrumentalization and domination is not merely a free-floating moral obligation, but a legal constraint."[72] This obligation cashes out into the international legal obligations imposed upon states by human rights law. Thus, the fiduciary conception can show that human rights are "constitutive of the state's legal authority to provide security and legal order as a fiduciary of the people subject to its power."[73] For example, the fiduciary conception can identify those economic, social, and cultural rights, such as the right to education, that qualify as distinctively *legal* human rights, thus helping to solve the outstanding and controversial question whether human rights generate positive duties in addition to negative ones.[74]

Here too Criddle and Fox-Decent overstate the resolving power of the fiduciary conception itself. Private fiduciary law indeed imposes obligations that are constitutive of a fiduciary's authority. It is also notorious for its moralizing rhetoric. The line between moral demands and legal rights in fiduciary law is not always clear.[75] And therefore it is unclear how much the fiduciary conception can help us sort between the moral duties and legal duties of states.

Morality and law are intertwined in complex and fluctuating ways in private fiduciary law. As Tamar Frankel has summarized it, "[c]ourts regulate fiduciaries by imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary."[76] Over time, the balance between morality and legal right may shift in fiduciary law: "[T]he level of legal intrusion into fiduciary relationships depends in part on whether and the extent to which, morality on the one hand and entrustors and the markets, on the other hand, prevent fiduciaries from violating their entrustment."[77] Pressing the point further, Edward Rock has argued that judicial opinions in fiduciary law, particularly corporate law, "can best be thought of as ... sermons," with judges speaking "more as preachers than

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72 *Ibid* at 120.

73 *Ibid* at 107.

74 *Ibid* (arguing that right to education is human right because "the fiduciary principle cannot authorize states to create a kind of order in which some are entirely dependent on the choices of others" at 115).

75 As a former Chief Justice of the Delaware Supreme Court has put it, one purpose "of fiduciary duties is to serve as the moral pulse of our society." Myron T Steele, "The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties" (2012) 26:1 Notre Dame JL Ethics & Pub Pol'y 3 at 3.

76 Tamar Frankel, "Fiduciary Law" (1983) 71:3 Cal L Rev 795 at 829–30.

77 Tamar Frankel, *Fiduciary Law* (Oxford: Oxford University Press, 2011) at 101.

as policemen."[78] Disagreeing with this characterization, Julian Velasco has argued the matter is more complicated still: There are fiduciary duties that comprise standards of legal liability, duties that are required by law but not enforced, and standards of conduct that are not legally required.[79]

Of course, the openness of the fiduciary conception of authority to moral themes lends itself to an account of the legal authority of states that looks to moral philosophy for much of its content.[80] But to say that the state is a fiduciary does not by itself draw the line between its moral duties and its legal ones any more than labeling a corporate director a fiduciary specifies the line between morality and legal liability.

Consider again the right to education, which Criddle and Fox-Decent argue is a positive *legal* duty under the fiduciary conception of state sovereignty.[81] It is far from clear, however, that a fiduciary conception of authority entails positive duties. In the Anglo-Australian tradition of fiduciary law, there is doubt that fiduciaries owe positive duties to their beneficiaries. We might therefore think that a distinction between proscriptive and positive is inherent in the fiduciary conception of authority.[82] Indeed, "influential decisions of appellate courts in England, Australia, and elsewhere have now asserted that there are properly no positive *fiduciary* duties; such duties must find their source in contract or tort, or elsewhere in equity doctrine."[83] On that understanding, the fiduciary conception of state sovereignty cannot itself demonstrate that the right to education is a legal right, and, indeed, might even be at odds with such a claim.

3. The Scope and Content of the State's Duties

Nor can the fiduciary conception itself specify the scope and content of a state's legal duties. Criddle and Fox-Decent argue that "the fiduciary model provides a solid theoretical foundation for specifying the meaning of

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78 Edward B Rock, "Saints and Sinners: How Does Delaware Corporate Law Work?" (1997) 44:4 UCLA L Rev 1009 at 1016.

79 Julian Velasco, "The Role of Aspiration in Corporate Fiduciary Duties" (2012) 54:2 Wm & Mary L Rev 519 at 523–24.

80 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 22ff. If the contractarian account of fiduciary law is to be believed, however, the fiduciary conception cannot do this sort of work. See e.g. Easterbrook & Fischel, *supra* note 68 ("[f]iduciary duties are not special duties; they have no moral footing" at 427).

81 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 115.

