

**Virtue and the *Three Monkey Defence*:
Regulating Ethical Conduct in the
Australian Public Service**

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ABSTRACT

The thesis is an investigation of the efficacy of the “values-based” ethics regulation system (“system”) operated by the Australian Public Service (“APS”). Normative propositions which identify virtue, human character, or dispositions to behave, as determinatively contingent factors in public officials’ compliance with their statutory ethics obligations serve as an entry-point for the investigation. The proposition, that a public officer’s compliance with statutory ethical obligations is down to virtue, is critiqued from the standpoint of the tension which arises from two mutually incompatible narratives argued to coincide in relation to perceptions of ethical conduct in the APS; the first ‘official’ narrative is in the form of the APS Commissioner’s annual *State of the Service Report*, which regularly reports near perfect compliance of APS officers with their ethical obligations. The second narrative arises from myriad news reports, parliamentary inquiries and whistleblower disclosures, of apparently considerable and systemic misconduct, serious misconduct, corruption, and other forms of misfeasance.

In order to put this analysis into effect, the thesis poses the following questions:

- To what extent is virtue – expressly or impliedly – a constituent theoretical component in the development of the liberal-democratic tradition and, in particular, the model of Westminster public administration which developed from this tradition in the nineteenth-century?
- Does the APS system of ethics regulation rely upon a virtue-ethics type methodology, or is one implied in its design?

- What challenges are posed to the efficacy of the APS system of ethics regulation from the standpoints respectively of situationist ethics and sociological theories of interaction?

The thesis investigates the historical place of virtue (and related concepts) in the theoretical formation of the liberal-democratic project, and particularly the conceptual development of the social contract and the Westminster model of public administration. The triumvirate concepts of trust, legitimacy, and consent, provide an analytical prism through which to critique the notional place and operation of the statutory system of ethics regulation in the APS and, particularly, certain (arguably) virtue-like statutory provisions which are traditionally emblematic of, or otherwise fundamental to, the principles of Westminster public administration. Nineteenth-century developments such as the disappearance of “virtue” from public discourse and the formative development of the idea of the ‘permanent civil servant’ are analysed in their historical context. The evolution of the modern APS, from its traditional Westminster formulation, to the current results-focused “values-based” system, is described and critiqued in terms of the resulting tensions for the accountability and impartiality of public servants.

Finally, the proposition that virtue must properly constitute the basis for a public officer’s compliance with statutory ethical obligations is critiqued from two theoretical perspectives that pose a challenge to virtue-ethics: firstly, the current debate between situationist ethicists and virtue ethicists as to the validity of the so-called *fundamental attribution error*; and, secondly, interactionist theories, focusing in particular on the work of Harold Garfinkel, Erving Goffman, and Anthony Giddens. The thesis proposes that the (unacknowledged) primary purpose of the APS ethics regulation system is to manage perceptions of legitimacy for the sake of the social contract.

DECLARATION

This is to certify that:

1. The thesis comprises only my original work towards the PhD except where indicated in the preface,
2. Due acknowledgement has been made in the text to all other material used,
3. This thesis is fewer than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.

Melbourne, 15 September 2019

Philip Patterson

PREFACE

The data in chapter 4 comprising statutory provisions and associated statutory analyses, some examples of official reporting of ethical compliance and associated analyses, and media reporting of incidence of alleged misconduct up to and including the year 2012 and associated analyses, have been drawn from the author's Master of Arts thesis in consultation with the PhD Supervisor.

ACKNOWLEDGEMENTS

The path to completing this thesis has been a long one, beginning formally in 2010, not with my commencement of the PhD program at the University of Melbourne, but with my commencement of the Master of Arts in Professional and Applied Ethics at the university's Centre for Applied Philosophy and Public Ethics. My PhD supervisor, Andrew Alexandra, accompanied me, not only through the years of my PhD, but also as my supervisor for my Masters thesis, and I am grateful to him for his attention and availability as I tried to give shape to an idea that began to form in the earliest days of my career as a lawyer.

At the beginning of my legal career, I was shocked to discover that lawyers whom I encountered in my work – each of whom had taken an oath to uphold the law – appeared to be just as likely as other members of society to engage in dishonest, corrupt, or criminal conduct. My direct experience of one such significant example was a central reason for my deliberate departure from the world of private legal practice in order to work exclusively as a government lawyer. Naïvely, I had assumed I could simply perform the role of 'impartial public servant.' In consecutive government organizations, I found things to be essentially no different to what I had confronted in the private sector. On a technical reading of the applicable ethics rules, I observed commonplace misconduct and, also, serious misconduct, including, quite possibly, the commission of indictable criminal offences, on the part of colleagues otherwise notionally charged with working for the public good. Some of those people I had trusted as ethical colleagues and friends, who subsequently revealed their capacity for self-serving and destructive deceit. The most significant example from my direct experience occurred whilst I was employed as a counter terrorism lawyer at the Commonwealth Attorney-General's Department in 2003 – an incident in respect

of which I finally succeeded in giving evidence to the Commonwealth Senate Select Committee for a National Integrity Commission in 2017.¹

Destructive mendacity, of course, is not the preserve of lawyers or public officers alone; it is a feature of human life. My escalating preoccupation with breaches of trust and dishonest conduct did not originate with my own experiences in government organizations; nor my previous experiences as a permanent member of the armed forces or subsequently as a crisis worker, but in my personal life. Nonetheless, it was my experiences in public sector environments which provided me with the grist and motivation to understand the less than ethical conduct of those who purport to conduct themselves ethically in the interest of others. Ultimately, leaving permanent public-sector employment to undertake post graduate work was as much an exercise in therapy as it was a scholarly pursuit. So, ironically enough, I feel some kind of gratitude to those certain colleagues – particularly those of: the Commonwealth Attorney-General's Department Security Law Branch, and Department of Health; the Commercial Law Practice Group of the NSW Crown Solicitor's Office; and the Tasmanian Department of Health and Human Services, Child Protection Services, North West Region - whose ethical failures, whether pedestrian or remarkable, galvanized my determination to look inside their flawed souls, so to make sense both of their less-than-ethical conduct and the ethical failures of their respective workplaces.

It is a harsh lesson that brings one to appreciate the deceit and betrayal that may harbour in evil souls, despite – to borrow the words that Plato attributed to the god Zeus – that they may be apparelled in fair bodies, and despite that numerous witnesses may come forward and testify on their behalf that they have lived righteously. Had I understood in 1995 and '96 the potential for that kind of person to affect my own wellbeing, I doubt that I would ever have been moved subsequently to write this thesis.

¹ Submission No. 32:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Submissions?main_0_content_1_RadGrid1ChangePage=2_20

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INTRODUCTION

The public officials who populate the ranks of the Australian Public Service (APS) are accountable, technically speaking, through the hierarchical structure of their respective departments, to their minister, who is in turn accountable to Cabinet and ultimately to the population.¹ This notional structure derives directly from traditional *Westminster* principles of constitutional government and public administration, although the APS scheme is a “*Values-based*” system incorporating a mix of traditional Westminster principles and other performance and result-oriented objectives.

At a theoretical level, the importance of ethical conduct on the part of those who exercise the authority of the state in liberal-democratic institutions is long-acknowledged. Locke, for example, argued that the *consent* of the citizenry to be governed constitutes an expression of *trust* that the authority, and the (ultimately) coercive powers so-vested in the state, will be exercised in their interest.² Margaret Levi argues that citizens will consent even to onerous obligations imposed by the state when they perceive their relations to governmental agents as both reliable and fair.³ On this account, it is upon the citizens’ *consent*, which according to Locke is not irrevocable and may be withdrawn where the state's rule is oppressive,⁴ that the *legitimacy* of the state depends.

In any event, it stands to reason that an important aspect of a government's legitimacy depends upon a state administrative apparatus that will conform, cooperatively and voluntarily, to the

¹ Emy, H., and Hughes, O. (1988) *Australian Politics: Realities in Conflict*, at p.344.

² Hardin, R. "Trust in Government" in Braithwaite, V., and Levi, M. (Eds)(1998) *Trust & Governance*, at p.9.

³ Tilly, C. (2004) "Trust and Rule" in 33(1) *Theory and Society* 1 at p.9.

⁴ Walzer, M. (1967) "The Obligation to Disobey" in 77(3) *Ethics* 163 at p.163.

dictates of the governing authority. As Thompson notes with detached understatement, speaking of Commonwealth public administration institutions over a quarter of a century ago,

Problems arise because the bureaucracy...is not meaningfully under the control of the elected politicians. The received theory of ministerial responsibility with its underpinnings of public service neutrality and anonymity does not recognize the possibility of deep-rooted conflict between administrators and politicians and also hides from public view the political (though not necessarily partisan) role of the bureaucrat.⁵

The design of the modern-day APS is, in significant part, a result of a determined effort by consecutive Australian governments from the 1970s through to the 1990s, to regain control of the Commonwealth bureaucracy and halt the progressive erosion of ministerial power, public service politicization, and the erosion of its accountability.⁶ Despite the incorporation of less-than traditional performance-based objectives with traditional Westminster precepts of honesty, integrity, and impartiality, it remains the case that that public servants are expected to discharge their duties anonymously and impartially, in accordance with the original Westminster precepts.⁷

The Australian Public Service Commissioner (APS Commissioner) is statutorily responsible for the regulation and maintenance of APS standards and accountability. The centrepiece of the regulatory system (system) comprises a statutory scheme incorporating a statement of *Values*

⁵ Thompson, E. "Ministers, Bureaucrats and Policy-Making" in Woodward, D., Parkin, A., and Summers, J. (Eds.) (1985) *Government, Politics and Power in Australia – 3rd Edition*, at p.40; see, also: Wilenski, P. (1979) "Ministers, Public Servants and public Policy" in 51(2) *Australian Quarterly* 31 at p.33.

⁶ See, for example, Wilenski, P. "A Plan for Change in the Public Service" in Mayer, D. and Arnott, G. (1988) *Understanding Politics Through Newspapers*, Dellasta, Melbourne Australia, at p.89.

⁷ Emy, H., & Hughes, O. (1988) at p.344.

(*Values*) and a *Code of Conduct (Code)*.⁸ Together, these instruments establish a specific, legally-enforceable (i.e., mandatory) structure reflecting the expectations placed upon APS officers as regards their conduct according to specified criteria, such as *honesty, integrity, and impartiality*.

Pursuant to Section 44 of the *Public Service Act 1999* (PS Act), the Commissioner must produce a report annually which sets out the so-called “state” of the APS in terms of its compliance with its ethical objectives, among other things. Since the inception of the reporting requirement in 1999, the Commissioner has reported largely negligible levels of misconduct, describing such incidents in 2008, for example, as “overwhelmingly characterised by acts of individual poor judgment rather than systemic misbehaviour, maladministration or corruption.”⁹ As a means of regulating ethical conduct, the *Values* and the *Code* - and like statutory devices in like institutions - have been criticized for being internally inconsistent¹⁰ and open to manipulation.¹¹ But, in addition to that, the admirable report card reflected in the positive *State of the Service* reports is challenged by seemingly myriad, equally routine reports, to Parliament and also by the media, of extensive partial or corrupt conduct, including bullying and other forms of misconduct, throughout the APS. These conflicting narratives provide an initial basis for enquiry as to the efficacy of the system itself, as the extant basis for regulating ethical conduct in the APS. But a particular point of interest arises at the nexus connecting the claim that virtue constitutes the basis upon which APS officers’ strict compliance with the *Values* and the *Code* might be expected, on the one hand, and

⁸ Sections 10, 13, *Public Service Act 1999* (Cth)

⁹ Public Service Commissioner, *State of the Service Report, State of the Service Series 2008-9*, (Canberra, 2009) at p.177; see text associated with note 89, chapter 4.

¹⁰ Wanna, J. (2005) “Public Service, Public Values: The Implementation of a Charter of Values in the Australian Public Service”, at p.11.

¹¹ see Langford, J. (2004) “Acting on Values – An Ethical Dead End for Public Servants” in 47(4) *Canadian Public Administration*, 429 at p.439.

the fact of the *obligatory* nature of these statutory obligations, on the other – to be sure, the system is not an aspirational system by design; officers who do not comply with the *Values* and the *Code* are necessarily breaking the law. The point at which these two issues intersect throws up a range of theoretical indeterminacies and bases for challenge, which provide the opportunity for a thorough-going interrogation of the fundamental theoretical rationale – or lack thereof - behind the use of the *Values* and the *Code* as devices intended to obligate compliance in public sector environments.

This nexus, of *mandatory* statutory obligations that are owed by APS officers on the one hand, along with certain claims to the effect that the compliance of public officers with their ethical obligations is essentially “down to virtue” on the other, constitutes the crucial lens through which the focus of this thesis is determined. Out of this nexus, a unique tension is established by operation of a third ingredient in the form of essentially invariable claims, made by consecutive APS Commissioners in annual *State of the Service* reports, to the effect that, year-in and year-out, APS officers engage, in fact, in no more than negligible levels of misconduct. Importantly, for the purposes of the legislation, *misconduct* arises in respect of the occurrence of *any* breach of the *Values* or the *Code*. Given the vagaries of the human condition, what such a result must mean, insofar as the dispositional quality of virtue is concerned, becomes a primary point of investigation for the purposes of this thesis, because of the published views of those commentators¹² who contend that the compliance of public servants with their ethical obligations is indeed a matter of virtue. It is these claims that constitute the platform from which

¹² The examples used for the purposes of this thesis are Michael Pusey, Michael Macaulay and Alan Lawton, and Ralph Heintzman; see text associated with notes 68 – 71 & *ff*, Chapter 4.

this thesis steps off: that a public officer's compliance with promulgated ethical obligations is (essentially) *down to virtue*. References to this phrase or similar throughout this thesis are intended to be read as deriving directly from these claims, which assert the place of virtue in a public officer's compliance with promulgated ethical obligations but which, at the same time, provide no historical analyses for why virtue should be seen as the underpinning mechanism of a code of mandatory public sector ethics. Much of the official and public narratives of and about the performance of APS officers happen to be couched in terms arguably tantamount to virtue, using, as they do, superlatives such as *excellence*, as well as frequent references describing an apparently unwavering practical dedication to the *public good* on the part of APS officers generally.

That consecutive APS Commissioners report that departures of APS officers from their mandatory statutory obligations are 'negligible' in their incidence, whilst, in their statutory form, those obligations are arguably expressed, at least in certain respects, in virtue-like terms, such as is the case with the statutory obligation of *honesty* (i.e., truth-telling; albeit loosely speaking from an Aristotelian standpoint), provides one of the analytical foci of this thesis. From a statutory interpretation standpoint, the legislation casts the obligation of honesty (to take that example) in terms which are unmitigated, in that no concession is made for potential gradations of deceit (e.g., so-called *white lies*, etc.) which might bear upon the quality of truthfulness that is ostensibly expected. The obligation on the face of the legislation is, as a result, very high. Given that deceit is a normative and pervasive function of human life (i.e., *not* nominally deviant) the obligation of unmitigated honesty (for example) arguably becomes impossible. As a means of problematizing these issues in order to facilitate the analysis, the thesis investigates a counterpoint claim to the

one made by consecutive APS Commissioners, *to wit*, that there exists an apparently interminable raft of reported incidents of misconduct on the part of APS officers, evident in myriad news reports and parliamentary enquiries and other investigations. The aggregation of all of these alleged instances of misconduct apparently do not make it into the data relied upon each year by APS Commissioners in their reports of exemplary compliance with the *Values* and the *Code* for the purposes of the *State of the Service* reports.

A second crucial analytical perspective is provided by the views of Gertrude Anscombe and Alasdair MacIntyre (to be summarized in more detail later in this introduction) in which they opine against the decline of virtue in modernity and its resulting appropriation of an interpretation of so-called virtue which is fragmentary, incomplete, and incoherent. The term MacIntyre uses to describe the effects of this phenomenon is *emotivism*. Whilst, for the purposes of this thesis, MacIntyre and Anscombe's contentions are intended to provide a particular analytical lens by which to investigate and problematize the APS system for regulating ethical conduct in its officers, it is not the intention that the thesis should interrogate the theories of MacIntyre and Anscombe in their own right. Given that their theories are well established (if, in some senses, controversial) their use is intended to do no more than provide one means for interrogating the APS ethics regulation system, as described. Another point of significance for this thesis, regarding Anscombe and MacIntyre, arises from their advocacy for utilizing the lenses of theoretical disciplines other than that of philosophy for the purposes of investigating issues of applied virtue ethics in modernity. Anscombe's contention, that considerations of virtue ethics should be "laid aside" until an adequate "philosophy of psychology" is made available, arguably contemplates the centrality of the modernist construction of the human *self* – and, in particular,

its interiority - in any contemporary critique of virtue ethics. Similarly, MacIntyre's assertion that philosophical accounts of the role of virtue in bringing modernity back from calamity must necessarily incorporate history, anthropology, and sociology (and psychology) in order to be valid and effective, makes a number of theoretical perspectives from outside of the world of armchair philosophy not simply alternative bases of critique for the purposes of the thesis, but, indeed, a part of MacIntyre's story of emotivism. As an example, MacIntyre puts significant reliance upon an interrogation of Erving Goffman's concept of *presentation of self* in his analysis of the place of virtue in modernity. Whilst MacIntyre criticizes Goffman's proposed solutions, he nonetheless acknowledges Goffman's sociology and its place in his own theoretical argument. These modern-day academic perspectives on the intersection of concepts of virtue with their application in the modern human world (specifically, the disciplines of psychology and sociology are used for the purposes of Part III of this thesis), rather than constituting a strict analytical process, can and should be seen as a part of the story of MacIntyre's so-termed emotivism, whilst at the same time providing problematizing leverage for the thesis.

So the thesis is an investigation of certain theoretical considerations which bear upon assumptions that must necessarily underlie claims which affirm the efficacy of the "*values-based*" ethics regulation system operated by the APS. Normative propositions that identify virtue, human character, or dispositions to behave, as determinatively contingent factors in public officials' compliance with their statutory ethics obligations serve as an entry-point for the investigation. The concept of virtue has long been associated with the politico-philosophical development of ideas of social order, from Plato's conception of the tripartite soul, to Lockean ideas of the *public good*. And it is a contention of this thesis that the promulgated values of

honesty, integrity, and impartiality, made mandatory by operation of their statutory form, arguably constitute, nonetheless, archetypal virtues, in terms of the standard of *excellence* purportedly demanded of APS officers. Conventionally understood, virtue describes normatively-distributed dispositions to behave which inhere in an individual. But, quite apart from that, virtue can be seen to be represented, in methodological terms, by a kind of trajectory marked-out by developing systems of social order, from the polis, to modern systems of liberal-democratic governance.

The thesis is fundamentally an investigation in applied philosophy, and so it is appropriate that its investigations should transcend the traditional boundaries of armchair philosophy. The questions which arise through the course of the thesis spring from the intersections of theoretical conceptions of social order with shifting ideas of human motivation and the human so-called *self*, and the long-lived problematic of the human condition seen in the uncertain tensions between passion and reason. A primary contention of MacIntyre and Anscombe (and of many eminent theorists) is that the loss of the transcendental core, which they argue characterized pre-Enlightenment social morality, rendered modernity bereft of any unifying quality which could sustain a coherent morality in contemporary times. But whilst the thesis gives much of its time to addressing the politico-philosophical shifts which are argued to have occurred in the profound transition from pre-Enlightenment conditions to those of modernity, it is not an argument put by the thesis that this shift involved a wholesale abandonment of ‘transcendentalism’ howsoever conceived. The Thomist conception of it, which is the focus of MacIntyre in *After Virtue*, is but one mode of resort to transcendental justifications that have been relied upon through the ages to argue the moral necessity for a particular kind of social order. Plato’s tripartite soul constituted

a transcendental justification for the institution of so-called philosopher-kings as the benevolent rulers of society. The divine right of a king as the terrestrial representative of God was another. But in post-Enlightenment Britain, the *character* which, it was argued, necessarily attached to certain sections of society in Britain's highly stratified social order, similarly operated as a mechanism by which those who had it were seen to transcend the pedestrian passions that commonly characterized those who populated the lower classes. And, in contemporary times, the actualized *self* in the world of personality psychology says much to us about that person's purported ability to transcend the ignorance, neuroticism, indecisiveness, unreliability and instability that afflicts large segments of those who populate modern society. It is debatable that post-Enlightenment *character*, or *self-actualization*, amounts to anything much more than the narratives that individuals purport to adopt for themselves for the benefits such a characterization brings to the beneficiary. But, as with pre-Enlightenment devices of transcendentalism, these post-Enlightenment mechanisms perform a similar role in distancing the holder from those components of the human condition – traditionally known as the *passions* – which operate to diminish one's virtue in the context of the social order. The thesis is not concerned to evaluate the epistemological premises to these respective claims to transcendentalism (or, some transcendental mechanism), nor to consider their comparative ontologies. It is enough, for the purposes of the thesis, to recognize that these various examples played a role at various stages in the evolution of conceptions of social order, and in respect of the place of the *self* within those respective orders.