82 See Joshua Getzler, "Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent" in Gold & Miller, *supra* note 10, 39.

83 *Ibid* at 42 [emphasis in original].

norms ... [that] have been subject to conflicting interpretations" and state that its "appeal ... depends upon whether it is capable of specifying discrete rules, standards, and principles."[84] But their examples suggest that a fiduciary conception of authority cannot, without more, specify solutions to outstanding doctrinal problems in public law.

In their discussion of *jus cogens* norms, for instance, Criddle and Fox-Decent argue that the fiduciary theory "helps to elucidate the scope of particular human rights."[85] *Jus cogens* norms are peremptory norms in international law. States must observe them and may not derogate from them. *Jus cogens* norms include prohibitions against genocide and torture, to name two that implicate human rights law. Criddle and Fox-Decent's principal aim when discussing *jus cogens* norms is to explain why state sovereignty entails an obligation to comply with such norms. They go further, however, to argue that fiduciary concepts also can prescribe particular doctrinal solutions to outstanding problems concerning the scope and content of *jus cogens* norms. The fiduciary theory, they argue, allows us to distinguish torture from cruel, inhuman, and degrading treatment. In distinguishing the two, however, Criddle and Fox-Decent do not point to particular doctrines from fiduciary law. Instead, they rest upon the "fiduciary theory's principle of non-instrumentalization," which they have developed by reference to Hobbes and Kant, and which they specify to imply a prohibition on "the conscription of a subject against her will through the illicit use of violence."[86] Torture violates this prohibition against conscription through the deliberate use of pain and suffering. Whether Criddle and Fox-Decent are correct in defining torture thus turns not on any particularity of fiduciary law, but rather on the persuasiveness of their non-instrumentalization principle and the rigor with which they apply it to interpret international law.

Interestingly, Criddle and Fox-Decent sometimes do not refer to doctrines from fiduciary law when they might seem on all fours with the problem they consider. They argue that, contra the conventional wisdom, there is a *jus cogens* prohibition on state corruption. This is nonderogable, they argue, because "corruption is the antithesis of the other-regarding mandate that the fiduciary state enjoys."[87] Criddle and Fox-Decent are on solid footing in so far as a norm against self-dealing is a well-established feature of fiduciary law. But they do not refer to the doctrines concerning the prohibition on self-dealing. And once one burrows

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84 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 28, 76.

85 *Ibid* at 107.

86 *Ibid* at 108–09.

87 *Ibid* at 112.

into the doctrine, divisions appear. It is not clear, for example, that fiduciaries of all types and stripes are held to an unyielding prohibition against self-dealing.[88] And, therefore, it should be clear that the fiduciary conception of authority cannot itself demonstrate that a prohibition on corruption is a *jus cogens* norm.

The upshot is that fiduciary law is (often) divided. To label someone a fiduciary does not by itself decide the scope and content of that person's legal duties. To the extent that Criddle and Fox-Decent's fiduciary theory determines particular doctrinal outcomes, it is due less to the fiduciary conception of authority and more to the moral claims they make in its name.

4. To Whom Duties Are Owed

What of Criddle and Fox-Decent's central claim, to wit, that states are fiduciaries of humanity? States, they argue, are not only agents of their citizens, but also trustees for humanity. Is that claim mandated by the fiduciary conception of authority?

Not necessarily. Criddle and Fox-Decent's claim that states are fiduciaries of humanity depends upon filling the fiduciary conception with various premises drawn from moral philosophy, including premises that implicitly deny the classical conception of sovereignty that they aim to attack. For example, in making their argument that state sovereignty entails a human right to refuge, Criddle and Fox-Decent explain, "[a]n indispensable cosmopolitan premise of this argument is that states are not entitled to set policies unilaterally that have spillover effects prejudicial to the rights or justice claims of foreign nationals."[89]

Private fiduciary law does not necessarily entail this sort of cosmopolitan premise. In the law of private corporations, for example, there is general agreement that directors owe fiduciary duties to shareholders, not to all corporate constituents. Whatever duties they owe to others are not fiduciary duties. Scholars debate this premise, of course. Here, again, the fiduciary conception is divided.

Nothing in the fiduciary conception rules out the possibility that states are loyal agents of their citizens and no one else, much in the same way that corporate directors may be fiduciaries for their shareholders alone. The fiduciary conception, in other words, does not rule out "fiduciary real-

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88 See e.g. David Kershaw, "The Path of Corporate Fiduciary Law" (2012) 8:2 NYU JL & Business 395 at 400.

89 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 266.

ism".[90] And on a realist account, the fiduciary duties of states do not extend to the refugee at the border, the foreign detainee locked away in an offshore prison, or the enemy combatant on the field of battle.

More generally, private law contains its own divisions when it comes to sovereignty. Fiduciaries are not the only persons who hold power over other persons in private law. Owners also have power over persons. Unlike fiduciaries, however, owners can use their power over property for their own private reasons.

Are political sovereigns like fiduciaries or like owners? Public fiduciary theory holds that sovereigns are (or, at least, are like) fiduciaries. Unlike owners, but like fiduciaries, sovereigns have power for an other-regarding purpose, namely, to act on behalf of their people. But even if that is true, sovereigns might be (or, at least, be like) owners. We might think of states as owners of territory who can use their power over property solely for their own people.

In *Fiduciaries of Humanity*, Criddle and Fox-Decent do not think of states as owners of territory. Rather, they argue that states are fiduciaries for humanity with duties to provide refuge to refugees. In other work, Fox-Decent has extended their argument to what seems to me to be its logical conclusion: States have a duty of justification whenever they deny entry to peaceful immigrants.[91] States are not private owners with a robust right to exclude.

Suffice it to say that not everyone agrees that states are trustees of humanity rather than owners of their territories. Criddle and Fox-Decent concede that their fiduciary account "challenges current state practices in a variety of respects."[92] Indeed, it may be that we can better explain current international refugee law by thinking of states as owners with obligations to admit immigrants on grounds of necessity.[93] Why might we think of states as owners? One possibility is that we think that private

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[90] See Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010) (describing but rejecting a "'fiduciary obligation' position" under which there is an "overriding fiduciary obligation on the part of the leaders of states to serve the interests of their peoples, even when doing so violates other putative moral principles" at 207); Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 169.

[91] See Evan Fox-Decent, "Constitutional Legitimacy Unbound" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 119 ("if the state wishes to close its borders to peaceful migrants, then it owes them a duty of justification" at 131).

[92] Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 280.

[93] *Cf Commonwealth v Magadini*, 52 NE (3d) 1041 (Mass Sup Jud Ct 2016) (holding that homeless individual could raise necessity as a defense to a charge of trespass onto private property).

ownership is about self-determination. Owners' robust right to exclude others is necessary for their individual self-determination. Similarly, we might think, a robust right to exclude is necessary for collective self-determination. A state's robust right to exclude, in other words, might be grounded in ideas about self-government and democracy.

Nothing in private law thinking about the state rules this argument out of court. Criddle and Fox-Decent bracket questions of self-government and democracy in developing their fiduciary conception of international human rights law. They may be justified in doing so, insofar as democracy is not a requirement for international recognition of state sovereignty.[94] But the picture may be more complex than that. It may be that democracy is an emerging human right,[95] or, more modestly, that there is an emerging "principle of democratic teleology, according to which States are obligated to develop towards democracy."[96] Another possibility is that on normative, if not interpretive, grounds, "[t]he power of civil resistance movements to alter the map of the world is one reason why popular sovereignty should be integrated into the concept of external sovereignty in international law."[97] For those who think the current state practice is justified when it comes to immigration because of concerns about democracy, the ownership conception of the state is an attractive one. I do not think this conception can be ruled out on interpretive grounds, and its ubiquity seems to demand a normative response.

Fiduciary law's flexibility may make it a particularly rich source of metaphors for debates about a state's authority over those subject to its power. Criddle and Fox-Decent suggest that we want our states to be our loyal agents *and* trustees for humanity. This divided fiduciary conception is plausible because fiduciary law itself is divided. There are many recognized forms of fiduciary authority: agency, trusts, corporations, and guardianship, to name a few of the widely-recognized ones. And fiduciary law recognizes fiduciary relationships on an ad hoc basis, where the facts fit closely enough with the recognized forms. There are, moreover, many

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94 See e.g. Brad R Roth, "The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention" (2015) 16:3 German LJ 384.

95 See e.g. Thomas M Franck, "The Emerging Right to Democratic Governance" (1992) 86:1 Am J Intl L 46; Gregory H Fox, "The Right to Political Participation in International Law" (1992) 17:2 Yale J Intl L 539.