In brief (and to be elaborated upon in the following introductions for each Part), Part I of the thesis follows and critiques three separate but philosophically and politically concordant arcs of

virtue as it evolved in the development of systems of social order. In addition to briefly critiquing the systems by which governors have traditionally sought to secure the loyalty of their officers, Part II evaluates the APS ethics system against the background of mutually incompatible and conflicting narratives regarding the level of compliance exhibited by APS officers with their mandatory ethical obligations. Part III critiques the claim that a public officer's compliance with a promissory obligation is down to virtue against challenges brought to bear by the evolving disciplines of psychology (i.e., situationism) and sociology (i.e., interactionism).

PART I – THREE TRAJECTORIES OF VIRTUE

Introduction

Part I tracks three separate but philosophically connected *arcs* of virtue; separated in history, but constitutive of discrete accounts in the development of conceptions of virtue in the context of evolving systems of social order, each of which resonate with the culmination of liberal-democratic systems of government.

Chapter 1 critiques the profound transformation of virtue, from its early Homeric construction as a publicly available account of human (usually, *martial*) excellence, confirmed solely in observed *action*, to Plato's reconstitution of it as an essentially private *quality* inhering within an actor as dispositions to excellence. Virtue's trajectory, in this context, is considered as a function of evolving philosophies and systems of social order. Thucydides' account of justice (a non-virtue in Homeric times) – i.e., that the basis of social order is that which must be determined by the advantage of the stronger – arguably constitutes a *first step* in the evolution of accounts of social order grounded in moral philosophy. Plato, for whom virtue *is* knowledge, conceived of a tripartite soul, in which the highest part – *reason* – was the preserve of the aristocracy, who therefore must take the place of philosopher-kings in society. Aristotle's later reliance upon his account of dispositional virtue, in similarly justifying a politics based on stratified and class-based social order, in which he conceived of the *aristoi* as 'the best,' marks a culmination in virtue's trajectory in this sense, at least, so far as the world of ancient Greece is concerned. The genesis-of-interest to be noted here is the inception of philosophical accounts of a presumptive autonomous individual, given shape through Plato's reconstitution of *justice-as-virtue*. It is this

phenomenon which connects that arc in the development of virtue's place in conceptions of social order, as is considered in Chapter 1, with those separate but intersecting trajectories of virtue considered in the remaining chapters in Part I.

Another point of significance is that Chapter 1 sets the groundwork for later chapters, in its consideration of the fundamental reliance upon mythology that is evident in the philosophical development of those nascent theoretical structures connecting virtue with early systems of social order and governance. Myths provided a politico-philosophical substrate, imbued with transcendentalist justifications, upon which modernism would ultimately construct its social and political philosophies. But modernism, and the rise of the Enlightenment, saw a rejection of such transcendentalist justifications, in favour of science and a comparatively Socratic orientation to so-called knowledge. Nonetheless, vestiges of these transcendentalist foundation stones have been argued, by authors such as Gertrude Anscombe and Alasdair MacIntyre, to remain in the modern world only in fragmentary form. Chapter 2, for example, investigates the teleological origins of Scholastic treatments of contract, and the displacement of humanist justifications supporting those doctrines, that came with the advent of the Enlightenment. The resulting developments, evident in the rise of so-called '*will* theories of contract,' had profound implications for developing liberal conceptions of a social contract, and the place of an increasingly autonomous citizen within that rubric. Another example, addressed in Chapter 3 and considered briefly in Chapter 4, is that of the place of oaths, as a mechanism for the instantiation of a *promissory obligation* in our modern public institutions. Oaths originally comprised a self-curse to be put into effect at the pleasure of the gods in the event the oath is breached. It is through such mechanisms that, for thousands of years, kings and governors have attempted to

ensure allegiance to them and compliance with their directives. Such beliefs in curses have passed into history, but oaths remain, although their actual effect, beyond the word of the oath-taker, is a matter of dispute. Consideration of oaths, and like subjects, provide an introduction into a critique of the place and function of myth as an enduring feature of social arrangements and political authority in modernity, and particularly as regards the regulation of ethics in the APS. These matters are considered against the background of the variously-named *crisis of modernity* or *crisis of authority*, generally described as the decline of transcendental justifications used to support prevailing models of social arrangement and morality in modern liberal-democratic societies.

Chapter 2 introduces the intersecting theses, respectively, of Anscombe and MacIntyre, *viz*: that this *crisis* is constituted by a catastrophic decline of virtue ethics, commencing roughly around the time of the turn of the twentieth-century. The retention of the language of virtue, denuded of its teleological substance, constituted, for Anscombe, “remnants of a vocabulary that has lost its coherence.” The crisis, from her standpoint, as well as from that of MacIntyre, is very much a crisis which sits at the core of liberal-democratic institutions and Western society generally. The chapter critiques the place of virtue in the development of liberal-democratic conceptions of social order and the rise of the individual as an autonomous volitional agent, and it does so – as mentioned – through the lens of the evolution of theories of contract. As is the case with conceptions of virtue as a *quality* which inheres in an individual, the very idea of *contract* presupposes autonomous actors – or, ‘parties’ – who, in the case of a contract, enter into a legally-enforceable arrangement of some description, constituting a ‘meeting of the minds.’ In conceptual terms, any idea of a *social* contract is contingent upon the ontological configurations

that the notion of contract – as an organizing principle - was able to bring to *liberal* conceptions of social order, at the centre of which stood the *individual*. Victoria Kahn argues that concepts of contract – and the *elements* of contract, such as that of *interest* - came to infiltrate the social world beyond kings and noblemen, and re-framed ideas of *self* that commoners could hold for themselves, during the crucial contest for supremacy between the King and the Parliament in seventeenth-century England. As is addressed in Chapter 3, commoners' subjective ideas of their relationship with those by whom they were governed were profoundly redefined by this contest, in bringing forth the possibility that such arrangements could legitimately be the result of an exercise (collectively) of their own volition. And the issue of volition, itself, intersected significantly with notions of voluntarism and determinism which attended evolving Christian conceptions of individual responsibility for sin in the face of an all-powerful God; a God, who could do no evil.

The susceptibility of notions of responsibility to the arbitrary exercise of *responsibilization-through-attribution* by the king (or the king's officers), would come to be a significant factor in the connection of evolving ideas of the *individual* with developing ideas of freedom, in the form of the rise of the juridical concept of *habeas corpus*. Those freedoms, originally brokered by noblemen, for noblemen, and enshrined in the *Magna Carta*, would come to be generalized in legislative form – i.e., from '*freemen*' to '*men*' – in the fourteenth-century. Upon his ascension to the Crown in 1688, William of Orange had spoken, radically, of "the Liberties and Properties of the Subject," which now extended into positive forms of liberty, or, as the deposed and subsequently executed King Charles I might have considered it, 'a share in government.' The intersection of these nascent ideas of freedom, with the recognition by Enlightenment thinkers

of natural law sources of 'rights,' paved the way to the promulgation of the Bill of Rights in 1688, and the *Succession Act* 1701. Increasingly-contractual forms of social connection – at a conceptual level – and the contest between King and Parliament, made possible the idea of *consent* as the basis for government. And the radical nature of these changes subsequently came to be found more generally in society. Oaths of allegiance, the use of which had been widespread, came to compete with conceptions of the King's *mutual* obligations *vis-à-vis* the kingdom's subjects; an idea given philosophical credence in Locke's own argument that, in the face of *law's* place as the rightful mediating mechanism in such arrangements, State Oaths now constituted a public enactment of consent to *lawful* rule. Soon, as J. G. A. Pocock observes of the ensuing political landscape following the Glorious Revolution, citizens came to be defined no longer by their *virtue*, but "by their rights to and in things." Whereas principles of casuistry had presided over the determination of a subject's virtue (as Langston notes, as a function of their *internal* state) through the middle-ages, from soon after the Glorious Revolution, virtue as an organizing principle of social morality fell into abeyance.

Theoretical conceptions of the citizen within the notional frame of liberal-democracy had, in any event, been unable to move persuasively beyond irreconcilable accounts of how citizens form and retain their virtuous character; republicanism and liberalism each relying upon divergent assumptions regarding the place and role of the human condition. Chapter 3, in critiquing the decline of virtue from the time of the Glorious Revolution, charts the progression of ideas of social morality as modernising arrangements of social order came gradually to consolidate under the umbrella of evolving institutions of liberal-democracy. In the evolving secular and rationalist mood which characterized Enlightenment thinking at the dawn of the nineteenth-century,

conceptions of social morality came to centre on justifications that could be found within the individual, so that the external *telos* came ultimately to be replaced by the problematic conception of free-will. The social phenomenon of *politeness*, which had attended the rising insecurity of the ranks of the lower aristocracy in the years following the Glorious Revolution as a deliberate means of shoring-up their declining position in the social hierarchy, was, for a time, considered to be the marker of individual capacity, where, once, that marker had been virtue. But, in the nineteenth-century, politeness - which, in some quarters had been seen as a function of liberty - would come to be displaced by 'manly' *character* as the widely recognized marker of social excellence in English society. As had been the case with Platonic and Aristotelian conceptions of virtue, these new forms of social marker sought to legitimize ideas of social order that privileged justifications and assumptions which mirrored England's existing social structures, stratified – as they were - along the lines of power, privilege, and wealth.

The sheer momentum of social change in nineteenth-century England comprised synergies of a truly transformative nature.¹ The idea that government carried a responsibility for social welfare, and the connection of the Parliament's role, as a legislature, with the implementation of social programs, accelerated the urgency to refine workable structures that could facilitate these evolving expectations. Long standing arrangements which benefited elite society through privileged access to state structures and benefits, including sinecures, patronage, pensions, and rewards and government contracts - the so-called *Old Corruption* - came significantly under challenge, following the disastrous consequences of England's military and civil

¹ The issues addressed in the remainder of this Introduction are addressed and referenced in detail at pages 155 – 174 inclusive.

maladministration of the Crimean War in 1854-5. An evolving demarcation, between political office and that of civil administrators, led eventually to the creation of the dedicated British Civil Service, notionally borne of the principles proposed in the famous 'Northcote-Trevelyan Report' of 1854. Those principles comprised selection through examination and promotion on merit. It was only later that the principles of impartiality and anonymity - seen as constitutive of the Westminster precepts of public administration – would be included. The social contrivance of Victorian *character* was argued to be crucial to the success of the new Civil Service, although there was some disagreement as to which social quarters provided the best bases for recruitment of these types of men. The credibility that could be marshalled by the fast-developing sciences afforded the secular nineteenth-century conception of character with an efficacy that could stand independently of pre-Enlightenment transcendental justifications of virtue. However, Victorian character was also inescapably structurally imbued with incidents of social stratification such as birth, wealth, and education. Trevelyan, himself, anticipated that recruitment to the Civil Service would be largely restricted to the populations of Oxford and Cambridge Universities, a cohort he expressly referred to as “aristocratic” and *οι ἀριστοι* [i.e., *the best*].

And, so, from the standpoint of this Victorian lens, the impartial public officer represented a man of fearless and independent nature, who exercised prudence and good judgment as representative incidents of his intelligence and his free-will. These qualities distinguished him from those who were not so-equipped and marked out his inherent capacity to perform his duties of impartiality and anonymity, with honesty, and in the public good.

CHAPTER 1 – THE INTERNALIZATION OF VIRTUE: EMANCIPATING THE INDIVIDUAL

Virtue in pre-classical and classical Greece: myth and the ‘struggle for order’

It is often claimed¹ that the design of liberal-democratic systems of governance relies implicitly upon public officials whose conduct is somehow guided by those qualities of character known broadly as *virtue*. On its face, such a claim would not appear to be too misplaced. Indeed, it is relatively easy to identify immediate connections between *virtue* as a theoretical construct and the generally-accepted theoretical sources of – or inspirations for – the liberal-democratic project. It is a commonly accepted view that in classical Greek and medieval periods, Aristotelian virtue – or the promotion of human excellence – was generally held to be the ultimate aim of politics;² as Kevin Morrell observes,

[v]irtue ethics can be traced at least as far back as Plato and Aristotle and the 5th century BCE. Two of their most famous works (*Republic* and *Politics* respectively) also address the most suitable ways in which society should be organized.³

To be sure, and notwithstanding that neither was an enthusiastic proponent of democracy, the respective contributions of Plato and Aristotle represent a watershed in the evolutionary trajectory of the historical concept of virtue; and arguably they represent the germination of *philosophical* virtue. But historically speaking, the inception of virtue well precedes classical Greece. Despite that thinkers of the classical period of ancient Greek history are commonly regarded as the constitutive point of genesis for so much of our political theory and moral and

¹ See text associated with notes 68-71 inclusive, Chapter 4.

² Berkowitz, P. (1999) *Virtue and the Making of Modern Liberalism*, at p.4.

³ Morrell, K. (2009) “Governance and the Public Good” in 87(3) *Public Administration* 538, at p.546.

political philosophy, simply to trace the concept of virtue to Aristotle, or, for that matter, Plato, would be critically inadequate. As is observed by Robin Osborn, “[it would be]...absurd to pretend the buck stops dead in classical Greece.”⁴ Important contextual clues which bear upon the veracity of claims regarding the role of virtue in modern liberal-democratic contexts may be illuminated by a broader consideration of virtue’s contextual development.

Generally speaking, the political history of ancient Greece is usually categorized temporally through five consecutive periods: the Mycenaean Palace Age from 1700BC to 1200BC; the Dark Age from 1200BC to 800BC; the Archaic Age from the time of the first Olympiad in 776BC to 492 BC; the Classical Age from the defeat of the Persians to Alexander the Great’s conquest of Greece in 323 BC; and finally, the Hellenistic Period from about 320BC to the rise of Rome over Greece during the second century AD.⁵ For the purposes of this inquiry, it would serve no point to forensically track the chronological evolution of historic conceptions of virtue back through pre-literate societies in ancient Greece and the Near East. But it is, nonetheless, useful to acknowledge aspects of this evolution which are shown in the historic record and that meaningfully bear upon the development of ideas of virtue in the classical period. So, for example, Homer’s often-mythical accounts of virtue considered noble birth to have been a necessary if not determinative factor in a man’s *arête* (excellence), which was consistent with the Homeric approach that saw that all culture starts with the creation of an aristocratic ideal, shaped by the deliberate cultivation of the qualities appropriate to a nobleman and a hero.⁶ As is noted

⁴ Osborne, R. (2009) *Greece in the Making, 1200-479 BC - 2nd Edition* at p.2.

⁵ See generally, Bryant, J. (1996) *Moral Codes and Social Structure in Ancient Greece: A Sociology of Greek Ethics from Homer to the Epicureans and Stoics*.

⁶ Jaeger, W. (1946) *Paideia: The Ideals of Greek Culture Volume 1*, at p.5

by Werner Jaeger, *arête* may describe not only human merit, but also the excellence of non-human things, such as the power of the gods, or the speed of noble horses; “But...[he notes]...ordinary men have no *arête*....[a]rete is the real attribute of the nobleman.”⁷ Equally, its concomitant - relative wealth - “...was an absolute requisite for the good life.”⁸ This conception would be challenged by Hesiod’s identification of virtue with physical labour,⁹ which has been said to have turned notions of an exclusively aristocratic virtue “on its head” in challenging the fundamental notion that virtue belonged exclusively to the aristocracy.¹⁰ These are theoretically and contextually significant predicates to the development of ideas about virtue, particularly those of Plato. Arthur Adkins describes the Homeric myths as disparate and confusing, and Plato’s own mythology – which is “...of the utmost importance to [his] own world-view” – as a nobler conception in which infallible gods dispense reward and punishment in an *Afterlife*;¹¹ a wholly-new conception in ancient Greek mythology. Homeric references to an afterlife, such as they were, did not distinguish between the fate of souls on the basis of virtue and wickedness.¹² Plato, on the other hand, says Carus, taught the doctrine of the last judgment in *Phædo* and *Gorgias*.¹³ But, by itself, Plato’s mythology – at least, to this extent - was inadequate, for by the time of classical Greece, belief in the power of the gods to intervene in and affect people’s lives was much diminished.¹⁴

⁷ *Id.*

⁸ Finley, M. (1973) *The Ancient Economy*, at p.36.

⁹ See Adkins, A. (1960) *Merit and Responsibility*, at p.72; Jaeger, W. (1946) at p.57.

¹⁰ Braun, M. (2002) *Sovereignty, Democracy, and the Political Economy of Logos: A Defense of Antagonistic Rhetoric*, at p.44.

¹¹ Adkins, A. (1960) at p.148.

¹² Dover, K. (1974) *Greek Popular Morality in the Time of Plato and Aristotle*, at p.262; but cf. p.263.

¹³ Carus, P. (Ed.)(1898) “The Greek Idea of Salvation” in *The Open Court* (November) 675 at pp.686-7.

¹⁴ Adkins, A. (1960) at p.148.

Through the historical periods which preceded the classical period in ancient Greece, what Eric Voegelin has referred to as a “struggle for order”¹⁵ was a conceptual reality before it was a societal reality, as is evidenced, arguably, in Finley’s account of Hesiod’s *Theogony*, and the so-called ‘Homeric Hymns,’ which, he states,

tried to introduce some measure of order into the chaotic mass of myths – in itself an impressively new kind of activity and a new conception – and thereby they linked the myths directly and systematically to the rituals and ceremonials which ruled their own lives.¹⁶

The susceptibility of ancient communities to mystical beliefs in the management of their domestic and political arrangements cannot so easily be dismissed as an irrational artefact of a long-past age; certainly not in the face of the modern persistence of rituals, such as the bringing of a self-curse in the form of an oath taken - hand raised or otherwise placed upon the holy book (or both) - upon our admission into modern elite professions, or in the giving of sworn testimony in modern courts. In ancient times, supernatural and otherwise fantastical beliefs were deeply connected with historical efforts to articulate rationales for individual conduct and social and political arrangements in human communities. It was in this vein that Plato conceived of a cosmic *order* in terms of the very creation of the sun and planets complete with their measurable and predictable orbits, deliberately casting those phenomena in such a manner as to have direct relevance for human virtue. Plato describes the cosmos as an intelligent living being with a soul,¹⁷

¹⁵ See text associated with notes 187, 216-230, this chapter.

¹⁶ Finley, M. (1963) *The Ancient Greeks*, at p.30.

¹⁷ Archer-Hind, R. (1888) *The Timaeus of Plato*, 30b at p.92ff.

the result of an act of creation at the hands of a good and beneficent, and *paramount*, demiurge. In the *Timaeus*, Plato describes¹⁸ the demiurge as one comprising a *goodness* which is constitutive of all of his remaining characteristics, and which also explains his motivation for all of his works to be good.¹⁹ This, according to Taylor, constitutes the “one single organizing principle” for everything in the eyes of Plato, and the ultimate of his philosophical convictions; one he inherited from Socrates.²⁰ It is, in the eyes of Plato, the basis necessary for the establishment of a well-governed polis, according to Jonathon Lear, and the reason, therefore, why Plato believed there should be a prohibition upon the suggestion, by poets and the like, that God could be the cause of anything bad.²¹ The demonstrable, well-ordered things in the cosmos, the harmony of the mathematical proportions manifested in the movement of the stars, illuminated the truth of a controlling higher order through the model of absolute certain knowledge provided by mathematics.²²

David Runia notes that Plato’s concept of a *single* creator of the universe would later be adopted by Philo, a Hellenistic Jewish philosopher born in 25 B.C., who is credited as “...the first thinker to associate the goodness of Plato’s demiurge with the Judaeo-Christian conception of God the creator, an event of enormous significance in the history of ideas.”²³ As Russell observes, for the three-part soul in Plato’s *Timaeus*, mastery of the soul constitutes justice and happiness. The “motion” of the human soul emulates, to a greater or lesser degree, that of the universe and its

¹⁸ Archer-Hind, R. (1888) 29a at p.88.

¹⁹ *Ibid.* at 30a.

²⁰ Taylor, A. (1929) *A Commentary on Plato’s Timaeus*, at p.85.

²¹ Lear, J. “Inside and Outside the *Republic*” in Wagner, E. (Ed.) (2001) *Essays on Plato’s Psychology*, at p.171; see Plato. (2014) *The Republic*, 386a, 424e.

²² Burkert, W. (1985) *Greek Religion: Archaic and Classical*, at pp.322, 328.

²³ Runia, D. (1986) *Philo of Alexandria and The Timaeus of Plato*, at p.135

orbiting planets, which is achieved under the leadership of reason (which is equivalent to justice), and which constitutes - in its success - the reconciliation of one's inner motions by reason. He states, we therefore "stabilize the straying revolution within ourselves by imitating the completely unstraying revolutions of god."²⁴ Walter Burkert says "[n]ever before had gods been presented in such manifest clarity" in noting that Plato's enormous impact was no surprise, given he offered so much that was evident and intuitive.²⁵

More generally, in the case of ancient peoples, beliefs about society and social order were intimately bound-up with a blurring of the distinction between myth and history,²⁶ as that distinction might be understood from a modern standpoint. Pre-literate societies perceived their whole world through myths, conveyed through their oral traditions. In his study of the peoples of Homeric Greece, biblical Israel, and Old Babylonian Mesopotamia, Launderville notes, for example, that the resources of metaphor, symbol, and narrative, were heavily relied upon to assist peoples of those worlds to come to terms with their histories and environments, so to help make their worlds inhabitable.²⁷ In the absence of the sorts of epistemological resources that would arise with the founding of philosophical thought, the resort to myth in order to understand earthly phenomena revealed the fundamentally-human drive to comprehend and provide answers for the otherwise unknowable. Even in the case of Neanderthals, who existed up to a quarter of a million years ago, and who are believed to have gone extinct approximately 40,000

²⁴ Russell, D. (2004) "Virtue as a 'Likeness to God' in Plato and Seneca" in 42(3) *Journal of The History of Philosophy* 241 at p.243.

²⁵ Burkert, W. (1985) at p.328.

²⁶ See Edmunds, L. (Ed.) (1990) *Approaches to Greek Myth*, at p.91.

²⁷ Launderville, D. (2003) *Piety and Politics: The Dynamics of Royal Authority in Homeric Greece, Biblical Israel, and Old Babylonian Mesopotamia*, at p.30.

years ago, Armstrong observes that evidence from their graves shows that when they became conscious of their mortality, they created some sort of counter-narrative that enabled them to come to terms with their impending, inevitable, mortal end.²⁸ The desire to explain events in the natural world and their impact on one's life inspired a search for answers. In reflecting on their mortality, people also wanted to know where they would go after their mortal life ceased.²⁹ The confronting realities of "human finitude," revealed in the universal human vulnerability to disease, war, famine and death, were rationalized through the medium of comparison between human life and divine life; and the associated limitations for human freedom and possibilities "...was most often expressed through the interaction of humans with God or the gods."³⁰ Karl Reinhardt notes that comparisons of human life with divine life accounted for the primary means by which ancient peoples conceived of the limits of human life.³¹

Humans did not *randomly* conceive of and adopt supernatural phenomena - brought to life and given character in myths and metaphor - in order to explain their world. Launderville notes that the indispensable and constitutive capacity of language to facilitate the communion that individuals experience with other humans always played a vital role in the 'creation' of human reality before humans had ever, themselves, conceived of the possibility that they could ever *will* anything.³² To this end, the resonance of myths could not be explained by anything to do with their creation, as such. Elucidating this point, Burkert argues that a tale "becomes traditional"

²⁸ Armstrong, K. (2005) *A Short History of Myth*, at p.1.

²⁹ *Ibid.* at p.6.

³⁰ *Ibid.* at p.1.

³¹ Reinhardt, K. "The Adventures in the *Odyssey*" in Schein, S. (Ed.) (1996) *Reading the Odyssey: Selected Interpretive Essays*, at p.64.

³² Launderville, D. (2003) at p.26.

not by being created, but by being retold and accepted.³³ But in their attempts to explain the world around them, even the most literal statements of those inhabiting ancient communities about, say, inanimate objects, could only *approximate* the reality of such objects.³⁴ Armstrong explains this by the example of the sky. In speaking of those who lived during the Paleolithic period, she states,

The sky towered above them, inconceivably immense, inaccessible and eternal. It was the very essence of transcendence and otherness. Human beings could do nothing to affect it. The endless drama of its thunderbolts, eclipses, storms, sunsets, rainbows and meteors spoke of another endlessly active dimension which had a dynamic life of its own. Contemplating the sky filled people with dread and delight, with awe and fear...the sky was *mysterium tremendum, terribile et fascinans*.³⁵

From pre-literate times, humans relied on oral traditions of storytelling to convey interpretations of worldly events and natural phenomena. As Armstrong contends, “[m]yth is about the unknown; it is about that for which initially we have no words.”³⁶ Frye observes that in early societies, the delineation of subject and object was often neither clear nor consistent.³⁷ Armstrong states that, initially, there was no ontological gulf between the respective worlds of gods on the one hand, and of men and women on the other. Gods were not seen as entirely metaphysically separate; gods, humans, animals and nature were inextricably bound up together,

³³ Burkert, W. (1979) *Structure and History in Greek Mythology and Ritual*, at p.2.

³⁴ *Id.*

³⁵ Armstrong, K. (2005) at pp.17-8.

³⁶ *Ibid.* at p.4.

³⁷ Frye, N. “Identity and Metaphor” in Dolzani (Ed.)(2008) *Words With Power: Being a Second Study of ‘The Bible and Literature’*, at p.75.

made up of the same “divine substance” and subject to the same laws.³⁸ Indeed, the readily recognized modern delineation between the class of traditional, non-factual stories: *mýthos*, with that of assemblages of verifiable facts: *lógos*,³⁹ did not exist in the time of Homer. As is evidenced in Achilles’ father’s instructions to Phoinix in Homer’s *Iliad*, notes Dowden, the twin competences of the Homeric hero were to kill efficiently and to persuade through impressive *mythoi*;⁴⁰ these were the primary virtues. And *mythoi* were not necessarily false; the utterance of one’s “*mytheisthai*” could constitute one’s testimony as to the truth of something.⁴¹ Dowden explains that it was only from the mid-6th century BC with the development of prose, that the term *lógos* came into being, ultimately pushing back the frontiers of *mýthos*.⁴² The term *mýthos* came to be applied largely to fiction, and whereas the predominant distinction had been between *mythoi* and battle-action, it came to be – crucially - between *mythoi* and *lógos*.⁴³ There were other linguistic valences that were possible in the referent and relative positioning of “mythos.” As Lincoln observes, many Greeks found the juxtaposition of *mytheomai* to *legein* (Gr: “to speak, to say”), from which *lógos* derives, the most comprehensible and effective way to counterpose linguistically the quality of truth against that of deception; in this case, ironically, it is the pole represented by *mytheomai* that is associated with truth.⁴⁴ Lincoln refers to pre-classical *lógos* as a weapon of the weak. It marked the speech of women, the weak, the young, and the shrewd; it

³⁸ Armstrong, K. (2005) at p.5.

³⁹ Burkert, W. (1979) at p.3.

⁴⁰ Dowden, K. (1992) *The Uses of Greek Mythology*, at p.3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Lincoln, B. (1999) *Theorizing Myth: Narrative, Ideology, and Scholarship*, at p.4.

tended to be soft, and delightful, and alluring, but, says Lincoln, “[w]hile it may be heard in many places and contexts, it is absent from the battlefield and the assembly place...”⁴⁵

In ancient times, in what was, largely, an oral culture, metaphor and myth provided a means of bridging the gap between the physically observed and the otherwise unexplained and unknowable. Frye calls gods “ready-made metaphors;”⁴⁶ for metaphors are the place in which something related to human personality and something related to the natural environment may be merged.⁴⁷ And as Coleridge noted, “...all metaphors are grounded on an apparent likeness of things essentially different.”⁴⁸ Launderville argues that it is these stories upon which the traditions of Homeric Greece and the Near East were built, in which interconnecting myths came to bring together and integrate a cultural world.⁴⁹

But, for our purposes, Launderville’s larger point is that most myths are constructed by way of an imperative; they are concerned about action.⁵⁰ He states, “[a]n imperative statement that initiates action is an example of authority in action: a manifestation of authority in its purest and simplest form.”⁵¹ The possibility that myths might have operated significantly in ancient times as imperatives to action finds particular illumination from Hadot’s articulation of the Greco-Roman tradition in the “guidance of the soul” and of the importance of the “spiritual guide;”⁵² an historical phenomenon the context of which Macris describes as the “central reality of ancient

⁴⁵ *Ibid*, at p.10.

⁴⁶ Frye, N. (2008) at p.75.

⁴⁷ Frye, N. (2008) at p.75.

⁴⁸ Coleridge, S. in Rooke, B. (Ed.) (1969) *The Friend*, at p.280, cited in Donoghue, D. (2014) *Metaphor*, at p.64.

⁴⁹ Launderville, D. (2003) at p.31.

⁵⁰ *Id*.

⁵¹ *Id*.

⁵² Hadot, I. (1969) *Seneca und die Griechisch-Römische Tradition der Seelenleitung*, referred at *infra* note 53.

culture that is constituted by the dynamic relationship between master and disciple.”⁵³ Steiner argues that the concept of “Mastery and discipleship” constituted an overarching theme which can be traced to Pythagoras in particular.⁵⁴

Pythagoras’ relationship with his followers was, in the least, asymmetrical, if not hierarchical, and a result of the “exceptional” charismatic authority invested in the “master of wisdom,” according to Macris.⁵⁵ *Mýthos*, in time, would run its course with the rise of *lógos*, leading to the fourth century B.C. development of the definition of *mýthos* as a false or imaginary fabrication, which remains the dominant meaning of the word “myth” to the present day.⁵⁶ But Pythagoras’ ability to inspire and galvanize the imagination of his followers in a way that gave rise to a profound relationship of Master and disciple represents a connection which is emblematic of that legitimating claim - to which resort would be made by pretenders and sovereigns alike for much of the next two millennia - known as the *divine right of kings*. In the eyes of his disciples, Pythagoras held a position intermediate between humans and gods.⁵⁷ He was the son of the god, Apollo, immaculately conceived by his virgin mother, Parthenis.⁵⁸ In his *De Vita Pythagorica*, Iamblichus called the *acousmata* handed down by Pythagoras himself “divine teachings.”⁵⁹ Macris states,

⁵³ Macris, C. “Charismatic Authority, Spiritual Guidance, and Way of Life in the Pythagorean Tradition” in Chase, M., Clark, S., and McGhee, M. (Eds.)(2013) *Philosophy as a Way of Life: Ancients and Moderns – Essays in Honour of Pierre Hadot*, at p.57.

⁵⁴ Steiner, G. (2003) *Lessons of the Masters*, at p.9.

⁵⁵ Macris, C., at p.61.

⁵⁶ Launderville, D. (2003) at p.32.

⁵⁷ Riedweg, C. (2005) *Pythagoras: His Life, Teaching, and Influence*, at p.72.

⁵⁸ Riglioso, M. (2007) *Bearing the Holy Ones: A Study of the Cult of Divine Birth in Ancient Greece*, at p.498.

⁵⁹ *Id.*

The famous saying *autos epha* (*ipse dixit*, i.e., ‘the Master said it’) gave perfect expression to the absolute respect inspired by the presence, wisdom, and actions of Pythagoras, a respect that was transformed into genuine veneration....In these circumstances, a distance was created, a profound ‘anthropological’ gap that noticeably separated the “divine” master from the disciples who sat at his feet.⁶⁰

Certainly, the centrality to *order* of the divine relationship between kings and gods well precedes the time of Pythagoras, and even of Homer. Baines and Yoffee note, in speaking of the example of Egypt, that during the period c. 3100 – 2600 B.C., the king acquired a complex titulary which proclaimed he manifested aspects of various deities on earth.⁶¹ They go on, “[n]either the country of Egypt nor full rulership could be imagined without kingship, because the king was the sole formal intermediary with the gods.”⁶² Henri Frankfort contends in *Kingship and the Gods* that the ancient Near East considered kingship the very basis of civilization: “[o]nly savages could live without a king.”⁶³ It is the thesis of Baines and Yoffee that the evolution of the level of order and hierarchization necessary to establish a sovereign as divine intermediary in ancient Egypt and Mesopotamia is the result of processes of the legitimation of the place of elites; a place necessarily characterized by inequality.⁶⁴ Elites were “profoundly separate” from the rest of their societies,⁶⁵ and sought to use their control over cultural and symbolic resources to legitimate what were, effectively, systems of inequality, in ways that ensured their access to the surpluses

⁶⁰ Macris, C., at p.62.

⁶¹ Baines, J., & Yoffee, N. “Order, Legitimacy, and Wealth in Ancient Egypt and Mesopotamia” in Feinman, G., & Marcus, J. (1998) *Archaic States*, at p.206.

⁶² *Ibid.* at p.205.

⁶³ Frankfort, H. (1948) *Kingship and the Gods: A Study of Ancient Near Eastern Religion as the Integration of Society and Nature*, at p.3.

⁶⁴ Baines, J., & Yoffee, N., at p.234.

⁶⁵ *Ibid.*, at p.233.

generated by their societies.⁶⁶ In this vein, Werner Jaeger contends that the cultural trajectory of Ancient Greece begins in the world of Ancient Greece's aristocrats, in which an ideal of human perfection was the focus of aristocratic emulation, constituting "...nothing but an aristocratic ideal increasingly intellectualized."⁶⁷ This, indeed, was the world that would come to be inhabited by the likes of Plato and Aristotle in classical Athens, both of whom were deeply invested in their respective conceptions of what they saw to be the proper social order, not to mention their respective places in it.

Baines & Yoffee observe that the Neolithic period was characterized by varying degrees of instability, followed by an explosive period of political, economic and architectural restructuring.⁶⁸ They note that "[i]n this context of instability, and perhaps especially of the rapid process of state formation and consolidation, the issue of *order* is fundamental."⁶⁹ Richards and Van Buren argue that, in the context of ancient civilizations, whilst civic order resulted from the creation of new institutions, along with concomitant laws and legitimized coercion, worldly order, on the other hand, "...was also generated by incorporating society into a broader, more perfectly ordered cosmological whole."⁷⁰ Indeed, in its initial incarnation as was used - and some say invented⁷¹ - by Pythagoras, *kosmos* is the word ancient Greeks used for 'order.'⁷² But even in the case of the production of political and social structures, Launderville argues, metaphoric and

⁶⁶ *Ibid.*, at p.232.

⁶⁷ Jaeger, W. (1946) at p.4.

⁶⁸ Baines, J., & Yoffee, N., at p.212.

⁶⁹ *Id.*

⁷⁰ Richards, J., & Van Buren, M. *Order, Legitimacy, and Wealth in Ancient States*, at p.4.

⁷¹ Pont, G. (2004) "Philosophy and Science of Music in Ancient Greece: Predecessors of Pythagoras and Their Contribution" in 6(1) *Nexus Network Journal*, accessed at: <http://www.nexusjournal.com/filename.html> on 26 April 2016.

⁷² Cartledge, P. & Millett, P. (1998) *Kosmos: Essays in Order, Conflict and Community in Classical Athens*, at p.3.

symbolic ‘truth’ capable of prompting people to look past appearances for an intuitive truth that explained their experience and gave reason for hope was fundamental.⁷³

In terms of the consolidation of order through the establishment of societal institutions and structures, Frye observes that gods, given a basis of belief or social acceptance, constituted a stabilizing influence.⁷⁴ For example, he says, the statement “Neptune is the sea” is stabilized where there are temples to Neptune or sea voyages are commenced by prayers to him.⁷⁵ And it was the vitality of the metaphors, symbols and narratives in communicating metaphoric and symbolic ‘truth’ that was central to this process of legitimation.⁷⁶ Indeed, such was the persuasive vitality of Pythagoras’ metaphoric credentials (to take his example again) that Pont points out that the Pythagorean *living cosmos* – itself a centrally-situated legitimating pillar in Pythagoras’ contemporaneous authority – continues to capture the imagination even in modern times, as is evidenced in its rejuvenation “...in new vitalist theories including the Gaia hypothesis of James E. Lovelock...”⁷⁷ It was from Pythagoras, says Bertrand Russell, that Plato took the Orphic elements which informed his own philosophy,⁷⁸ particularly his cosmic theories. These are the myths upon which Plato would construct his theories about virtue and its legitimating role in his conception of the proper social order.

⁷³ Launderville, D. (2003) at p.10.

⁷⁴ Frye, N. (2008) at p.75.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Pont, G. (2004).

⁷⁸ Russell, B. (1947) *The History of Western Philosophy and its Connection with Political and Social Circumstances from the Earliest Times to the Present Day*, at p.126.

Platonic Virtue and its Homeric Antecedents

For Plato, the connection between virtue and politics is very direct; the state itself has its own virtue, distinct from that of its citizens. In the *Republic*, Plato's account of the polis holds that its inhabitants fall into three classes: Guardians, Auxiliaries, and the Productive class. Virtue is constituted respectively by *wisdom*, *courage*, *moderation* and *justice*, and Plato says that the completely good city has all of these.⁷⁹ But Plato's account of what he sees to be the necessary demarcation in the distribution of virtue between society's classes reveals an abjectly determinist connection between his construction of virtue and his politics. For, on Plato's account, the respective distribution of wisdom, courage, moderation and justice varies in fundamentally qualitative terms, according to which class of citizen one belongs.

Of the three classes who inhabit the city (Plato does not include slaves, women or aliens in the subject classes), it is the smallest, the Guardians, whose souls alone are governed by reason, according to Plato.⁸⁰ According to Annas, reason constitutes one of three⁸¹ parts of the Platonic soul which correspond to the three classes of inhabitants in the city;⁸² the other parts being *spirit*,⁸³ and *desire*.⁸⁴ Plato says that one or the other of these parts comprises the dominant part of the soul, respectively, in the Auxiliaries and in the Productive class.⁸⁵ Annas notes that the two main functions of the reasoning part of the soul are, firstly, to search for truth and accumulate

⁷⁹ Plato. (2014) at 427e10-11.

⁸⁰ *Ibid.*, at 428 c-d.

⁸¹ *Ibid.*, at 441a.

⁸² Annas, J. (1981) *An Introduction to Plato's Republic*, at p.125.

⁸³ *Id.*

⁸⁴ Plato. (2014) at 439d.