96 Niels Petersen, "The Principle of Democratic Teleology in International Law" (2008) 34:1 Brook J Intl L 33 at 36.

97 Elizabeth A Wilson, "'People Power' and the Problem of Sovereignty in International Law" (2016) 26:3 Duke J Comp & Intl L 551 at 593.

faces of fiduciary loyalty.[98] Sometimes fiduciary loyalty is undivided loyalty to a beneficiary. Other times fiduciary loyalty is divided. Often a fiduciary acts for multiple beneficiaries whose interests are divided, rendering her duty of loyalty an obligation of due regard. We might therefore think of fiduciary law as a category of family resemblances, like all families divided in various ways, but sharing similarities that we can see if we look long enough.[99] When it comes to questions of state sovereignty, fiduciary law provides a set of metaphors *because* of its divisions, not its coherence. Those divisions, however, undermine its power to resolve outstanding problems in public law.

D. Rethinking Problems in Private Law and Public Law Together

The generative power of Criddle and Fox-Decent's fiduciary account comes as much from the ways in which they rethink the nature of fiduciary authority as it does from their rethinking of state sovereignty. *Fiduciaries of Humanity* can be read in a dialectical mode: It rethinks problems of private fiduciary law together with problems arising in public law.

For example, *Fiduciaries of Humanity* depends upon an idea, which Criddle and Fox-Decent draw out in a recent book chapter, that fiduciaries may have duties that operate at different orders or levels of analysis.[100] In the first instance, states are fiduciaries for their citizens. But they are also, in the second instance, fiduciaries of humanity. They have, as Criddle and Fox-Decent put it, both first order and second order fiduciary duties.[101] The concept of a second order fiduciary duty allows Criddle and Fox-Decent to argue that states' duties under international human rights law are *fiduciary* duties even when those duties are owed to international society as a whole. Such duties are fiduciary duties rather than side constraints on the state's discretion to act as a fiduciary for its citizen-beneficiaries.

The notion of second-order fiduciary duties thus allows Criddle and Fox-Decent to offer a cosmopolitan conception of fiduciary authority. Far from focusing upon the narrow, parochial interests of a fiduciary's speci-

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98 *Cf* Andrew S Gold, "Dynamic Fiduciary Duties" (2012) 34:2 Cardozo L Rev 491 ("a key feature of fiduciary duties is that they are read differently across time and between firms" at 491).

99 See Ludwig Wittgenstein, *Philosophical Investigations*, 3rd ed, translated by GEM Anscombe (Oxford: Basil Blackwell, 1968), § 67.

100 See Evan J Criddle & Evan Fox-Decent, "Guardians of Legal Order: The Dual Commissions of Public Fiduciaries" in Evan J Criddle et al, eds, *Fiduciary Government* (Cambridge, UK: Cambridge University Press, 2018) 67.

101 *Ibid.*

fied beneficiaries, fiduciary authority also has a systemic, cosmopolitan component that may entail duties to the broader public. Private fiduciaries may have these sorts of obligations: lawyers have duties to promote the fair administration of the justice system, not just duties to their clients; and doctors have duties to protect the public health, not just to treat their patients.[102] *Fiduciaries of Humanity* offers not simply a fiduciary theory of state sovereignty, but also a cosmopolitan theory of fiduciary authority.

IV. The State and the Morality of Private Law

This cosmopolitan theory of fiduciary authority responds to a jurisprudential crisis in public law. As Criddle and Fox-Decent put it, "[i]f international law is to be taken seriously, the international community needs a more sophisticated account of state sovereignty."[103] The torture and abuse of prisoners at Abu Ghraib in Iraq, the United States' rendition of individuals to "black sites" in other nation-states, and the resistance of European nations and the United States to fulfilling their obligations to asylum seekers under international refugee law are recent instances where international law has not been taken seriously. Each presents a jurisprudential crisis concerning the coherence, integrity, and normative force of international human rights law. Turning to private law may open up a moral brief in response to such crises in public law.

My aim in this concluding Part is to take stock of this fourth way of looking to private law, one that draws upon private law while it constructs a political morality for public law. Private law can provide a language and a set of techniques for normative judgment in a world divided by much more than state borders. But the resort to private law thinking is not and cannot be determinative. In this way, private law thinking about the state is a "mindset—a tradition and a sensibility about how to act in a political world."[104] Public lawyers' turn towards this private law mindset would be significantly enriched—and challenged—by a critical and thoroughgoing exploration of the culture of legal practice and the limits of a lawyer's vision of politics.

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[102] *Ibid* at 71ff.

[103] Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 10.

[104] Koskenniemi, "Constitutionalism as Mindset", *supra* note 15 at 9.