⁸⁵ See *Ibid.*, at 581c.

knowledge⁸⁶ – an ability enjoyed exclusively by the reasoning part of the soul – and secondly, to rule in the soul.⁸⁷ It is the capacity of the reasoning part of the soul to concern itself with the interests of the whole soul, unlike those parts of the soul governed by spirit and desire, which makes obvious, on Plato’s account, why the Guardians are best suited to the rule of the city. The Guardians are the philosophers, and it is by virtue of their reason that they are lovers of wisdom; and it is their wisdom which most suits them to good judgment⁸⁸ and the ability to plan and deliberate,⁸⁹ and which, therefore, recommends them as the most suitable rulers of the city.⁹⁰

This, of course, is Plato’s conception of the *philosopher-king*, as proposed by Socrates in his exchange with Glaucon;⁹¹ a “not too surprising solution for people who had witnessed the life and death of Socrates” according to Hannah Arendt.⁹² As Ellen Meiksins Wood describes it, “...there is no ambiguity in...[Plato’s]...belief that there is an absolute and universal hierarchy of knowledge which must be reflected in the organization of the polis.”⁹³ In terms of the trajectory of virtue’s place in the paradigm of liberal-democratic principles, the “solution” of the philosopher-king is worthy of remark for a number of reasons. In political terms, it is the practical culmination of Socrates’ claim in the *Meno*, championed by Plato, that virtue *is* knowledge; a point that distinguishes Aristotle’s conception of virtue, which Wood argues is less demanding and ordinary, by comparison.⁹⁴ Wood’s analysis differs from Annas,’ in that Wood argues that, in

⁸⁶ Annas, J. (1981) at p.125.

⁸⁷ *Ibid.*, at p.126; see Plato. (2014) at 441e, 442c.

⁸⁸ Plato. (2014) at 428b.

⁸⁹ *Ibid.*, at 428c-d

⁹⁰ *Id.*

⁹¹ *Ibid.*, at 473c-d.

⁹² Arendt, H. (1968) *Between Past and Future*, at p.114.

⁹³ Wood, E. (2008) *Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Middle Ages*, at p.59.

⁹⁴ *Ibid.*, at p.82.

a very direct sense, the doctrine of the soul serves the theory of the state in Plato's *Republic*.⁹⁵ For her, Plato's articulation of the qualities of a good soul is an elaboration of the qualities appropriate to a ruling class, as opposed to those qualities which must consign men to political subjection.⁹⁶ Wood argues that Plato's tripartite soul is only "sporadically" referred to in his work, and that he relies most substantively upon a bipartite conception comprising "better" and "worse," each condition constituted respectively by "reason" and "appetite," in progressing his argument for an essentially bipartite state comprising "ruler" and "ruled."⁹⁷ In this conception, the tripartite soul referred to by Annas is better understood as a bipartite soul constituted by the "ruler" and "ruled" parts respectively, with the putative third part in fact reflecting a second and concomitant function of the "ruler" part: *spirit*.

A second point worthy of observation, which comes out of this focus upon Plato's conception of the philosopher-king, as regards the historical and conceptual trajectory of virtue, involves the development of Plato's conception of virtue as it might be distinguished from the mythological Homeric conceptions which came before. Gerhart Niemeyer states that it was the "common property" of the Homeric myths that provided the first experience of unity for the "[f]ar-flung and politically scattered Hellenic society."⁹⁸ Given the essentially fragmentary state of the Homeric record, there remains much – and fundamental – contention about existing accounts of Homeric society. Snodgrass contends for example, in contrast to Adkins, that Homer is describing

⁹⁵ *Ibid.*, at p.71.

⁹⁶ *Id.*

⁹⁷ See *Id.*

⁹⁸ Niemeyer, G. (1959) "The Depth and Height of Political Order" in 21(3) *The Review of Politics* 588 at p.590.

a mixture of practices derived from a diversity of sources,⁹⁹ and that his picture is composite.¹⁰⁰

In any consideration of the rise of Platonic and Aristotelian conceptions of virtue and the state however, it is difficult to overstate the importance of Homer. As Richard Hunter puts it, “Homer was the ‘source’ from which all subsequent writers were irrigated, the fountainhead of both subject and style, and also the father of all later literature.”¹⁰¹ Richard Posner suggests that, even in modern times, the undiminished prestige and continued popularity of the Homeric epics suggests they are not the artifact of some primitive culture to which we could not possibly relate; that there must be considerable similarity in thought and values between Homer’s world and our own.¹⁰² Any consideration of the place of Homeric mythology, or indeed any aspect of the Homeric tradition, must account for the unsettled and contested state of that tradition.

It is certainly true that among the so-called Greeks, Homer’s literature was pervasive, and it was widely distributed. Finley notes that of all the ancient scraps and fragments of original literary works (papyri) which had been found in Egypt and published by 1963, the vast majority of the items comprised fragments from the *Odyssey* and the *Iliad*.¹⁰³ He contends that Xenophanes’ criticism of Homer two centuries prior to the appearance of Plato, viz: “Homer and Hesiod have attributed to the gods everything that is disgraceful and blameworthy among men: theft, adultery, and deceit,” illustrates his recognition of the tremendous hold Homer had on the Greeks.¹⁰⁴

⁹⁹ Snodgrass, A. (1974) “An Historical Homeric Society?” in 94 *The Journal of Hellenic Studies* 114, at p.117.

¹⁰⁰ *Ibid.*, at p.118.

¹⁰¹ Hunter, R., “Homer and Greek Literature” in Fowler, R. (Ed.) (2004) *The Cambridge Companion to Homer*, at p.235.

¹⁰² Posner, R. (1979) “The Homeric Version of the Minimal State” in 90(1) *Ethics* 27 at p.27

¹⁰³ Finley, M. (2002) *The World of Odysseus*, at p.7.

¹⁰⁴ *Ibid.*, at p.8.

According to Arthur Adkins, reputation counted for everything in Homeric society, and at the end of one's life, the chief good was to be well-spoken of, while to be badly-spoken of constituted the chief ill.¹⁰⁵ In this value-structure, concerns about one's reputation pertained entirely to the present life; any thought of a life after death amounted to "a pale unreality."¹⁰⁶ Adkins states that this was the normal attitude of the times; a "shame-culture" in which what mattered overtly was "what people say," as is clearly represented, in Adkins' example, by Eteocles' speech in the Homeric poem *Seven against Thebes*.¹⁰⁷ It is within this "politics of reputation," whose normative poles are honour and shame, that the norms, practices, and beliefs of Athenian society operated, according to Cohen.¹⁰⁸

In this Homeric world, the most powerful adjective for describing the excellence of particular human qualities was *agathos* (good), whilst for human actions the chief term of value was *kalon* (beautiful).¹⁰⁹ The determination of these superlatives was made within the prevailing value-system which recognized only the success or failure of one's actions, in Adkins' view.¹¹⁰ Homeric virtues are frequently identified as primarily *martial* virtues, and the reasons for the preoccupation of the Homeric world with them is evident in the pages of the *Iliad* and the *Odyssey*. Osborne notes that the *Iliad* explores relations between paramount chiefs in the context of exceptional forms of inter-city warfare, while the *Odyssey* examines issues of political succession in an extreme situation of political vacuum and uncertainty.¹¹¹ Atwell states that the

¹⁰⁵ Adkins, A. (1960) at p.154.

¹⁰⁶ *Ibid.* at p.155.

¹⁰⁷ *Ibid.* at pp.154-5.

¹⁰⁸ Cohen, D. (1991) *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens*, at p.189.

¹⁰⁹ Adkins, A. (1960) at pp.30-1; 179.

¹¹⁰ See *Ibid.* at p.239; but cf: Finkelberg, M. (1998) "Timē and Aretē in Homer" in 48(1) *The Classical Quarterly* 14.

¹¹¹ Osborne, R., "Homer's Society" in Fowler, R. (Ed.) (2004) *The Cambridge Companion to Homer*, at p.4.

heroic conception of *arête* (excellence) – *kalos kagathos*,¹¹² was the oldest model of virtue in the Greek culture.¹¹³ So, for example, as Theodor Tarkow notes, it is a point of current critical consensus that the famous *Poem 9* of the poet-fighter Tyrtaeus, composed sometime during the Second Messenian War at around the time of the late Seventh Century BC, places patriotic martial valour as the pre-eminent *arête*.¹¹⁴ It is in this context that it has been suggested that the heavily armed hoplites began to evolve in the eighth century BC, and that by 650BC they had emerged as the archetypal Greek fighting man and a dominant figure in Mediterranean warfare.¹¹⁵ Tyrtaeus says of them:

Fair and Good [*kalòn...agathòn*] the man who falls fighting in the front rank, dying for the fatherland.¹¹⁶

The heroic value-system of Homer is found in Book 1 of the *Iliad*, in which the prize of honour, *geras*, was granted by society to those of its members who sufficiently exhibited *arête*, which in this heroic world meant “excellence on the field of battle, in combat with the sword, spear and shield.”¹¹⁷ Hawhee suggests that one of the best examples of agonistic manifestations of *arête* is to be found in Homer’s *Achilles*, who is characterized as “strong,” “swift,” and “godlike.”¹¹⁸ She continues:

¹¹² *Gentlemanly conduct, particularly in relation to battle.*

¹¹³ Atwell, J. (1990) *Schopenhauer: The Human Character*, at p.78.

¹¹⁴ Tarkow, T. (1983) “Tyrtaeus 9 D: The Role of Poetry in the New Sparta” in 52 *L’antiquité Classique* 48, at p.49.

¹¹⁵ Hale, J. “Not Patriots, Not Farmers, Not Amateurs: Greek Soldiers of Fortune and the Origins of Hoplite Warfare” in Kagan, D., & Viggiano, G. (Eds)(2013) *Men of Bronze: Hoplite Warfare in Ancient Greece*, at p.177.

¹¹⁶ *Id.*, Tyrtaeus, Fragment 10.

¹¹⁷ Sale, W. (1963) “Achilles and Heroic Values” in 2(3) *Arion: A Journal of Humanities and the Classics* 86, at p.89.

¹¹⁸ Hawhee, D. (2002) “Agonism and Areté” in 35(3) *Philosophy and Rhetoric* 185 at p.187.

His *arête* in the *Iliad* has a double force, for not only is he a brave and brilliant warrior, but from the outset, he is destined to die in battle at Troy..., with the utmost glory, a guarantor of *arête*. Conceptually, *arête* was tightly bound with *agathos* (good), *kleos* (glory), *timē* (honour), and *philotimia* (love of honour).¹¹⁹

Importantly, there was no dimension of morality to the Homeric concept of virtue, as it might be understood in a modern context. So, *courage* and *cunning* were predominant virtues in the Homeric scheme of values, however *justice* was not.¹²⁰ Homeric virtue was intrinsically related to the preferences and prejudices of the gods. To that end, for example, in the case of competition between mortals, the gods were given to intervene purposefully to augment or otherwise assist one competitor against his rival, or even to sabotage a competitor so as to end his chances of success. Hawhee notes that the gods here were not just approving judges, but, indeed, the very enablers of heroic actions.¹²¹ Whereas, in a modern context, such behaviour would be regarded as unfair interference, in Homeric competition, divine interventions of this kind “conferred a special dignity on both victor and victim by showing that the gods themselves were concerned to intervene in their struggle,” according to Schein.¹²²

The heroic cast of this form of virtue was also reflected in the actions of idealized mythic heroes. The greatest of Homeric mythic heroes, Hercules (Heracles), was the son of the god Zeus. By the fifth century BC he had become the ideal-type of Greek hero, greater even than Achilles.¹²³ In the

¹¹⁹ *Id.*

¹²⁰ Kamtekar, R., “Ancient Virtue Ethics: An Overview with an Emphasis on Practical Wisdom” in Russell, D. (2013) *The Cambridge Companion to Virtue Ethics*, at p. 29.

¹²¹ Hawhee, D. (2002) at p.188.

¹²² Schein, S. (1984) *The Mortal Hero: In Introduction to Homer's Iliad*, at p.58.

¹²³ Dickerman, E., & Walker, A. (1996) “The Choice of Hercules: Henry IV as Hero” in 39(2) *The Historical Journal* 315 at p.316.

allegory of ‘the choice of Hercules,’¹²⁴ by the classical philosopher Xenophon, Hercules is presented with a choice by two women, Vice, and Virtue (*Arête*), in which he is offered to take one or the other of their respective paths. Virtue’s offer to Hercules is that if he takes the road towards her, he would become the doer of great and valorous deeds and that he would be remembered and honoured forever. Dickerman and Walker note that it is of no material consequence that the allegory does not reveal Hercules’ choice, for his reputation that subsequently came to be in the eyes of the ancient Greeks of the fifth century is incontrovertible.¹²⁵ They state “He was the epitome of aristocratic *arête*, the demigod, who by his indomitable will and martial deeds was not only ‘remembered for all time’ among men, but took his seat forever with the Olympians, transcending his humanity, as ‘both hero and god.’”¹²⁶ Carus notes that Hercules is called the repeller of evil, leader in the fray, the brightly victorious, the celestial, destroyer of flies, vermin, and grasshoppers.¹²⁷

Adkins describes the Homeric virtues as “competitive values or excellences”¹²⁸ and notes that they co-existed within a traditional framework of divine justice, dispensed in this life by the gods as a means to a desired end.¹²⁹ Ancient rulers were bound by this traditional framework, necessitating that the sovereign pay due respect to a subjects’ *timē* - the prerogatives, ranks and traditional honours that are inseparable from his sovereignty. To fail in this was to risk the bringing of a divine curse.¹³⁰

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Carus, P. (Ed.)(1898) at p.681.

¹²⁸ Adkins, A. (1960) at p.6.

¹²⁹ *Ibid.* at p.164.

¹³⁰ Vernant, J. (1990) *Myth and Society in Ancient Greece*, at p.114.

This martial construction of virtue in the world of Homer is accounted for by the role that the *agathoi* of the time played in the protection of the community. This Homeric conception of virtue was linked very much to the security and prosperity of the state; to the men most able to secure society's safety.¹³¹ As Adkins notes, from the time of Homer onwards, the *agathos* could be considered as a unit functioning more or less successfully in his environment, and within which he must succeed to secure his' and his society's continued existence.¹³² He states,

The primary function of any state is to survive, and to prosper as well as it may; and in a small state such as a Greek city-state, in competition with its neighbours for the produce of a not very wealthy land, this primary function can never be long out of mind. To ensure survival, the will and ability to resist, coupled with good counsel, are the most evident necessities.¹³³

But it is Adkins' thesis in *Merit and Responsibility*, that Plato's conception of virtue was revolutionary, in the sense that it elevated the comparative status of what he refers to as the *co-operative* virtues, and that this change to the theoretical landscape of virtue was crucial to his political theory. By the time of the rise of the maritime city-state of Athens in the classical Greece of the 4th Century BC, the social factors legitimizing Homeric notions of virtue had changed.¹³⁴

Finley observes that a deep horizontal cleavage had marked the previous world described by the Homeric poems. He states that during this period, "above the line were the *aristoi*, literally the *best people*, the hereditary nobles who held most of the wealth and all the power, in peace as in

¹³¹ Adkins, A. (1960) at p.206.

¹³² *Ibid.* at p.300.

¹³³ *Ibid.* at p.197.

¹³⁴ i.e., see text associated with note 14.

war. Below were all the others, for whom there was no collective technical term, the multitude.”¹³⁵ But, as Osborne identifies, a range of factors would see pre-Classical society evolve in a way that was distinctly more egalitarian.¹³⁶ Finley argues that “...neither mainland Greece nor the Aegean islands could support a sizable agrarian population.”¹³⁷ Inevitably, the changing societal conditions of Homeric society saw the distribution of scattered households and closely-knit communities give way to unevenly increasing community concentrations and urbanization. These were evidenced by clustering in villages or about citadels or palace-complexes,¹³⁸ and were notably subject to much variation through the Archaic period,¹³⁹ but often included features such as town squares, or possibly even an acropolis.¹⁴⁰ Factors including the progression of literacy, the successful techniques of warfare employed by the Greeks, and increasing wealth amongst classes outside of the *aristoi*, all contributed to rising social tensions. Latacz notes that increasing autonomy and self-reliance amongst those not of the aristocracy brought “serious demands for the abolition of aristocratic privileges, for justice, for equality, and ultimately for self-determination.”¹⁴¹ Adkins states that the acknowledged justification for the rise of Athenian democracy was, in fact, the important role played by the poor in providing martial services to the polis, particularly the navy.¹⁴² With this came a rise in status and an extension of privileges such as the right to offer opinions and observations at the Assembly. This shift heralded a conflict of values which Plato was able to exploit, according to Adkins. The traditional *agathos*- and *arête*-

¹³⁵ Finley, M. (2002) at p.41.

¹³⁶ Osborne, (2004) at p.210.

¹³⁷ Finley, M. (1963) *The Ancient Greeks*, at p.33

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Ibid.* at p.34.

¹⁴¹ Latacz, J. (1996) *Homer: His Art and His World*, at pp.57-8.

¹⁴² Adkins, A. (1960) at p.197.

standards were generalized standards, martial in nature but restricted to the wealthy aristocratic class.¹⁴³ Adkins states that it had previously been the case that Homer had no desire to prove the superiority of one set of *aratoi* over another.¹⁴⁴ But by the time of Theognis of Megara in the sixth-century BC, it was possible for attributions of virtue to stand on the basis of wealth alone. Adkins notes that by the time of the classical period in Ancient Greece, a crisis of values grounded in a confusion about such matters as the proper meaning of virtue had arisen, which would provide such thinkers as Plato with the leverage needed to redefine the connections of *arête* with society.¹⁴⁵

Challenges to the definition of virtue did not start with Plato, however. Xenophanes, who died half a century before the birth of Plato, is well known as a critic of the martial virtues and of Homeric conceptions of the gods. He has been referred to as the “the first Greek who wrote literary criticism; the first moral philosopher; the first critic of knowledge; and the first speculative monotheist.”¹⁴⁶ In his *Metaphysics*, Aristotle disregarded Xenophanes as a thinker on the basis that he considered him naïve.¹⁴⁷ However, Lesher contends that Xenophanes’ fragments reveal a philosophy of considerable complexity, inhering a number of important claims, including, in particular, that the measures of personal excellence included piety in thought and deed, service to the city, and a life of moderation which avoids unlimited wealth and luxuries;¹⁴⁸ a conception of *arête* dramatically at odds with the prevailing Homeric ideas of virtue.

¹⁴³ *Id.*

¹⁴⁴ Adkins, A. (1960) at p.71.

¹⁴⁵ *Ibid.*, at pp.75-6.

¹⁴⁶ See Kattel, R. (1997) “The Political Philosophy of Xenophanes of Colophon” in 1(2) *Trames* 125 at p.127.

¹⁴⁷ Aristotle *Metaphysics* at 986b26, in Barnes, J. (1991) *Complete Works (Aristotle)*, at p.12.

¹⁴⁸ Lesher, J. (2001) *Xenophanes of Colophon: Fragments: A Text and Translation with a Commentary*, at p.5.

Werner Jaeger refers to him as an “intellectual revolutionary” who championed a truth which he saw emerging from the ruins of all previous ways of viewing the world.¹⁴⁹ He observes that, in his verses, Xenophanes concerned himself with “...problems of *Weltanschauung* – the nature of the gods, natural phenomena, the origin of all things, truth, doubt, and false authority.”¹⁵⁰ He is credited with deprecating the Homeric tendency towards numerous, anthropomorphized gods; and he is acknowledged as one of the first to favour the idea of one immortal, omnipresent, all-powerful, all-knowing, and transcendental God.¹⁵¹ Xenophanes’ God was disconnected from the earthly lives of mortals through total ‘otherness.’¹⁵² He was the first to formulate the kind of religious universalism which would later be considered to be an indispensable facet of any true religion, according to Jaeger.¹⁵³

But moreover, and, in large part because of his God’s otherness – or disconnectedness - Xenophanes rejected the Homeric notion that the gods were the measure of man. For Xenophanes, humans had limited knowledge, and therefore, a limited capacity to know God, and he considered it improper for them to rely upon something they could not truly know.¹⁵⁴ Instead, Xenophanes championed the cultivation of the intellect.¹⁵⁵ He argued that his wisdom should be regarded as of greater value than the martial achievements of athletes, and that his own wisdom was of greater service to the city than the physical attributes and achievements of “men and

¹⁴⁹ Jaeger, W. (1936) *The Theology of the Early Greek Philosophers*, at p.41.

¹⁵⁰ *Ibid.* at p.39.

¹⁵¹ See Freeman, K. (1962) *Ancilla to the Pre-Socratic Philosophers: A Complete Translation of the Fragments in Diels, Fragmente der Vorsokratiker*, at p.23.

¹⁵² Kattel, R. (1997) at p.140.

¹⁵³ Jaeger, W. (1963) at p.48.

¹⁵⁴ Kattel, R. (1997) at pp.131-2.

¹⁵⁵ Jaeger, W. (1963) at p.49.

horses.”¹⁵⁶ Xenophanes compared his wisdom to these things using the superlatives *agathē* (good) and *ameinōn* (better), and argued that it was *dikaios* (just or right) to regard it in such terms.¹⁵⁷ Leshner argues that this would have amounted to a controversial argument which would not have been accepted by Xenophanes’ audience on its own terms, but notes also that he further asserted that his wisdom could contribute to the good and prosperity of the city – thereby constituting a *public* or civic good – in a way that the *private* good of an athlete could not. Whilst the conception of athletic prowess as a private good, subordinate to Xenophanes’ wisdom, was equally contestable, certainly the fundamental idea of a civic good ordered above that of a private good would have been acceptable to Xenophanes’ audience, according to Leshner.¹⁵⁸

Whatever their reception by his audience, Leshner notes that Xenophanes’ views, particularly as regards his disparagement of the honours accorded to athletes, his call to censor the stories told by poets about the gods, and his advocacy of moderation in life, anticipated Plato’s own views¹⁵⁹ expressed in the *Republic*.¹⁶⁰ He states:

In the *Republic*, Plato shows himself to be the spiritual heir of Xenophanes when he states that the guardians of his ideal state are more deserving of honours and public support than the victors at Olympia, criticizes the stories told about the gods by the poets, and calls for a life of moderate desire and action.”¹⁶¹

¹⁵⁶ Leshner, J. (2001) at p.56.

¹⁵⁷ *Id.*

¹⁵⁸ *Ibid.* at p.58.

¹⁵⁹ See Plato. (2014) *Republic*, at: 607a, 378b, 372b.

¹⁶⁰ Leshner, J., "Xenophanes", in Zalta, E. (Ed.)(2014) *The Stanford Encyclopedia of Philosophy*, at p.6.

¹⁶¹ *Ibid.* at p.16.

Virtue, Political Authority and the Liberal-Democratic Tradition

Plato's account of virtue was the first philosophically coherent elaboration to incorporate a necessary connection between virtue and the question of how a human community might best be ordered *as an integral part* of virtue's theoretical formulation. Plato's singular achievement in his distillation of the concept of *justice* as a virtue, and, in that, his distillation of virtue as a discrete human *quality*, was an historical event. It would ultimately come to be of determinative importance – not just for the liberal-democratic project, but for an epoch of human social and political organization. But even pre-classical accounts of virtue are not restricted to an evaluation of human agency or questions of character in isolation of other factors; they incorporate, in some way, a preoccupation with questions about the proper ordering and functioning of society, as must be the case for any necessarily relational, moral concept. Ellen Meiksins Wood notes that, in pre-classical Greece, the political order was generally not treated as an object of systematic critical speculation, and would not be so-treated until the arrival of the first political theorists: Protagoras, who was a Sophist, Socrates, Plato, and Aristotle.¹⁶² But, even in pre-classical times, in which virtues were conceived of as excellences of a predominantly *martial* nature, it is arguably possible to identify a pre-philosophical account which promulgates martial virtue as a proper basis for the correct ordering of society. In the *Melian dialogue* of Thucydides' *History of the Peloponnesian War*, the Athenian emissaries, in their attempt to persuade the rulers of Melos to accede to the extension of the Athenian empire to their shores and to pay Athens tribute, put their position in simple terms: "...right, as the world goes, is only in question between equals in

¹⁶² Wood, E. M. (2008) at p.3.

power, while the strong do what they can and the weak suffer what they must.”¹⁶³ This has come to be recognized as Thucydides’ ‘might is right’ argument, although the intended import of the statement itself is contested. Gregor¹⁶⁴ argues that Thucydides was a realist and saw imperialism as the inevitable manifestation of human nature. She goes on:

This ‘natural impulse to rule others’...was justified by the traditional doctrine that ‘might is right’, and the weaker must be ruled by the stronger...This principle was much in the air at the time when Thucydides was finishing his history..., and was later a commonplace of philosophy.¹⁶⁵

Whilst in agreement that the emissaries’ statement constitutes a recognition of a natural tendency or *law of nature*, De Romilly contends that the statement is, nonetheless, not an attempt to “adduce a moral justification.”¹⁶⁶ Morris Zelditch, on the other hand, argues that it is the earliest example of a recorded attempt to address the question of *legitimacy* in the context of coercive power:¹⁶⁷ “[w]hat makes power – meaning ‘might’ – morally right?”¹⁶⁸ Zelditch contends this is the same theme that would later come to constitute the focus of both Plato’s *Republic* and Aristotle’s *Politics*.¹⁶⁹ But, what the exchange between the Athenians and the Melians also makes apparent is that authority – in its political sense – is normatively distinct from rule borne of coercive power alone. Power *qua* relationship operates as a fulcrum, and what it

¹⁶³ Thucydides (2009) *History of the Peloponnesian War*, at p.566.

¹⁶⁴ Gregor, D. (1953) “Athenian Imperialism” in 22(64) *Greece & Rome* 27 at p.29.

¹⁶⁵ *Id.*

¹⁶⁶ De Romilly, J. “Thucydides and the Cities of the Athenian Empire” in Low, P. (Ed.)(2008) *The Athenian Empire*, at p.271.

¹⁶⁷ Zelditch, M. “Theories of Legitimacy” in Jost, J., & Major, B. (Eds.) (2001) *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations*, at p.33.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

balances is the question of the complicity of those who are the *subjected* in that equation. It is the potentiality that arises when agency is operationalized so that subjection is contingent: that it *could have been otherwise*; a potentiality to which Aristotle gives consideration in books IV and VI of the *Nicomachean Ethics*.¹⁷⁰ In the legend, the Athenians did not persuade the Melians of the rightness of their might; and the Melians did not prevail in the ensuing rout. Whatever the Athenian's capacity to prevail and command - not to mention their merit in terms of martial virtue - it did not extend to an ability to command *voluntary* obedience, this being an essential component of authority, according to Frank Furedi, following Hannah Arendt. It is the question of the human motivation to follow a ruler, whether voluntarily or otherwise, that has attended – either impliedly or in express terms – the inception and survival of every sovereignty in the history of human kind. That question is expressed in clear and simple fashion as the opening sentence of Launderville's introduction to *Piety and Politics*, viz: "*Why would anyone obey a king's command?*"¹⁷¹ As Stanley Milgram observes in *Obedience To Authority*,¹⁷²

Obedience is as basic an element in the structure of social life as one can point to....Obedience is the psychological mechanism that links individual action to political purpose. It is the dispositional cement that binds men to systems of authority.¹⁷³

So, the question of obedience – be it voluntary or coerced – necessitates, from this point of view, an analysis of authority: does the aspirant ruler exhibit *real* authority – of a quality, for example, capable of crystallizing consent - or does he practically rely, for example, upon the immediate

¹⁷⁰ Aristotle. (1996) *Nicomachean Ethics*, book IV, esp. pp.53-4; book VI, p.147.

¹⁷¹ Launderville, D. (2003) at p.1; my emphasis.

¹⁷² Milgram, S. (1974) *Obedience to Authority: An Experimental View*.

¹⁷³ *Ibid.* at p.1.

threat of violence? So-called 'authority' is a useful point of enquiry, for these reasons, as well as because of Arendt's claim that it is foundational.¹⁷⁴

Sebastian De Grazio says authority is power over people based on the esteem or respect of those people, but adds that authority is *communal* – “it involves the public, the members of the political community.”¹⁷⁵ Authority is a relational concept, which touches on the question: What makes people perceive commands and institutions as authoritative?¹⁷⁶ The answer to that question cannot be excised from the historical context of those who so perceive, be they voters registered to vote in a United States presidential election, or Homeric Greeks. As De Grazio notes, “[m]an is not a discrete entity living in a vacuum. A world passes through his pores. As it does, it affects his beliefs.”¹⁷⁷ He goes on:

If people believe that the only way they can find a man with the necessary capacity and dedication to the common good is by popularly electing him, a leader arrived at in no other way has authority for them. If they feel that only in a hereditary succession is such a man found, authority will repose in lineal kings.¹⁷⁸

In the context of the liberal-democratic project, authority, defined in this way, might be argued to be foundational because it is these issues that provide theoretical and practical traction to the concept of the social contract. It has been stated to be of particular significance, here, that Greek culture, up to the time of Plato, had only ever been characterized by discrete, localized cults,

¹⁷⁴ See Arendt, H. (1968) Chapter 3 “What is Authority.”

¹⁷⁵ De Grazio, S. (1959) “What Authority is *Not*” in LIII (2) *The American Political Science Review* 321 at pp. 321; 322.

¹⁷⁶ Furedi, F. (2013) at p.7.

¹⁷⁷ De Grazio, S. (1959) at p.322.

¹⁷⁸ *Id.*

never subordinated to unitary political control, and never unified in a singly orthodoxy of belief.¹⁷⁹ Furedi suggests that this reality is associated with the failure of pre-classical Greece to develop a concept of authority.¹⁸⁰ And, moreover, Hannah Arendt contends “[n]either the Greek language nor the varied political experiences of Greek history shows any knowledge of authority and the kind of rule it implies;” noting the Roman origin of the word: *auctoritas* - a word the Greek historian Dio Cassius reportedly found impossible to translate in the Greek language.¹⁸¹ It is the contention of Arendt and Furedi that it is Plato who provides the philosophical architecture that makes authority possible in the context of classical Greece. Gouldner argues that authority constitutes one of the most crucial problems addressed by Plato, and that, indeed, the resolution of the issue of authority in his own social context is at the core of Plato’s metaphysics.¹⁸²

Plato’s cosmological, creationist account of the divine beginnings of mankind (and that of animals) on earth places virtue as the causal basis by which humans (whilst still in their pre-human state) come to be distinguished by gender, and distinguished, in turn, from all other creatures.¹⁸³ For Plato, virtue is measured by the success with which the soul is mastered;¹⁸⁴ and it is perfected upon the achievement of God’s likeness.¹⁸⁵ The Platonist scholar, Julia Annas, contends that Plato’s use of the term *soul* should properly be seen in respect of mundane day-to-day applications, and read as an analogy to the contemporary concept of *the mind*,

¹⁷⁹ Havelock, E. (1957) *The Liberal Temper in Greek Politics*, at p.31.

¹⁸⁰ Furedi, F. (2013) at p.37.

¹⁸¹ Arendt, H. (1968) at p.104.

¹⁸² Gouldner, A. (1971) *Enter Plato: Classical Greece and the Origins of Social Theory Part II*, at pp. 133, 134.

¹⁸³ Archer-Hind, R. (1888), 42 at p.142ff.

¹⁸⁴ *Id.*

¹⁸⁵ See Russell, D. (2004) “Virtue as a ‘Likeness to God’ in Plato and Seneca” in 42(3) *Journal of The History of Philosophy* 241 at p.242.

notwithstanding that she acknowledges that Plato considered the soul to be eternal.¹⁸⁶ However, Voegelin criticizes this and like accounts of Platonist theory on the basis that the omission of Plato's (and Aristotle's) transcendentalist understanding of the soul and life obscures the contribution of Greek philosophy to the history of mankind and society's historic struggle for order.¹⁸⁷ To be sure, the persistence of the connection of the transcendentalist belief structure - brought to the fore for the first time in a political context by Plato in the form of the *Afterlife* - with the trajectory of political theory and systems of government which culminated in the liberal-democratic project, is widely recognized; and the purported loss of this legitimizing element from around the turn of the twentieth-century is argued by Hannah Arendt to be the cause of modern society's so-called *crisis of authority*.¹⁸⁸ The intersections of this political trajectory with conceptions of virtue, as conceived by the likes of Plato and Aristotle, are important elements to be accounted for in any critical evaluation of the history of the liberal-democratic project and the place of virtue in its development.

Despite Plato's enormous contribution, Platonist accounts of virtue are generally not those which are considered to inform the main corpus of liberal-democratic thought. Platonist and Aristotelian constructions of virtue diverge significantly when it comes to their respective accounts of the conceptual makeup of virtue itself, its role in the case of citizens and non-citizens respectively, and its place and function in political society. Catherine Zuckert notes that modern Anglophone virtue ethicists who write, predominantly, in liberal democracies, commonly trace

¹⁸⁶ Annas, J. (1981) at p.124.

¹⁸⁷ Federici, M. (2002) *Eric Voegelin – The Restoration of Order*, at p.36.

¹⁸⁸ See text associated with f/n 227 ff.

the provenance for their inspiration to Aristotle.¹⁸⁹ Daniel Russell suggests that the basis for this preference for the ethics of Aristotle is epitomized in Raphael's famous painting, *The School of Athens*, which depicts the mystical Plato pointing to the heavens while the down-to-earth Aristotle points to the ground.¹⁹⁰ It is Plato, in Bertrand Russell's view, who has had the greater impact in subsequent ages,¹⁹¹ but insofar as the preference for Aristotle by scholars of the liberal democratic project is concerned, in Daniel Russell's estimation, Plato's ethics are too fantastic.¹⁹²

Aristotle's account of the virtues in terms of their connection with the political arrangements within the polis also inspires criticism; which criticism often goes to issues of compatibility. Aristotle famously referred to *megalopsychia* (literally, *Greatness of Soul*) - noted by Howard Curzer to be a virtue long-admired since Homer¹⁹³ - as a "crowning ornament of the virtues."¹⁹⁴ Cullyer contends that the concept of *megalopsychia* refers to the superiority of the great-souled man and provides "...absolute justification for his rule over others." For her, it is a concept founded on inequality not capable of being incorporated into the value-system of modern liberal democracy, "...without severe reconstruction."¹⁹⁵

To be sure, in the vast scholarship which has addressed the subject of virtue in the context of the liberal-democratic project, the overwhelming preference for Aristotelian ethics, whilst immediately evident, does not achieve any clear vindication for Aristotle's attempts to provide a

¹⁸⁹ See Zuckert, C. (2014) "Aristotelian Virtue Ethics and Modern Liberal Democracy" in 68(1) *The Review of Metaphysics* 61 at p.61.

¹⁹⁰ Russell, D. (2004) at p. 241.

¹⁹¹ Russell, B. (1947) at p.125.

¹⁹² *Id.*

¹⁹³ Curzer, H. (2012) *Aristotle and the Virtues*, at p.121.

¹⁹⁴ Aristotle. (1996) *The Nicomachean Ethics*, at p.94.

¹⁹⁵ Cullyer, (1999) *Greatness of Soul from Aristotle to Cicero*, at p.3; but cf: Curzer, H. (2012) at pp.121ff.

scaffold of philosophical ethics to support the development of his political philosophy. A clear example of this is to be seen in the more-than-century-old debate about whether Aristotelian virtue and his conception of the ‘best regime’ have anything much to do with *actual* politics. As William Bluhm puts it, “[t]he tradition of Aristotelian scholarship has always distinguished in the *Politics* two different, independent, and even discordant theoretical concerns – a theory of the ideal, or best state, and a theory of actual states.”¹⁹⁶ The conflict was recognized by Machiavelli, who stated in *The Prince*,

Many have dreamed up republics and principalities which have never in truth been known to exist; the gulf between how one should live and how one does live is so wide that a man who neglects what is actually done for what should be done learns the way to self-destruction rather than self-preservation.¹⁹⁷

Machiavelli’s observation, applied to Aristotle, certainly captures, for example, Aristotle’s conception of the best regime, which on his formulation is *aristocracy*, the “first and best regime,” because it is the only regime made up of the “best” (i.e., members of the *aristocracy*) simply on the basis of virtue.¹⁹⁸ For Aristotle, aristocracy aims at virtue and operates as an aristocratic standard for existing regimes. In Aristotle’s conception, the *good* are those who are the “best” as a measure of virtue.¹⁹⁹ Thomas Hobbes more directly excoriated Aristotle’s

¹⁹⁶ Bluhm, W. (1962) “The Place of the ‘Polity’ in Aristotle’s Theory of the Ideal State” in 24(4) *The Journal of Politics* 743, at p.743.

¹⁹⁷ Machiavelli, N. (1961) *The Prince*, at pp.90-1.

¹⁹⁸ See Aristotle. (1996) *The Politics*, at 1293b.

¹⁹⁹ *Id.*; see Alexander, L. (2000) “The Best Regimes of Aristotle’s *Politics*” in 21(2) *History of Political Thought* 189 at p.191.

philosophy in *Leviathan* on many points, including his view that the good life is the primary purpose of the state,²⁰⁰ and also his theory of essences.²⁰¹

Werner Jaeger argues that the theoretical divergence between *best* and *actual* states is the distinction which stands respectively between Books VII and VIII of the *Politics*, on the one hand, and Books IV to VI on the other.²⁰² For Jaeger, this distinction marks a turning-point between Aristotle's early embrace of the "purely constructive" methodology of Plato, and his abandonment of this approach in favour of empiricism.²⁰³ But notwithstanding Aristotle's acknowledgment of the unattainability of the ideal state, and his pragmatic acceptance of the so-called 'second-best state' i.e., the *best-possible* state, it remains the case that his virtue is a virtue of social stratification favouring his own socially-privileged cohort.

Platonic transcendentalism and virtue, and the ensuing crisis of modernity

It is understandable that the sensibilities of modern-day scholars might be less confronted by the comparative sobriety of Aristotle's account of the connections between ethics and politics. But it is not simply for reasons of historical context that it is nonetheless useful to illuminate the pre-classical and Platonic evolution of concepts of virtue and politics, and particularly its mysticism and mythology. These things form a significant part of the conceptual substrate upon which our modern-day theories of virtue were originally constructed. Scholarly contentions regarding, for

²⁰⁰ Adler, M. (1990) at p.272.

²⁰¹ *Ibid.*, at pp.269-70.

²⁰² Jaeger, W. (1948) *Aristotle: Fundamentals of the History of His Development*, 2nd Edition, at p.264.

²⁰³ *Ibid.*, at p.265.

example, the historical decline of virtue²⁰⁴ (a matter which is taken up in the next two chapters), or the modern so-called *crisis of authority*,²⁰⁵ reveal how the embrace of Aristotelian ethics by the post-enlightenment liberal-democratic project failed to obviate - or even successfully obscure - its fundamental reliance on a theoretical substructure grounded in Platonic transcendentalism and cosmology. The scholarly characterizations of this crisis have been described by Michael Federici as “variegated.”²⁰⁶ Nonetheless, a number of influential scholars have identified the source of this contended failure of modernism as being in some way related to those transcendental concepts which can be traced, either directly or indirectly, to Plato.

In his address at the 1978 Harvard Commencement, Aleksandr Solzhenitsyn lamented the rise of a calamitous “de-spiritualized humanism” in the West.²⁰⁷ Born in the Renaissance and given political expression in the Enlightenment, this form of “irreligious humanistic consciousness” had come, he felt, to characterize Western culture during the late-nineteenth and early-twentieth centuries. On Solzhenitsyn’s account, it elevated the material satisfactions and freedoms of “imperfect man” above and beyond, he says, “...the concept of a Supreme Complete Entity, which used to restrain our passions and our irresponsibility.”²⁰⁸

The socio-philosophical malaise identified by Solzhenitsyn is conceptually coincident – or it at least intersects - with the phenomenon labelled *emotivism* by Alasdair MacIntyre, who says, recalling Nietzsche, that without a commonly-recognized teleological reference based in reason,

²⁰⁴ For example, Anscombe, G. (1958) “Modern Moral Philosophy” in 33(124) *Philosophy* 1; MacIntyre, A. (1984) *After Virtue*.

²⁰⁵ See Arendt, H. (1968).