A. Jurisprudential Crisis

Two paintings from Fernando Botero's Abu Ghraib series hang in the second-floor hallway of the law school where I teach.[105] The paintings, which emphasize the humanity of the Abu Ghraib prisoners who endured torture and humiliation at the hands of U.S. military in Iraq between 2003 and 2004,[106] stand as a stark reminder of a crisis in the rule of law. International law should have blocked the baton strike depicted in one of the paintings in Botero's series.[107] It did not. U.S. officials responsible for policymaking during the so-called War on Terror should have taken international law seriously. They did not.[108] Failures of the rule of law like those at Abu Ghraib are supposed to be aberrations.[109] But are they?

Does the rule of (international) law exist only at the sufferance of the sovereign? If so, then normative judgment about international law's assignment of sovereign authority to states is beside the point. States will do what they will do, and what they will do is what is in their self-interest. Perhaps political calculation, not conceptual coherence or normative legitimacy, is what gives the rule of (international) law its force.[110] If so, then the lesson of Botero's Abu Ghraib series is that we need to be realistic about the limits of the law in a political world.

Or perhaps the lesson is that lawyers need a normative jurisprudence to shore up the fragments of international law against its ruin. And perhaps that jurisprudence may be found in a surprising source: the moral foundations and techniques of private law. Thinking about what we owe

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105 See Berkeley Law, "Boalt Helps Bring Dramatic Abu Ghraib Exhibit by Fernando Botero to Berkeley" (10 January 2007), online: <www.law.berkeley.edu/article/boalt-helps-bring-dramatic-abu-ghraib-exhibit-by-fernando-botero-to-berkeley>, archived at https://perma.cc/MLG2-HCLS.

106 See Roberta Smith, "Botero Restores the Dignity of Prisoners at Abu Ghraib", *The New York Times* (15 November 2006), online: <www.nytimes.com>, archived at https://perma.cc/7EDD-CWV4.

107 See Berkeley Law, *supra* note 105 (displaying a photograph of one of the paintings in Botero's Abu Ghraib series).

108 See David Cole, "The Idea of Humanity: Human Rights and Immigrants' Rights" (2006) 37:3 Colum HRLR 627 ("[p]erhaps the central challenge for international human rights advocates focused on the United States is to get domestic actors to take human rights seriously" at 656).

109 See Burt Neuborne, "Spheres of Justice: Who Decides?" (2006) 74:5 Geo Wash L Rev 1090 ("[events such as the torture at Abu Ghraib] are the predictable results of fear, secrecy, and the inversion of the reciprocal assumptions about risk that have traditionally defined our institutions of justice" at 114–15).

110 See generally Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (New York: Oxford University Press 2005).

one another as a matter of justice may open up a new moral brief about what the state owes those subject to its power.

The torture and abuse at Abu Ghraib provides an obvious example. The torturers at Abu Ghraib did not violate only the demands of international human rights. Torture is a tort, and torturers are tortfeasors. What tort law teaches us about what persons owe each other may also shed light on the moral foundation of human rights law and its enforcement.[111]

The moral foundation of *Fiduciaries of Humanity* is an account of what private fiduciary law teaches us about what one person owes another whose interests are entrusted to her care.[112] By looking to this account of fiduciary obligations, Criddle and Fox-Decent develop a moral brief against conceptions of state sovereignty that emphasize power and political calculation. In particular, Criddle and Fox-Decent address various problems that press the limits of human rights law, such as those arising from public emergencies, armed conflict, and interrogation and torture, including the abuse of prisoners at Abu Ghraib.[113]

International law faces a jurisprudential crisis that has left its legal and moral foundations uncertain, or so Criddle and Fox-Decent argue. One challenge comes from the erosion of the classical understanding of state sovereignty:

> Dissonance between the retreating classical model [of sovereignty as exclusive and absolute jurisdiction] and the ascendant fiduciary model, coupled with increasing institutional specialization across the international legal system, has led to doctrinal fragmentation within and across the various sub-disciplines of international law. These dynamics, in turn, have undermined the international community's confidence in the coherence and integrity of the international legal system as a whole.[114]

Another challenge springs from increasing suspicion that international law cannot constrain states, a suspicion illustrated by Carl Schmitt's conception of the sovereign as "he who decides on the exception."[115] The

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111 See Seth Davis & Christopher A Whytock, "State Remedies for Human Rights" (2018) 98:2 BU L Rev 397 (arguing that tort law provides moral principle of right to redress of wrongs that also supports enforcement of human rights in domestic courts at 403). See also Hanoch Dagan & Avihay Dorfman, "Interpersonal Human Rights" (2018) 51:2 Cornell Intl LJ 361.

112 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 22ff.

113 *Ibid* at chs 3–6.

114 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 43.