²⁰⁶ Federici, M. (2002) at p.15.

²⁰⁷ Solzhenitsyn, A. (1978) “The Exhausted West” 80(6) *Harvard Magazine* 21 at pp.25, 26.

²⁰⁸ *Id.*

all that is left is will, and “...if there is nothing to morality but expressions of will, my morality can only be what my will creates.”²⁰⁹ He argues that emotivism had been preceded by a now gone “...tradition which relied on a shared belief in the lifelong accountability and the teleological ordering of a life,”²¹⁰ which he identifies as Aristotelian virtue. For MacIntyre, this is at the heart of the reasons that the so-called Enlightenment “project” failed.²¹¹ Through his successive works following-on from *After Virtue*, MacIntyre emphasizes the attempts to justify competing moralities by successive traditions, starting with the Aristotelian tradition, through Thomas Aquinas and Augustinian Christianity, and subsequently the Scottish Enlightenment.²¹² According to Stephenson, the successful articulation of a *telos* of human existence, in MacIntyre’s view, necessitates a theological view of a final end;²¹³ “...a single history of the world within which all other stories find their place and from which the significance of each subordinate story derives.”²¹⁴

Through the epic scholarship of his five-volume *Order and History*, and other ancillary and complimentary texts, Eric Voegelin similarly connects what he identifies as twentieth-century social disorder as a phenomenon which is symptomatic of a deeper civilizational crisis.²¹⁵ Voegelin acknowledges the beginnings, in the eighteenth century, of “...a continuous stream of literature on the decline of Western civilization;” commenting that “...the theorists of decline on

²⁰⁹ MacIntyre, A. (1984) *After Virtue – 2nd Edition*, at pp.113-4.

²¹⁰ MacIntyre, A. (1990) *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition*, at p.199.

²¹¹ See, generally, MacIntyre, A. (1984) Chapters 4-6.

²¹² See, generally, MacIntyre, A. (1988) *Whose Justice, Which Rationality*, Ch. XVII.

²¹³ Stephenson, S. (1999) “Narrative, Identity and Modernity” Discussion Paper for ECPR Workshop ‘The Political Uses of Narrative, Mannheim, 29-31 March, 1999, at p.4.

²¹⁴ MacIntyre, A. (1990) at p.144.

²¹⁵ Federici, M. (2002) at p.16.

the whole have a case.”²¹⁶ In fact, Voegelin traces the origins of the crisis to the twelfth-century Calabrian monk, Joachim of Fiore, who, in establishing a new religious order, conceived a three-stage periodization of history “...which made possible the conceptualization of modernity itself.”²¹⁷ This, indeed, was the division of history into the of Ages of Father, Son, and Holy Ghost, which represented the nominal predicates of the *ancient*, *medieval* and *modern* eras.²¹⁸ Voegelin considered that this so-called decline constituted a “Western apocalypse,” represented by the successful rise of a Gnostic civilization which had displaced divine salvation with immanent “self-salvation;” an event, he notes, that is dramatized in Nietzsche’s declaration (in his *parable of the madman*²¹⁹) that God had been murdered.²²⁰ Plato’s Athens had seen growing social chaos and the destruction wrought by the Peloponnesian War from 431 BC to 404 BC,²²¹ which came nearly a century after the institution of constitutional *democracy* in 507 BC, under which the domination of the aristocracy had been abolished.²²² Plato’s achievement, according to Voegelin, had been the recovery of *order* through his creation of a new science of politics “...born from the crisis of Hellenic society.”²²³ Federici argues that it was at the risk of intellectual skepticism²²⁴ and charges, according to Niemeyer, of obscurantism,²²⁵ that Voegelin characterized the spiritual crisis as a loss of transcendental consciousness reflected in “positivism’s rejection of

²¹⁶ Voegelin, E. (1987) *The New Science of Politics: An Introduction*, at p.128

²¹⁷ *Ibid.*, at p.vi.

²¹⁸ *Id.*

²¹⁹ Nietzsche, F. (1887) *The Gay Science*, at §125.

²²⁰ *Ibid.* at §.131.

²²¹ Hansen, M.H. (1991) *The Athenian Democracy in the Age of Demosthenes: Structure, Principles and Ideology*, at p.39.

²²² *Ibid.*, at pp.33-4.

²²³ Voegelin, E. (1987) at p.1.

²²⁴ Federici, M. (2002) at p.xvii

²²⁵ Niemeyer, G. (1959) at p.594.

transcendental reality.”²²⁶ It is Plato’s conception of the well-ordered soul that constitutes the symbolic expression of this consciousness. Voegelin notes that, in Plato’s mythology, the restoration of the order that had been lost through Athens’ descent into war could only be achieved through “...a soul that had ordered itself by attunement to the divine measure.”²²⁷ For Voegelin, the crisis of the West is seen in contemporary ideas conceptually detached from any historical antecedent, according to Federici.²²⁸ Voegelin argues that Plato’s theory was not simply an account of the *best polis*, but a *philosophy of order*, which could only be adequately comprehended when it is interpreted in a way that accounts for the decline and restoration of order.²²⁹ He contends that in the History of Ideas, ideas became separated from their engendering symbols – symbols necessarily required and used to articulate them – through a process he calls “deformation,” which resulted from their reification into dogma or doctrine, or abstraction. In Federici’s words, “[t]he proliferation of ‘isms’ in the nineteenth century represents a variety of fragments of reality that are considered by their proponents to be the whole of reality.”²³⁰ This scenario, of course, is un-mistakenly akin to the dystopian scene painted by MacIntyre in the first few pages of *After Virtue*; a scene which he believes characterizes the current day modernist maladaptation of Aristotelian virtue. For Voegelin, it is only through a reclamation of “transcendental reality” that the modernist crisis of order can effectively be addressed.

²²⁶ Federici, M. (2002) at p.22.

²²⁷ Moulakis, A. (Ed.) (2000) *The Collected Works of Eric Voegelin, Volume 15: Order and History, Volume II: The World of the Polis*, at p.109

²²⁸ Federici, M. (2002) at p.35.

²²⁹ Moulakis, A. (Ed.)(2000) *World of the Polis*, at pp. 98-9.

²³⁰ Federici, M. (2002) at p.37.

For Hannah Arendt, any such reclamation is an impossibility.²³¹ Although she maintained an active interlocutory relationship with Eric Voegelin, Arendt nonetheless agreed with him regarding the fundamental importance of Plato's transcendentalism. The crisis in modernity, in Arendt's formulation, constitutes a "crisis of authority." She argues that authority "was once fundamental to political theory" but that it has "vanished from the modern world."²³² She considers there to have been a wholesale breakdown of traditional authority, evident since the turn of the twentieth century and constitutive of the rise – among other things – of totalitarianism.²³³ She explains that Plato's objective – to legitimize the rule of the few over the many through the elaboration of what was, essentially, a revolutionary series of *moral* justifications – amounted to failure in his own lifetime, but was truly *foundational* to the successes, respectively, of the Roman Empire and, subsequently, the Catholic Church. On Arendt's account, Plato's success was enabled through his realization of the political power of – and invention of – the notions of divine judgment and retributive justice in an afterlife, in which, he insisted, "for every wrong men had done to anyone they suffered tenfold."²³⁴ Bernstein notes that Plato was fascinated with the notion of post-mortem retribution, and that he uses the lens of these religious beliefs to assess for their effects upon social organization and political order.²³⁵ In identifying Plato as the source-or-otherwise principal consolidator of these afterlife myths, Frederick Conybeare agrees that the awful shadow of the Christian hell was cast across the

²³¹ Arendt, H. (1968) at p.135.

²³² *Ibid.*, at p.91.

²³³ *Id.*

²³⁴ Plato. (2014) at 615a.

²³⁵ Bernstein, A. (1993) *The Formation of Hell: Death and Retribution in the Ancient and Early Christian Worlds*, at p.52.

human mind long before the birth of Christianity; Jesus the Messiah, he says, was simply the last and best of the redeeming gods.²³⁶ And, as regards the myth's profound impact, he states,

In the dread of death and in the belief in the eternal fire of hell, which pervaded men's minds, a few philosophers excepted, Christianity had a *point d'appui* without availing itself of which it would not have made a single step towards the conquest of men's minds.²³⁷

To put Arendt's contention another way, Plato's objective was to introduce something akin to *authority* – which, she argues, had not previously existed - into the political community of the polis.²³⁸ It was, she says, a concept unique in Greek thinking, in which Plato "...confronted the reality of the polis with a utopian rule of reason in the person of the philosopher-king."²³⁹ Arendt argues that the attempt to institute a concept of authority within the political structure of the polis foundered because the Greeks had no previous experience of such a concept in a political context.²⁴⁰ With Rome's politics grounded in tradition founded on the authority (*auctoritas*) of its ancestors (which, in their view, included the Greeks), a political and spiritual heritage of extraordinary strength and endurance was established, which was ultimately appropriated, for its own purposes, by the Christian Church.²⁴¹

²³⁶ Conybeare, F. (1896) *The Armenian Apology and Acts of Apollonius – and Other Monuments of Early Christianity*, at p.17.

²³⁷ *Id.*

²³⁸ Arendt, H. (1968) at p.104.

²³⁹ *Ibid.*, at p.106.

²⁴⁰ *Ibid.*, at p.119.

²⁴¹ *Ibid.*, at pp.124-5.

The ground reconnoitred by each of these scholars coincides with that previously surveyed by Friedrich Nietzsche. In relation to the diminishing persuasive power of transcendentalist ontological justifications in Western thought, Nietzsche argued that Plato had gained his greatest influence through Christianity, although, ironically, it was ultimately not skepticism but Christian *probity* that killed God.²⁴² He ridiculed Socrates' *dæmon* – the “divine voice” which counselled Socrates that human instinct negates the progress of human perception – through which, in Plato's estimation, one could acquire knowledge, and, through knowledge, virtue. For Nietzsche, “...in all productive men it is *instinct*²⁴³ that is the creatively affirmative force, and consciousness that acts critically and dissuasively.”²⁴⁴

Since Nietzsche, there has been a growing conviction amongst some contemporary intellectuals that the political philosophy that has grounded and directed liberal-democracy since its inception should be reconsidered or even abandoned. Lutz observes that it is claimed by leading theorists that this shift represents not simply a question about the efficacy of liberal political rationalism, but of the entire “onto-theological” tradition of Western thought.²⁴⁵ Of this shift, and its genesis, Anthony Giddens observes,

Some one hundred years ago Nietzsche had already ‘brought modernity to its senses,’ showing Enlightenment itself to be myth and thereby posing disquieting questions about knowledge and power. Nietzsche's was, however, the lone voice of the heretic. Modernity has been forced to ‘come to its senses’ today, not so much as a result of its internal

²⁴² See Lutz, M. (1997) “Socratic Virtue in Post-Modernity: The Importance of Philosophy for Liberalism” in 41(4) *American Journal of Political Science* 1128 at p.1131.

²⁴³ My emphasis.

²⁴⁴ Nietzsche, F. “The Birth of Tragedy” in Kaufmann, W. (2000) *Basic Writings of Nietzsche*, at p.88.

²⁴⁵ Lutz, M. (1997) at p.1128.

dissenters as by its own generalizations across the world. No longer the unexamined basis of Western hegemony over other cultures, the precepts and social forms of modernity stand open to scrutiny.²⁴⁶

These philosophical contentions cannot help but devolve into fundamental ontological and epistemological disagreements. Nietzsche, and many who have followed, are criticized as anti-realists whose theories preference moral relativism over universal philosophical precepts capable of persuasive moral authority.²⁴⁷ In many ways this kind of criticism is reminiscent of that levelled at the sophist; the word itself a term of abuse from the time of Plato, denoting a charlatan who deceives with pseudo-knowledge.²⁴⁸

From his “anti-realist” tradition of *pragmatism*, Richard Rorty contends that the merits of the pragmatist approach are that it comprises- among its nominal characterizations – simple “...anti-essentialism applied to notions like ‘truth,’ ‘knowledge,’ ‘language,’ ‘morality,’ and similar objects of philosophical theorizing.”²⁴⁹ Rorty follows thinkers such as William James in his commitment that the quality of *truth*, as a *relation* “...which may obtain between an idea...and its object”²⁵⁰ has nothing to do with essences; “...truth is not the sort of thing which *has* an essence.”²⁵¹ The kinds of essentialist beliefs such an approach is intended to encompass includes the Enlightenment idea of *reason*; the idea that there is a relation between the ahistorical essences

²⁴⁶ Giddens, A. “Living in a Post-Modern Society” in Beck, U., Giddens, A., and Lash, S. (1994) *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order*, at p.57.

²⁴⁷ See, for example, Hunter, J. (2000) *The Death of Character: Moral Education in an Age Without Good or Evil*, at p.225.

²⁴⁸ Burkert, W. (1985) at p.311.

²⁴⁹ Rorty, R. (1982) *Consequences of Pragmatism*, at p.162.

²⁵⁰ James, W. (1909) *The Meaning of Truth*, at p.v.

²⁵¹ Rorty, R. (1982) at p.162.

of the human soul and moral truth, "...a relation which ensures that free and open discussion will produce 'one right answer' to moral as well as scientific questions."²⁵² There seems no great epistemological distance between this kind of moral truth and the "truth" that Burkert notes bound Homeric Greece to traditions grounded in anthropomorphized gods; or, for that matter, that which is suggested in Plato's perfectionist theory of forms. Burkert notes that it was with the rise of *thinking comprehension*, first expressed through the prose of the *sophoi*, that "truth" managed to gain its independence from tradition and everyday experience.²⁵³ The truth of the Sophists was not to be found in transcendent sources such as the gods or a Platonic realm of universal forms, according to Herrick;²⁵⁴ for them, it emerged from a clash of arguments. Thereupon, truth at once traversed and redefined the conceptual and moral landscape connecting *mýthos* and *lógos*.

Rorty argues that the principles of the liberal-democratic project can be supported by pragmatic resort to the community itself in lieu of philosophical justifications. Nietzsche, to be sure, went much further than this in his belief that, like Christianity, democracy itself should be done away with. For him, something akin to the *Great-Souled* man; the "Übermensch," should be the goal humanity sets for itself. Although Nietzsche regarded Socratic reason as an illegitimate denial of the human instinct, he was nonetheless strongly supportive of the concept of something akin to – albeit, a more individualized conception of – Plato's philosopher-king. As Julian Young describes it,

²⁵² Rorty, R. "The Priority of Democracy to Philosophy" in Outka, G., and Reeder, J. (1992) *Prospects for a Common Morality*, at p.255.

²⁵³ Burkert, W. (1985) at pp. 305-311.

²⁵⁴ Herrick, J. (2005) *The History and Theory of Rhetoric: An Introduction*, at p.38.

In accordance with the ‘aristocratic nature of the spirit,’ the ‘natural order of rank,’ Nietzsche tells his audience, the proper order of society is ‘the mastery of great individuals,’ the ‘servitude of the mass...under the scepter of genius.’²⁵⁵

Fundamentally, it is an assumption of natural inequality that attended Greek conceptions of the cosmos and the social order, which, Larry Siedentop notes, they regarded as a continuum until such times as the sophists began to distinguish those concepts.²⁵⁶ Plato’s conception of the soul elaborated a cosmological rationalization of virtue that saw its realization in *knowing one’s place*. Much later, such interpretations of virtue would still find voice in significant strands of American republicanism, such as the political philosophy of the second president of the United States and constitutional founder, John Adams.²⁵⁷ But, even in classical Greece, this was no new development in terms of the ancients’ understanding of virtue. As Fustel de Coulanges noted in his seminal work *The Ancient City*,²⁵⁸ the pre-Homeric ancient societies, which were anthropologically structured - both physically and spiritually - on the basis of the family, home, and hearth, gave virtue the name of *piety*.²⁵⁹ And even in the 3rd Century BC, ‘pious’ was used as a general term for virtue.²⁶⁰ In the family household, which was its own church; the paterfamilias its magistrate and its high priest,²⁶¹ piety represented “...the obedience of the son to his father, the love which he bore to his mother.”²⁶² Given the aristocratic sensibilities of Plato and Aristotle,

²⁵⁵ Young, J. (2010) *Friedrich Nietzsche – A Philosophical Biography*, at p.145; quotations from Nietzsche, F., *On the Future of Our Educational Institutions*.

²⁵⁶ Siedentop, L. (2014) *Inventing the Individual: The Origins of Western Liberalism*, at p.42.

²⁵⁷ See generally: Diggins, J. (1984) *The Lost Soul of American Politics*, Chapter 3.

²⁵⁸ Coulanges, F. de (1874) *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome*.

²⁵⁹ *Ibid.*, at p.129.

²⁶⁰ Dover, K. (1974) at pp. 67, 265.

²⁶¹ Siedentop, L. (2014) at p.9.

²⁶² Coulanges, F. de (1874) at p.129.

which would come with the inevitable growth of discrete and insular family units into human communities and, eventually, cities, it is not difficult to see how Aristotle would come to conceive of the *philosopher* alone as a “great-souled man;” a station constitutive of the “crown” of the virtues in Aristotle’s eyes.

But what *was* new in this classical Greek world was the incremental, albeit barely-perceptible, emancipation of the individual. Of course, many historical factors evidence the slow unfolding of autonomy in ancient Greece beyond the originally immutable sociological boundaries which saw citizenship as conceivable only for the paterfamilias.²⁶³ It is, therefore, with some irony that, in moving to establish his essentially anti-democratic and class-based conception of harmonious societal order, built upon his theory of the soul, that Plato developed a theory of *justice-as-a-virtue*. For Plato took Thrasymachus’ assertion that justice was simply “the advantage of the stronger” and developed it, radically, as a quality which could inhere in the individual, just as it did in the polis itself. Whereas virtue in earlier times had been inseparable from action, Eric Havelock showed how Plato’s use of the concept of justice came to represent the idea of morality as a principle or set of principles which could have an existence independent of its application (unlike martial virtue); it was now capable of describing human personality – and *inhering* as a representative *agentic* marker - through Plato’s proposition that it was really a function of the *psyche*.²⁶⁴ It is from this conceptual leap by Plato that Aristotle could eventually construe virtue

²⁶³ Siedentop, L. (2014) at p.18.

²⁶⁴ Havelock, E. (1978) *The Greek Concept of Justice: From Its Shadow in Homer to Its Substance in Plato*, at pp.311-2, 319.

in terms of *character*, and, from that, a means by which consent-legitimizing political authority could, ultimately, someday be conceived.

CHAPTER 2 – DECLINE OF VIRTUE – RISE OF CONTRACTUAL RELATIONS

Accounts of the decline of virtue, and the ensuing, so-called, crisis of modernism

It is incontrovertible that, as political philosophy advanced and culminated in the conception - and then the real-world establishment - of what we recognize today as the institution of liberal-democracy, virtue, as an organizing principle of moral practice, declined and fell into abeyance. Virtue disappeared “not only from the centre of moral discourse, but from ordinary language as well.”¹ Alasdair MacIntyre characterizes the result of this decline for modern society, controversially, as one of invisible and catastrophic moral disorder, unrecognized by the academic curriculum.²

According to Frede, ‘virtue’, which, she observes, had been the focus of moral discussion for more than 2,500 years, “has become all but unintelligible.”³ She notes that MacIntyre laments of this once purportedly-coherent system, that all that remains are “shadow images of the old tradition and the remnants of a vocabulary that has lost its coherence.”⁴ This coherence is revealed in the teleological scheme, explicated, in MacIntyre’s account, in the fundamental distinction between the human potentiality described as man-as-he-happens-to-be, and the perfecting of the human *telos* described as man-as-he-could-be-if-he-realized-his-essential-nature.⁵

¹ Frede, D. “The Historical Decline of Virtue Ethics” in Russell, D. (2013) *The Cambridge Companion to Virtue Ethics*, at p.125.

² MacIntyre, A. (1984) at p.4.

³ Frede, p.126.

⁴ *Ibid.* at p.125.

⁵ MacIntyre, A. (1984), at p.62.

To some extent, Anscombe anticipated MacIntyre's dissatisfaction in the 1958 paper in which she presented her 'three theses.'⁶ Anscombe's paper is generally credited as the inspiration for a revival of virtue ethics that has escalated through the latter half of the twentieth century and into the present time. She advocates that conceptions of moral obligation and duty should be "jettisoned" as they are "survivals, or derivatives of survivals, from an earlier conception of ethics which no longer generally survives, and are only harmful without it."⁷ Compellingly, insofar as the later development of this thesis is concerned, she also proposes as her first thesis that the practice of moral philosophy should be "laid aside" until such times as an adequate philosophy of psychology has been developed.⁸

The causes of virtue's decline are a subject of dispute amongst present-day commentators. Frede rejects MacIntyre's conclusion that virtue's decline was a consequence of early modern philosophers' preoccupation with the power of human reason.⁹ For her, the devastating impact of long European wars coincident with continued insecurity, violence, religious persecution and political repression, and the rise of absolutist rule by "divinely appointed princes," rendered the Aristotelian teleological outlook of a unified state of human perfection as seemingly implausible.¹⁰ What transpired was an assignation by philosophers to the increased importance of the autonomy of the individual, particularly through the seventeenth and eighteenth centuries.¹¹ But unlike MacIntyre's contention that this came out of a 'faddish' fascination with

⁶ Anscombe, G. (1958)

⁷ *Id.*

⁸ *Id.*

⁹ Russell, D. (2013) at p.126.

¹⁰ *Ibid.* at p.136-7; but *cf.* Berkowitz, P. (1999) *Virtue and the Making of Modern Liberalism*, at pp.9, 194 (n.8).

¹¹ *Ibid.* at p.138.

“individualism,” Frede argues that the real cause was the disappearance of a unified tradition.¹² She argues that philosophers “from Shaftesbury and the British sentimentalists to Hume, Adam Smith, and Rousseau,” remained concerned with the concept of virtue, and particular virtues, and continued to assign a central role to them.¹³ But, their conceptions were diverse and contradictory, and this plurality – far beyond anything known in antiquity or medieval times – was the main cause of virtue’s demise. Schneewind, also, denies that philosophers of the seventeenth- and eighteenth- centuries neglected virtue.¹⁴ But he contends that, in competition with act- and rule-centred alternatives, virtue found itself incapable of instantiating a morality that the European culture of the time “...seemed to have been hungry for...;”¹⁵ that is, “...a morality giving the kind of explicit guidance that rules and laws provide.”¹⁶ To Schneewind’s way of thinking, natural lawyers and philosophers, particularly Grotius, Pufendorf, and Adam Smith, satisfied this need in a way virtue could not.¹⁷

A second or perhaps alternative ‘transition’ said to characterize the evolution of the story of liberal-democracy also happens to implicate the decline of virtue in a way that might be regarded as significant. From this standpoint, Aristotelian virtue, as a foundation principle in political thought in antiquity, declined with the shift from early dominant classical or neo-classical conceptions of politics to early-modern or modern accounts; from the idea that the polis was populated by a relatively homogeneous people who actively participated in its governance and

¹² *Id.*

¹³ *Id.*

¹⁴ Schneewind, J. (1990) “The Misfortunes of Virtue” in (October) *Ethics* 42, at p.42.

¹⁵ *Ibid.* at p.48.

¹⁶ *Id.*

¹⁷ See Schneewind, J. (1990), esp. pp. 46-55.

in whom a commitment to the public good was fostered, to one in which government: is respectful of divergent conceptions of the good held by its many constituents; protects their private liberty; and respects that self-interest - not virtue - is the usual motivating force of political behaviour.¹⁸ In its most common characterization, this trajectory is described through the rise of market society in early modern Europe, resulting in the progressive replacement of the classical 'active' civic ideal by a modern 'passive' or 'liberal' ideal "which, according to Burchell, crucially weakened or distorted the vitality of the original civic impulse."¹⁹

This dichotomy is perhaps most readily recognized, in a contemporary sense, as the "supposed tension"²⁰ between liberalism, characterized by its commitment to the freedom of the individual from interference from either his neighbours or the state, on the one hand, and republicanism, in the form of the individual as a participating agent in the state, on the other. At one pole of this dichotomy, scholars of the republican tradition contend that political virtue represents, perhaps, *the* distinguishing feature of the classical republican tradition; and this is true, according to Burt, of both Aristotelian and Roman forms of the tradition.²¹ Burt argues that, in either case, "...the virtue sought after is understood...as this disposition to further public over private good in action and deliberation."²² For many scholars, this tension constitutes an "incompatibility" that necessarily demarcates liberalism and republicanism along the axis drawn between public good and private desires.²³ Kloppenberg notes that this tension is exemplified in the distance between

¹⁸ See: Sunstein, C. (1991) "Preferences and Politics" in 20(1) *Philosophy and Public Affairs* 3 at pp.3-4.

¹⁹ Burchell, D. (2006) "The Attributes of Citizens: Virtue, Manners and the Activity of Citizenship" in 24(4) *Economy and Society* 540 at p.541.

²⁰ Sunstein, C. (1988) "Beyond the Republican Revival" in 97(8) *The Yale Law Journal* 1539, at p.1566.

²¹ Burt, S. (1990) "The Good Citizen's Psych: On the Psychology of Civic Virtue" 23(1) *Polity* 23, at p.23.

²² *Ibid.* at p.24.

²³ Banning, L. (1986) "Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republican Republic" in 43(1) *The William and Mary Quarterly* 3 at pp.11-12.

John Locke's belief in natural law, discernible by reason, which led him to condemn the unregulated pursuit of self-interest "that Hobbes considered natural and that later writers who celebrated the market economy sanctioned."²⁴ Sunstein, on the other hand, contends that, in reality, a multiplicity of permutations figured in the debates and contentions which made up the rise of liberal-democratic politics, and in which a clear demarcation of liberal and republican ideas probably constituted the exception rather than the rule; and was, in any event, false.²⁵ Sunstein characterizes the reality as something closer to what he terms *liberal-republicanism*.²⁶ And in a sympathetic vein, Dagger argues that whilst it is possible to distinguish liberalism and republicanism, it does not follow that they are inconsistent or incompatible with each other.²⁷

Particularly in relation to questions of virtue, much of the contention which arises, not only in respect of the contended diachronic distance between liberalism and republicanism, but also respectively within each tradition, comes out of the disputed place and role of the human condition in each case. As is stated by Banning, liberalism and classical republicanism each "begin with different assumptions about human nature."²⁸ Burt notes that within the republican tradition itself, all accounts share the conception of virtue referred to above,²⁹ but there are striking differences as to their accounts of how citizens form and retain their virtuous character.³⁰

²⁴ Kloppenberg, J. (1987) "The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American and Political Discourse" in 74(1) *The Journal of American History* 9 at p.16. but cf: Pocock, J. (1975) *Machiavellian Moment* at p.545ff re Locke's influence.

²⁵ See Sunstein, C. (1988), p.1567, and generally.

²⁶ *Ibid.* at p.1541.

²⁷ Dagger, R. (1997) *Civic Virtues: Rights, Citizenship, and Republican Liberalism*, at p.12.

²⁸ Banning, L. (1986), at p.11.

²⁹ *Supra* note 22, associated text.

³⁰ Burt, S. (1990) at p.24.

Beyond this, a third significant trajectory in the evolution of liberal-democratic philosophical thought bears considerable relevance to both the project of liberal-democracy, and also the place of virtue within it. As Kahn describes it, the emergence in the seventeenth century “...of a distinctly modern conception of political obligation...” saw “...the shift from a world of status to one of contract – from a world...of hierarchical feudal relations to one made up of autonomous individuals who rationally consent to their self-imposed government.”³¹ In this shift, Kahn identifies the rise of the idea of human relations of governance as artifice, in contrast to classical notions of man as *zoon politikon* - and all that entails - so far as man’s virtuous dispositions are concerned.³² For Kahn, the presentation of an artificial arrangement between men that is constitutive of government,³³ such as that advocated by General Ireton of the Parliamentary Army, which he claimed would guarantee effectiveness and legitimacy, represented the emergence of a “distinctly modern conception of political obligation.”³⁴ This rise of contractarian thought, so argues Kahn, would go on to have a dramatic effect upon the development of liberal-democratic thought through the seventeenth and eighteenth centuries.

The social contract and the place of promise-keeping

Despite its theoretical and definitional heterogeneity,³⁵ not to mention the limited franchise to which it originally applied, the so-called *social contract* stands as perhaps the most emblematic

³¹ Kahn, V. (2004) *Wayward Contracts: The Crisis of Political Obligation in England 1640 – 1674*, at p.1.

³² *Ibid.* at p.12.

³³ *Id.*

³⁴ *Ibid.* at p.1.

³⁵ Boucher, D., and Kelly, P. “The Social Contract and its Critics” in Boucher, D., and Kelly, P. (Eds.) (1994) *The Social Contract From Hobbes to Rawls*, at p.2.

and readily recognized motif of the liberal-democratic project. Taking natural law as its foundation - the (idealized) precept that “...all men are naturally in...a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit...”³⁶ (in Locke’s formulation) - the social contract incorporates in interlocking complementarity the principles of *trust*, *legitimacy*, and *consent*, in its constitution of relations between individuals in the liberal-democratic ideal. To that end, the *consent* of otherwise free citizens to forego some part of their natural freedom so to submit to the jurisdiction and coercive power of the aspirant governor – whom they *trust* will guarantee to protect their (arguably) immutable freedoms – is the act (in this formulation) upon which the state’s *legitimacy* is thereby crystallized. Thereupon, the “contract” is effectuated and relations between the state and its citizens are established, comprising “mutual rights and obligations, government to subject and subject to government.”³⁷

Despite this neat encapsulation of the contractarian mechanism describing the ordering of relations between the citizen and the state, the story of the origins and development of the social contract doctrine is far from agreed. Höpfl and Thompson observe that almost every statement about the history of contract has been met with contradiction, notwithstanding that scholars agree on the centrality of contractarian arguments to the political thought of the sixteenth through to the eighteenth centuries;³⁸

We are told, for example, that the social contract theory was – and was not – invented in ancient Greece, that the Christian Middle Ages did – and did not – rediscover or anticipate

³⁶ Locke, J. “An Essay Concerning the True Original, Extent, and End of Civil Government” in Burt, E. (Ed.)(1994) *The English Philosophers From Bacon to Mill*, at p.425.

³⁷ Tilly, C. (2004) “Trust and Rule” in 33(1) *Theory and Society* 1 at p.17.

³⁸ Höpfl, H., and Thompson, M. (1979) “The History of Contract as a Motif in Political Thought” in 84 *American Historical Review* 919 at p.919.

the rediscovery of the social contract theory, and that the Protestant and Catholic *monarchomachi* of the sixteenth century did – and did not – invent social contract theory.³⁹

The intellectual history of European contractualism is said to have been constructed by Otto von Gierke in his *Das deutsche Genossenschaftsrecht*, published in four volumes between 1868 and 1913,⁴⁰ although the efficacy of his narrative is disputed.⁴¹ There is no surprise in this, given the diversity of traditions which bear upon the development of the so-called social contract and the manner in which the concept is and has been used. In this regard, Boucher and Kelly refer to the social contract as a “flexible tool...used for all sorts of reasons, and ...[which]...generates quite contrary conclusions.”⁴² They suggest that this is because the idea of the social contract offers a wide range of choices as to its function: it may bind in perpetuity or be renewed by succeeding generations; it may be historical, ideal or hypothetical; its expressions may be explicit or tacit; its contractees may comprise individuals contracting amongst themselves, or individuals contracting with their rulers and God, “...and the various permutations to which such a combination gives rise.”⁴³ Notwithstanding these contentions, Gough’s nomenclature of “the social contract proper – the *Gesellschaftsvertrag*, or *pacte d’association*”⁴⁴ on the one hand, and “the contract of government or the contract of submission – *Herrschaftsvertrag*, or *Unterwerfungsvertrag*, or *pacte de gouvernement*”⁴⁵ on the other, has been – and remains - influential.

³⁹ *Ibid.* at p.919-20.

⁴⁰ *Ibid.*, at p.919.

⁴¹ *Id.*

⁴² Boucher, D., and Kelly, P. (1994) at p.2.

⁴³ *Id.*

⁴⁴ Gough, J. W. (1957) *The Social Contract: A Critical Study of its Development* 2nd Ed., at p.2.

⁴⁵ *Id.*

Gough is one who makes the arguably ambitious claim that threads of contractarian thought can be traced back to the ancients. Ancient Greek and Roman ideas were fundamentally different to modern notions of the individual and of the state, and of the relationships governing their connection. As Siedentop observes, “[a]t the core of ancient thinking we have found the assumption of natural inequality,”⁴⁶ of which a characteristic example is to be found in the contention of Thrasymachus, when he says “Listen then...for I say that justice is nothing other than the advantage of the stronger.”⁴⁷ In a fundamental sense, any notion of a contractual basis for enfranchisement in the polis must be necessarily limited, given the limited reach of citizenship and the inevitable marginalization of the likes of slaves and women. Nonetheless, on Gough’s account, the philosophical tensions that existed between Sophist and Ancient Greek points-of-view agitated early conceptions of the state and its relationship with those subject to its laws in a way – later complimented by Stoic philosophers and Roman law makers – that anticipated the development of the modern social contract doctrines. Gough notes that Greek philosophers of the Ionian school, including Thales and his successors, considered that the variance evident in the physical world must be accounted for by some unifying principle.⁴⁸ With the introduction of science to Athens in the fifth century B. C., philosophers came to draw a distinction between the apparent uniformity which was evident in physical nature, and the changeability in the ways of men.⁴⁹ It was from this that the famous distinction between *nature* and *convention* arose, wherein the Greek word for convention (or custom) also meant *law*.⁵⁰ The connection of this

⁴⁶ Siedentop, L. (2014) *Inventing the Individual: The Origins of Western Liberalism*, at p.51.

⁴⁷ Plato (2014) *Republic*, at p.49; equivalent statements are attributed also to Thucydides – see Chapter 1.

⁴⁸ Gough, J. W. (1957), at p.8.

⁴⁹ *Id.*

⁵⁰ *Ibid.* at p.9.

development with the central contention of the field of *political obligation* is obvious; the idea of a law of nature, enshrined in a higher moral validity than the mere local positive laws of any state, binding on all men and therefore demanding man's ultimate obedience.⁵¹

The place of promise-keeping in the establishment of trust and consent

From a generally normative standpoint, it seems intuitively correct that such a contract as that described must rely upon the making of a promise and its acceptance; specifically, the promise of the aspirant governor which activates trust in the mind of the putative citizen and inspires consent. In this sense, the aspirant governor, it may be contended, has invited the promisee citizen to trust that he or she will protect those 'freedoms' of the citizen he purports to guarantee. As is suggested by Friedrich and Southwood, "[i]n inviting the promisee's trust, and having the invitation accepted (or at least not rejected), the promiser incurs an obligation to the promisee not to betray the trust that she has invited in promising. In breaking the promise, she violates this obligation."⁵²

Certainly, the idea that the mere utterance of a 'promise' could ever be sufficient for the purposes of its instantiation as a moral obligation is contentious. As Hume remarked, for example,

I shall further observe, that, since every new promise imposes a new obligation of morality on the person who promises, and since this new obligation arises from his will;

⁵¹ *Id.*

⁵² Friedrich, D., and Southwood, N. (2011) "Promises and Trust" in Sheinman, H. (Ed.) *Promises and Agreements*, at p.278.

it is one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to *transubstantiation* or *holy orders*, where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human creature.⁵³

Promise-keeping has nonetheless been a matter of moral consideration since the time of the ancients. Certainly, Aristotle considered promise-keeping to be directly mandated by the virtues, primarily those of honesty and justice.⁵⁴ Aristotelian virtue has been shown to have provided a conceptual basis and rationale in the development of jurisprudential theories of contract as they evolved in the middle ages, before being entirely removed from the modern formulations which arose out of the Enlightenment. Nonetheless, virtue can be seen to have featured significantly in the philosophies of the foundation social contract and liberal-democratic thinkers, if not in the modern accounts of liberal-democratic theory they inspired.

Aristotelian Virtue and Contract and the Confounding Influence of *Will*

Küng says that Aristotle's works were rediscovered in the Christian Middle Ages and began to filter into Europe through the Caliphate of Cordoba early in the twelfth century.⁵⁵ Latin translations quickly ensued, and it is claimed they had a "transformative" effect on liberal-arts courses in most leading universities in northern Europe.⁵⁶ However, Aristotle was seen by the

⁵³ Hume, D. (1888) *A Treatise of Human Nature*, at p.524.

⁵⁴ Habib, A. (2014) "Promises" in Zalta, E. (Ed.) *The Stanford Encyclopedia of Philosophy* (Spring); (online).

⁵⁵ Küng, H. (1995) *The Great Christian Thinkers*, at p.101; Skinner, Q. (1978) *The Foundations of Modern Political Thought – Volume 1: The Renaissance*, at p.50.

⁵⁶ Skinner, Q. (1978) at p.50.

Catholic Church as a dangerous influence due to the pagan nature of his philosophies.⁵⁷ Skinner notes that Augustinian conceptions of Christian political life characterized society as a divinely ordained order that was imposed on fallen men as a remedy for their sins, whereas Aristotle's *Politics* posited the polis as a purely human creation, designed to fulfil purely mundane ends.⁵⁸ Catholic hostility towards Aristotle led – futilely - to Pope Urban IV banning his works - and not for the first time - as late as 1263.⁵⁹ St Thomas Aquinas, in Paris under the tutelage of Albert the Great, studied Aristotle and drew on his ideas broadly. Aquinas is often said to have 'baptized' Aristotle, and he wrote numerous commentaries on Aristotle's major works in order to both assimilate his thought and teach it to others.⁶⁰ Through the careful and systematic compilation of his *Summa Theologiae*, Aquinas adapted Aristotle's philosophies to the ultimately monotheistic design of his own philosophy.⁶¹

In terms of the evolution of contractarian thought, another significant thread is to be found in the rediscovery of the *Corpus iuris civilis*, which occurred gradually through the course of the twelfth-century.⁶² Gordley notes that this revival of Roman law affected almost every aspect of medieval religious and political life, contributing to an intellectual preoccupation with law, which is evident in the work of Aquinas.⁶³ However, it was not until the sixteenth and early seventeenth centuries that a synthesis of Roman law and Thomistic or Aristotelian philosophy was achieved by the 'late scholastics', otherwise known as the Spanish natural law school or the

⁵⁷ Küng, H. (1995) at p.105.

⁵⁸ Skinner, Q. (1978) at p.50.

⁵⁹ Küng, H. (1995) at p.105.

⁶⁰ Piderit, J., and Morey, M. (Eds.) (2012) *Teaching the Tradition: Catholic Themes in Academic Disciplines*, at p.71.

⁶¹ Küng, H. (1995), at pp.106-7.

⁶² Stein, P. (1999) *Roman Law in European History*, at p.43.

⁶³ Gordley, J. (1991) *The Philosophical Origins of Modern Contract Doctrine*, at p.3.

School of Salamanca. As Gordley notes, the Jesuits Luis de Molina (1535 – 1600) and Leonard Lessius (1554 – 1623) “...reorganized Roman law in its vast detail and presented it as a commentary on the Aristotelian and Thomistic virtue of justice.”⁶⁴ According to Gordley, the traditions of Roman law and Greek philosophy were united more closely than they ever had been before or were to be again.”⁶⁵

These advances coalesced to bring about developments in contractarian thought. Of particular significance was the rendering of sophisticated contractual systems by the scholastics “with detailed, specific rules to govern particular sale, hire, barter and loan contracts.”⁶⁶ Martin Doris notes that the late scholastic thinkers were “evidently building upon the doctrinal scaffold erected by the Romano-Canon lawyers of the fourteenth and fifteenth centuries”⁶⁷ and had, themselves, been preceded by Spanish civilian jurists who had, in their own right, advanced highly innovative and progressive contractual theories.⁶⁸ Through these developments, the scholastics considered the validity of a contract found its justification on the basis of virtues such as promise-keeping, liberality and substantive justice.⁶⁹ Gordley notes that this represented very much a teleological vision of contract – a view that contracts ought to be upheld because of the validity, both legal and moral, of the ultimate goal or object of the parties in entering into contractual relations.⁷⁰

⁶⁴ *Ibid.*, at p.70.