115 *Ibid* at 142–43, citing Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago: University of Chicago Press, 2005) at 6.

sovereign who decides on the exception stands outside the legal order. His decisions to comply with law, or to suspend it, are political decisions. Violations of international law during the War on Terror suggest that Schmittian suspension of law has become the rule, not the exception. Criddle and Fox-Decent's response to Schmitt's challenge draws upon a complex political morality they argue is the foundation of fiduciary obligations, one that "can guide deliberation" and public justification by state officials.[116] This fiduciary foundation for state sovereignty promises to restore the international community's lost confidence in the international legal system.

B. Looking to Private Law for Public Law's Moral Foundation

On this reading of *Fiduciaries of Humanity*, the most important principle that Criddle and Fox-Decent draw from private law is not doctrinal or conceptual, but moral: the exercise of discretionary power over another's interests must be subject to law.[117] With fiduciary power comes fiduciary duty. Private law stands between a fiduciary and her beneficiaries, securing their "equal freedom" by enjoining the fiduciary to act with care and faithfulness and providing the beneficiaries with remedies when she fails to do so.[118] What is true of private fiduciaries is also be true of states under international law, or so Criddle and Fox-Decent argue. Thus, private fiduciary law provides a moral foundation for concluding that a state's sovereignty necessarily entails legal obligations to those subject to its power.

Fiduciary obligations, in Criddle and Fox-Decent's account, have a moral foundation.[119] This moral foundation is protection for human freedom.[120] Thus, their turn towards a morality of private fiduciary law is also a turn towards a "mindset building on a tradition understood from a Kantian perspective as a project of 'freedom.'"[121] This constitutional mindset, when grounded in a fiduciary conception of authority, gives their account its moral brief against the classical and Schmittian conceptions of state sovereignty.

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116 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 99.

117 *Ibid* at 23.

118 *Ibid.*

119 *Ibid* at 22.

120 *Ibid* at 24.

121 Koskenniemi, "Constitutionalism as Mindset", *supra* note 15 at 23.

In this way, *Fiduciaries of Humanity* may be read as an example of what Robin West has called "the new legal criticism."[122] As West describes it, the new legal criticism "embrace[s] various *moral principles*, which are themselves imperfectly articulated in positive law, as the basis of their legal criticism or as constituting the baseline against which their criticisms are mounted."[123] Private fiduciary law, however imperfectly, articulates a moral principle of constraining discretionary power through law. This morality of the fiduciary principle serves as a touchstone for interpretation and critique of public law.[124]

Perhaps it is unsurprising that private law could furnish the foundation for a moral brief against a vision that treats public law as political calculation. Private law provides a set of lawyerly techniques and a mindset for normative judgment in a divided world. At its best, private law is not the language of raw power, even when it is deployed in the service of the powerful. Fiduciary law, property law, contract law, and torts, and so on, may give us categories for thinking about the state and making normative judgments that are not reducible to the will to power.

That is not to say, however, that a private law mindset about public law is apolitical. To the contrary, it is very much a lawyer's mindset about politics. For example, Criddle and Fox-Decent's turn towards private fiduciary law in the face of a jurisprudential crisis in international law shares more than a passing resemblance to what Martti Koskenniemi has called a "culture of formalism" in international legal practice.[125] The culture of formalism is international law is not apolitical, however.

Much like Criddle and Fox-Decent, Koskenniemi describes a jurisprudential crisis in international law:

> The phenomena of deformalization, fragmentation, and empire emerge from the sense that traditional diplomats' law is failing to manage the problems of a globalizing world due to its excessive formality and rigidity and its failure to "adapt" to new regulatory needs. ... Do not remain enchanted by the legal form, critics say.

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122 West, *supra* note 8.

123 *Ibid* at 147 [emphasis in original].

124 See Criddle & Fox Decent, *Fiduciaries of Humanity*, *supra* note 5 (sketching methodology of "blend of inference to the best explanation and Rawls's idea of 'reflective equilibirum'" as basis for their interpretive and prescriptive theory of international law) at 4, citing John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971).

125 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, UK: Cambridge University Press, 2001) [Koskenniemi, *Gentle Civilizer*].

> Look behind rules and institutions. Assess costs and benefits. Streamline, balance, optimize, calculate.[126]

Koskenniemi contrasts this instrumental conception of international law with a "culture of formalism", namely, a "culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it."[127] International law's formalism is indeterminate. International law cannot neutrally arbitrate between multiple, competing conceptions of justice.[128] To the contrary, legal argument oscillates between "apology" and "utopia".[129] International law aims not only to appeal to states, whose consent is necessary for its implementation, but also to offer a normative vision that transcends the particular interests of states.

This aspiration to a normative vision that transcends any state's self-interest helps explain why international lawyers might look to private law to think about state sovereignty. Ralf Michaels has charted parallels between Koskenniemi's "culture of formalism" and the work of private lawyers. First, Koskenniemi's culture of formalism focuses our attention on how "[a]ttempts to systematize law [are] attempts to free law from the eccentricities of sovereigns."[130] Second, the culture of formalism takes an anti-instrumentalist approach to dealing with political clashes in a divided world. The language of law addresses political conflicts of governance "as something other than just clashes[; it is] a language that avoids the idea

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126 Koskenniemi, "Constitutionalism as Mindset", *supra* note 15 at 13. By "deformalization", Koskenniemi means "the process whereby the law retreats solely to the provision of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions and 'balancing interests'" (*ibid*). By "fragmentation", he means, "the splitting of law into functionally defined 'regimes' such as 'trade law', 'human rights law,'" and so on (*ibid*). Finally, by "empire", Koskenniemi refers to the "emergence of patterns of constraint deliberately intended to advance the objectives of a single dominant actor, either through the law or irrespective of it" *(ibid*).

127 Koskenniemi, *Gentle Civilizer*, *supra* note 125 at 500.

128 See Frédéric Mégret, "The Apology of Utopia: Some Thoughts on Koskenniemian Themes, With Particular Emphasis on Massively Institutionalized International Human Rights Law" (2013) 27:2 Temp Intl & Comp LJ 455 (arguing that the "nature of the power of international human rights law" is "much more than the ability to speak justice to power—as it is typically conceived—the power to arbitrate between different concepts of the just society internationally from an apparently neutral standpoint" at 484).

129 See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, UK: Cambridge University Press, 2006) [Koskenniemi, *Apology to Utopia*].

130 See Michaels, *supra* note 15 at 508.

that pure power always wins."[131] Private law, "with its counterfactual reduction of individuals to legal subjects, provides a (fragile) common language for addressing social conflicts."[132] Third, Koskenniemi connects the techniques of law with its politics: "The politics of international law is what competent lawyers do. And competence is the ability to use grammar in order to generate meaning by doing things in argument."[133] Similarly, Michaels argues, "the vernacular of private law does not cut off discourse; instead, it makes discourse possible."[134] Thus, as *Fiduciaries of Humanity* suggests, the politics of international law and the politics of private law may converge.

Thus understood, the politics of the private law state is a lawyer's politics. Criddle and Fox-Decent state that their fiduciary theory "is ecumenical regarding the particular political institutions that might be necessary to guarantee" its aims,[135] but that does not seem right. It does not seem right because Criddle and Fox-Decent also explain that their fiduciary theory "strengthen[s] the political legitimacy—and, hence, the political influence—of courts and international institutions."[136] One of the first things the fiduciary state will do is look to the lawyers.

Thus, the fiduciary account is not only a moral one, but also a political and institutional one. It makes a claim for institutional power for courts and lawyers in the international system.[137] Criddle and Fox-Decent's fiduciary account would empower some institutions and actors at the expense of others.[138] It can therefore be understood as "a strategy for empowering particular types of expertise, systems of knowledge and value, institutional preference and bias."[139] The relevant types of expertise are those of human rights lawyers.

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131 *Ibid* at 517.

132 *Ibid*.

133 Koskenniemi, *Apology to Utopia*, *supra* note 129 at 571 [emphasis omitted].

134 Michaels, *supra* note 15 at 520.

135 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 at 161, n 153.

136 *Ibid* at 161.

137 *Cf* Martti Koskenniemi, "Human Rights Mainstreaming as a Strategy for Institutional Power" (2010) 1:1 Humanity 47 at 47.

138 *Ibid* (explaining that "human rights mainstreaming ... does empower some groups at the cost of other groups" at 51).

139 *Ibid*.

C. The Limits of a (Private) Lawyer's Mindset About Politics

If public lawyers are to turn to private law thinking to ground moral critiques of public law, then we would do well to offer a critical and thoroughgoing exploration of a (private) lawyer's vision of politics. While a full exploration is beyond the scope of this Article, it is worth concluding by considering some limits of a lawyer's mindset, particularly as it arises in the tradition of fiduciary theorizing about public law.

Private law is a system of rules, standards, concepts, and moral principles developed (at least in the common law world) through contextual and incremental styles of reasoning. In this way, private law is a mindset for resolving conflicts in a political world. It is also a system of power.

Private law has a long and sometimes mutually-reinforcing historical relationship with unilateralism and domination. The morality of private property law, for example, was invoked "to subjugate peoples and places, cultures and natures, to an imperial regime."[140] Fiduciary law, for its part, underwrote European and American colonialism. Colonial states claimed authority over Indigenous lands as trustees with a mandate to bring civilization to Indigenous Peoples.[141] As trustees for Indigenous Peoples, colonial powers claimed the authority to deny recognition of Indigenous property rights and self-determination.[142] Where the fiduciary principle of colonial rule has supported Indigenous rights, it has done so incrementally without fundamentally challenging the colonial state's claim to sovereign authority.[143] In this way, the fiduciary principle has not spoken justice to power, but instead lent its hand to power's status quo.[144]

The risk, in other words, is that a private law mindset is not ambivalent enough about state sovereignty or the rule of law. Bringing power under the rule of law—and the rule of lawyers—is not the only way to transform it and may not be the best way to realize one's moral aims. That, in a nutshell, is a critique of the lawyer's mindset as it arises in *Fiduciaries of Humanity*.[145] It is possible that the fiduciary principle's ratifi-

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[140] Michael Burger & Paul Frymer, "Property Law and American Empire" (2012) 34:2 U Haw L Rev 471 at 471.

[141] See e.g. *supra* notes 22–28 and accompanying text (discussing Indian trust doctrine in U.S. federal law).

[142] See Davis, "American Colonialism", *supra* note 6 at 1757.

[143] *Ibid* at 1757–58.

[144] *Ibid* at 1791.

[145] I develop a related critique in Seth Davis, "Pluralism and the Public Trust" in Criddle et al, *supra* note 100, 281 [Davis, "Pluralism"].

cation of state sovereignty may "limit possibilities for justice globally."[146] Elsewhere, for example, I have argued that a fiduciary conception of state sovereignty struggles to make space for subjects who claim the authority to make law that does not depend upon the state's authority.[147] Such subjects, which include Indigenous Peoples, do not simply demand that the state act for them when making and enforcing laws; they also demand the right "to make their own laws and be ruled by them."[148] They demand, in other words, something more than the right afforded by the fiduciary principle to be "coauthors" of the colonial state's projects.[149]

In short, where private law's moral principles run out, so too does the morality of the private law state. Where private law's moral principles are flawed or incomplete, so too will the private law state's moral foundations be flawed or incomplete.[150] The project of the private law state would therefore be significantly enriched—and challenged—by a critical engagement with the morality of private law and the limits of a private lawyer's vision of politics.

Conclusion

Reflection about the reasons we have states makes the diversity of our moral intuitions about what powers states do (and should) have strikingly apparent. Some of us, perhaps most of us, hope that when push comes to shove, our state will have the power to put our interests first. But some of us, perhaps most of us, are worried about the state's power to harm others in our name. We want borders, and guards with guns to patrol them,[151] and we want to know who is to guard the guardians.

In this Article, I have explored a lawyerly response to our divided world. The response is to look to private law to think about state sovereignty. I have offered a qualified defense of this response. The defense is

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146 Mégret, *supra* note 128 ("[p]aradoxically, international human rights law may, under its cosmopolitan guise, actually end up making it even more difficult to challenge the state system in some of the ways that it can be said to limit possibilities for justice globally" at 488).

147 See Davis, "Pluralism", *supra* note 145.

148 *Williams v Lee*, 358 US 217 (1959) (discussing right of American Indian Nations "to make their own laws and be ruled by them" at 220).

149 Criddle & Fox-Decent, *Fiduciaries of Humanity*, *supra* note 5 (arguing that Indigenous Peoples have right under fiduciary principle to be "coauthors" of large-scale development projects that would affect their lands at 61).

150 *Cf* West, *supra* note 8 (discussing "limits of new legal criticism" at 159ff).

151 *Cf* Joseph H Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 Rev Politics 251 ("[b]orders have guards and the guards have guns" at 251).

that private law provides a set of lawyerly techniques and a mindset for normative judgment in a divided world. The qualification is that private law itself cannot determine the solution to normative problems that private law itself contains.

Criddle and Fox-Decent's *Fiduciaries of Humanity* is a pathbreaking example of private law theorizing about state sovereignty. As it masterfully demonstrates, looking to private law is a powerful way of developing a moral brief against conceptions of sovereignty that place it outside the rule of (international) law. There is much to be said for treating states as fiduciaries of humanity. There is also much to be gained by wondering whether fiduciaries are what humanity needs.