⁶⁵ *Ibid.*, at pp.71.

⁶⁶ Doris, M. (2004-5) “Did We Lose the Baby With The Bath Water?: The Late Scholastic Contribution to the Common Law of Contracts” in 11 *Texas Wesleyan Law Review* 361 at p.363

⁶⁷ *Ibid.*, at p.363, n.13.

⁶⁸ *Id.*

⁶⁹ Doris, M. (2004-5) at p.363.

⁷⁰ Gordley, J. (1991) at p.70.

Such a teleological conception of contract was made possible by prevailing Aristotelian conceptions of politics and law. Simmonds observes that in the relatively integrated community assumed by the Aristotelian tradition, law held an important but not pre-eminent place.⁷¹ Aristotle's *Politics* placed excellence at the centre of political life, and institutions such as property, the family, and the rule of law were scrutinized and interpreted by reference to their capacity to encourage and inculcate excellent lives.⁷² But Simmonds notes that with the advent of the modern state, which introduced ideas of not just physical but moral separation where, previously, medieval European principalities had been characterized by overlapping powers and jurisdictions, law came to take a central place in the configuration of now-autonomous state relations.⁷³ Simmonds argues that by the seventeenth century, the framework of Aristotelian and scholastic political and metaphysical thought was under attack.⁷⁴ Schneewind observes that this did not go so far as to extinguish an Aristotelian teleology or ethic from the political landscape.⁷⁵ What it did lead to by the seventeenth century, according to Simmonds, was an emergent form of political thinking "which sought to entrench a distinction between the juridical realm of rights and justice, and the ethical realm of virtue, prudence and practical wisdom."⁷⁶ Simmonds notes that theories of natural law exploring separate autonomous relations between states, brought forth the possibility that moral relations between individuals within the state could be conceived of in a similar way, "fostering new forms of individualism in political thought more generally."⁷⁷

⁷¹ Simmonds, N. (2001) "Protestant Jurisprudence and Modern Doctrinal Scholarship" in 60(2) *Cambridge Law Journal* 271 at p.278.

⁷² *Ibid.* 276.

⁷³ *Ibid.* 279.

⁷⁴ *Ibid.* 275.

⁷⁵ Schneewind, J. (1998) *The Invention of Autonomy: A History of Modern Moral Philosophy*, at pp.286-7.

⁷⁶ Simmonds, N. (2001) at p.277.

⁷⁷ *Ibid.* at 279.

It is through the trajectory of these events that ideas of virtue can be seen to intersect with and then diverge from the developing ideas of a social contract as the basis of government, as jurisprudential notions of contract evolved into a modern doctrinal form. This is the time of the English Civil War, and of Hugo Grotius and Thomas Hobbes. Gordley points out that in their original form, the late scholastics' doctrines, informing concepts of contract, relied themselves "directly upon Aristotelian and Thomistic conceptions about virtue and metaphysical conceptions about the nature or essence of things."⁷⁸ Following on from its basis in the virtue of liberality and/or that of commutative justice, each type of contract, he states, "...had a certain 'nature' or 'essence' from which certain obligations flowed,"⁷⁹ such that, "...in Thomas's philosophical account, essences are linked to ends, and the essences of moral actions are defined by ends that are themselves means to the ultimate ends of man."⁸⁰ Grotius, however, took a somewhat more terrestrial view of contracts. Kahn notes that Grotius emphasized the central role of language in the construction of contracts and the power of language to elicit "the capacity for reason and sociability."⁸¹ She states that Grotius considered "that the meaning of an individual's consent to a contract, including a political contract, was constrained by a prior agreement regarding the use of language."⁸² Not only did such a view break with medieval notions of the binding nature of "internal acts" which are "perceivable by God,"⁸³ but it can be argued to have elevated the place of human will as a foundational act in the establishment of contractual relations. Gordley, notes that by the nineteenth century, the making of a contract had come to be regarded "simply as an

⁷⁸ Gordley, J. (1991) at p.6.

⁷⁹ *Ibid.* at p.7.

⁸⁰ *Ibid.* at p.23.

⁸¹ Kahn, V. (2004) at p.38.

⁸² *Ibid.* at p.39.

⁸³ *Id.*

act of will, not an exercise of a moral virtue.”⁸⁴ In a world witnessing a rapid diminution in the extent to which human conduct was understood as being founded upon a transcendental substrate, such an eventuality is no surprise.

In this regard, Doris identifies Grotius and Pufendorf in particular, who popularised the scholastic legal doctrines but simplified much of the early humanist concepts.⁸⁵ He states that the end result “...was the loss of philosophical and moral justifications underpinning contract law...and the drifting apart of philosophical principle and legal doctrine.”⁸⁶ Gordley notes that a second emphasis contributed to this process. The French jurist, Jean Barbeyrac, desired to make the law accessible to as broad an audience as was possible, and he considered Pufendorf’s works suitable to facilitate this project.⁸⁷ But this resulted in a diminution of philosophical depth and in rigour of argument.⁸⁸ Gordley states:

Pufendorf and Barbeyrac could speak about virtue of fidelity or about the essence, substance, or nature of a contract without considering closely what these terms could mean in the non-Aristotelian world they thought they were inhabiting.⁸⁹

Finally, according to Doris, the eminent German philosopher, Christian Wolff, “developed contract theory scientifically and deductively on a pragmatic basis...[and]...the late scholastic debate dropped out of sight, as he failed to comprehend the Aristotelian tradition that he was

⁸⁴ Gordley, J. (1991) at p.8.

⁸⁵ Doris, M. (2004-5), at p.364.

⁸⁶ *Ibid.* at n.17, pp.364, 365.

⁸⁷ Gordley, J. (1991) at p.131.

⁸⁸ *Ibid.* at p.132.

⁸⁹ *Id.*

attempting to modernise and revive.”⁹⁰ On this analysis, the “will theory” of contract -as it came to be known - along with the mantra of “freedom of contract,”⁹¹ would provide a basis for treatise writers and the English judiciary to assimilate the concept of autonomy into that of contract.⁹² This followed a long period during which they purged contractual concepts of their original Aristotelian underpinnings, and borrowed superficially, repeating the phrases of the natural lawyers, although with little understanding of their original meaning - and with *will* remaining as a surviving artefact.⁹³

This process would eventually mature in the nineteenth-century. But as it developed, the concept of contract was analogized – particularly in literary accounts alluding to the so-called *literary contract* (i.e., that between the author and his or her readership) - to account for the basis of the relationship between the governor and the governed. Kahn states,

Civil war writers explicitly analogized the reader’s consent to the literary contract to an individual’s consent to the political contract, and vice versa. There had, of course, been earlier examples of authors’ calling attention to the literary contract, but this contract was compared with a legal document rather than with the contract of government....in 1642, when Milton referred to his “covenant” with the “knowing reader” in *The Reason of Church Government*, readers would have understood the political overtones of this covenant, not only because of Milton’s own discussion of the relationship of church government to political government, but also because the widespread political and

⁹⁰ Doris, M. (2004-5) at p.364; Gordley, J. (1991) at p.133.

⁹¹ Gordley, J. (1991) at p.369

⁹² *Ibid.*, at p.372

⁹³ *Id.*

religious use of this metaphor in the preceding decades....it is clear that seventeenth-century writers thought of contract as a metaphor and consent as a speech act. They knew that, in imagining a new, voluntary, and therefore contingent beginning of obligation, they were rewriting traditional accounts of obligation as a story that 'could have been otherwise.' They understood the metaphor of the political contract as requiring a narrative, even as they differed on the meaning of consent and on the larger story they wished to tell.⁹⁴

Kahn states that the traditional narrative of contract from the 1640s could provide for divergent conceptions of the contracting subject; a religious (i.e., casuist) version of covenant emphasizing claims of individual conscience, and a secular version which stressed calculation, self-interest and the natural right of self-preservation.⁹⁵ But her bigger point is the aforementioned one championed by Grotius – the constitutive power of language in crystallizing human relations conceptually through contract, as opposed to a conception of human life via Aristotelian virtue and the concomitant notion of a natural disposition to the political life.⁹⁶ She notes that in the years leading up to the English civil war, the conflict between the Stuarts and the Parliament brought the language of contract to the fore in politics.⁹⁷ And she also notes that the Putney debates of 1647 and the debates at Whitehall in 1648 illustrate the explosion of the language of contract during the civil war.⁹⁸ But moreover, language itself was exploding, and everywhere competing interests struggled to prevail in the control of the meaning of words. Gunn, for

⁹⁴ Kahn, V. (2004) at pp.18-9.

⁹⁵ *Ibid.*, at p.5.

⁹⁶ *Ibid.*, at p.9.

⁹⁷ *Ibid.*, at p.83.

⁹⁸ *Ibid.* at p.11.

example, notes the place of the word *interest* in the growth of modern political vocabulary.⁹⁹ Normally, states Gunn, “...people distinguished between interests, born of calculation, and passions, based on impulse.”¹⁰⁰ He notes that the volatile world of seventeenth-century English politics employed the word in ways for which there was no precedent.¹⁰¹ Prior to the civil war, the term *interest* was largely restricted to the designs of the monarch, or those claimed for England. But the maxim of the Huguenot statesman and general, the Duke of Rohan, “the interests of England” – which Gunn notes had no currency before the civil war¹⁰² – was taken up by the polemicists of the civil war.¹⁰³ Whereas the supporters of Parliament, and later of the Commonwealth, had been reluctant to cite the maxim, which “...smacked of that very prerogative against which they rebelled,”¹⁰⁴ it came to be that politics could not be discussed without referring to “interest.”¹⁰⁵ Following the execution of Charles I, “interest” assumed a prominent place in the language of politics, so that, where previously, Kings had spoken “mysteriously” of their “interests,” now it was claimed, all men had such interests.¹⁰⁶ And whereas previously little was asked of the ordinary citizen but a selfless loyalty,¹⁰⁷ now, with these developments, came what Kahn refers to as “[t]he new fiction of the autonomous political subject”¹⁰⁸ to whose

⁹⁹ Gunn, J. (1968) “Interest Will Not Lie”: A Seventeenth-Century Political Maxim” in 29(4) *Journal of History of Ideas* 551 at p.551.

¹⁰⁰ *Ibid.* at p.558.

¹⁰¹ *Ibid.* at p.551.

¹⁰² *Ibid.* at p.552.

¹⁰³ *Ibid.* at p.555.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Ibid.* at p.556.

¹⁰⁷ *Ibid.* at p.558.

¹⁰⁸ Kahn, V. (2004) at p.13.

interests appeal could be made. And, herein, was to be found the traction by which the elements of the social contract could generate momentum.

The resulting foment of the struggles between the Parliamentarians and the Royalists leading to the civil war animated unprecedented debate regarding the place of the autonomous citizen and the arrangements by which that place could be determined. For the first time in history, according to Kahn, there existed a cultural conversation about the consent of the individual subject as a crucial aspect of political legitimacy.¹⁰⁹ Gough notes that ideas of contract and the popular origin of government would become familiar in England by the time of the civil war. James I had alluded to contract theory in a speech to Parliament and parliamentary lawyers commonly invoked the concept.¹¹⁰ The idea of a government contract¹¹¹ was particularly contentious and much debated. The English jurist, John Selden, for example, openly avowed contract theory in this sense: “To know what obedience is due to the prince, you must look into the contract betwixt him and his people...”¹¹²

Equally, the idea that the incumbency of the monarch was a position held on trust was also widely held. Cromwell considered the king to be “a king by contract,”¹¹³ holding that a king’s breach of trust should be punished more than any crime whatsoever.¹¹⁴ Gough notes that Milton, who was one of the first English publicists to articulate a thorough-going contract theory, considered the people’s natural sovereignty was the basis for a relationship with the king, not of contract, but

¹⁰⁹ *Ibid.* at p.57.

¹¹⁰ Gough, J. W. (1957) at p.89.

¹¹¹ *Supra* note 45, associated text.

¹¹² Gough, J. W. (1957) at p.89.

¹¹³ *Ibid.*, at p.100.

¹¹⁴ *Id.*

trusteeship.¹¹⁵ It is this concept of trust upon which John Locke built his theory in *Treatise of Civil Government*,¹¹⁶ although the distinction between trust and contract has often been overlooked in Locke's case, according to Gough.¹¹⁷ Barker explains that Locke used the concept of trust – not contract – to explain “‘subjection.’”¹¹⁸ Through Locke's formulation, according to Barker, ‘the People,’ who comprise both the trustor and the *cestui que trust*, act (collectively) in their capacity of trustor, conferring a fiduciary power (which inheres, as it does, certain fiduciary obligations) on the legislature, which thereby becomes the trustee.¹¹⁹ Barker notes that under this formulation, if political power is regarded as a trust, it follows that the Sovereign has not entered into a contract with the people, nor the people with him. He states:

The trust, in its application, leaves no room for a ‘contract of subjection.’ We may say that Locke did not assign a contractual position to the sovereign because it would have given him rights of his own, derived from the contract; and he had no wish to vest the sovereign with *eigenes Recht*. Conversely, we may say that Hobbes (who equally leaves no room for a ‘contract of subjection’) did not assign a contractual position to the People because it would have given *it* rights of its own; and he had no wish to vest the People with *eigenes Recht*.¹²⁰

In the context of philosophical considerations of *political obligation* and the relationship between the governor and the governed generally, notions of trust are not confined to legalistic concepts

¹¹⁵ *Id.*

¹¹⁶ i.e., the second of his *Two Treatises of Government*.

¹¹⁷ Gough, J. W. (1973) *John Locke's Political Philosophy: Eight Studies by J. W. Gough*, 2nd Ed., at p.155.

¹¹⁸ Gierke, O. (1957) *Natural Law and the Theory of Society 1500 to 1800*, at p.299, note 68.

¹¹⁹ *Id.*

¹²⁰ *Ibid.* at p.299-300.

of trusteeship. Braithwaite and Levi contrast legal conceptions of trust – of which, they note, is that of trust as a moral obligation of power (which include legislatures as trustees of the people) – and the dominant social science conception of trust as confidence.¹²¹ Both are relevant to trust as a condition of political obligation, and, according to Braithwaite and Levi, are mutually constituting.¹²² Insofar as the conception of trust as confidence is concerned, John Dunn describes it in the following terms:

Trust is both a human passion and a modality of human action – a more or less consciously chosen policy for handling the freedom of other human agents or agencies. As a passion, a sentiment, it can be evanescent or durable. But as a modality of action it is essentially concerned with coping with uncertainty over time. A human passion, let us agree with David Hume, is an original existence. Human beings can certainly affect their own feelings through time, by more or less ingeniously strategic dispositions. But they cannot at a particular time simply choose these feelings.¹²³

Liberal-democracy and virtue

From the standpoint of liberal-democratic theory, virtue, and how it is constituted in terms of the state, has eluded concordant definition. Definitionally-speaking, virtue has proved to be malleable, as is suggested in Burt's observation "that the virtues can be defined both substantively (through a descriptive list of what counts as human virtues) and formally (by means

¹²¹ Braithwaite, V., and Levi, M. (Eds.) (1998) *Trust and Governance*. at p.344.

¹²² *Ibid.* at p.345.

¹²³ Dunn, J. (1990) *Interpreting Political Responsibility*, at p.26.

of a definition abstract enough to accommodate the various members of the substantive list).¹²⁴

As Kloppenberg points out, the competing ideologies of the seventeenth- and eighteenth-centuries – which he contends were “rich in diversity and ambiguity”¹²⁵ - saw Montesquieu distinguish between Christian, political and moral forms of virtue in his *The Spirit of the Laws*.¹²⁶

Even within the philosophies respectively of Locke and Hobbes, the place and colour of virtue has not been without its share of controversy. Kloppenberg notes that with the rise of market conceptions of liberalism, Locke’s philosophy suffered the imposition of “meanings gathered from the social consequences of capitalism.”¹²⁷ Devine contends that this movement in scholarship saw Locke cast as a hedonist, so that Lockean civil society reflected not virtue, “...but only the brutish pursuit of self-interest.”¹²⁸ Laslett, for example, has described Locke’s “ethic” as one “...of the Hobbesian sort, with pain and pleasure as the springs of action.”¹²⁹ Hobbes similarly has been described as a hard-headed cynic whose theories were starkly individualistic and a basis for modern incarnations of utilitarian market-liberalism.¹³⁰ Notably, his scathing criticism of Aristotle is well known; in Chapter 46 of *Leviathan* he argues, for example, that Aristotle’s work “...is not properly philosophy...but *Aristotelity*.”¹³¹ Hobbes states: “I believe that scarce anything can be more absurdly said in natural philosophy than that which is called Aristotle’s *Metaphysics*; nor more repugnant to government than much of that he hath said in his *Politics*; nor more

¹²⁴ Burt, S. (1992), at p.5.

¹²⁵ Kloppenberg, J. (1987) at p.19

¹²⁶ *Id.*

¹²⁷ *Ibid.* at p.16

¹²⁸ Devine, D. (1978) “John Locke: His Harmony Between Liberty and Virtue” in 22(3) *Modern Age* 246 at p.250.

¹²⁹ Laslett, P. (1960) *John Locke – Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus*, at p.82.

¹³⁰ Kloppenberg, J. (1987) at p.16.

¹³¹ Hobbes, T. “Leviathan, or, Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil” in Adler, M. (Ed) (1990) *Great Books of the Western World Volume 21 Machiavelli, Hobbes, Second Edition*, at p.269.

ignorantly, than a great part of his *Ethics*.”¹³² Hobbes rejected Aristotelian ideas of human perfection, and perhaps it is for this reason more than any other that, historically, he has been considered to have calculatedly removed any “sentimental” notions about humanity’s inherent virtue from his theory.¹³³

Whatever their agreements, both Locke and Hobbes differed in significant ways regarding the place of government in respect of the governed. Devine contends that, for Locke, “[g]overnment remains limited in civil society because God gave man the ability, through work and reason, to subdue the earth and thereby improve his life by the use of private property.”¹³⁴ Locke considers that man would not hand over the power of decision to a government in this way were he not able to secure his property by doing so.¹³⁵ Devine notes that Locke’s theory here relies both on the virtue of the people and the virtue of the governor to whom they consent.¹³⁶

But in the case of both Hobbes and Locke, virtue, in one form or another, can be seen to provide a significant basis for their respective theories regarding the inception of government. Aristotle’s conception of virtue is connected directly to the ultimately unattainable ends of human perfection, on the one hand, and the citizen’s inherently social character,¹³⁷ on the other, with its obvious and inevitable culmination in the polis. For Locke, government takes a more artificial form. Dunn states “[a]t the centre of Locke’s conception of government – and catching the

¹³² *Ibid.* at p.268.

¹³³ See for example, Mouritz, T. (2010) “Comparing the Social Contracts of Hobbes and Locke” in 1 *The Western Australian Jurist* 123 at p.125.

¹³⁴ Devine, D. (1978) at p.252.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Kahn, V. (2004) at p.9.

ambivalence of this vision – was the idea of trust.”¹³⁸ Anderson observes that this trust, for Locke, “...is the true foundation of legitimate government” relying upon the honesty and wisdom of the governor.¹³⁹ Unlike Aristotle, the promotion of virtue is not the purpose of politics in Locke’s view.¹⁴⁰ And rather than an Aristotelian virtue of the human soul, Locke’s conception of virtue is reflective of a good citizen in a regime based on natural freedom and equality.¹⁴¹ Berkowitz notes that Locke never developed a role for virtue in his political writings, which have generally been taken to constitute a repudiation of it.¹⁴² But Devine notes that this is because Locke’s political writings are about *government*, not *ethics* or *morality*.¹⁴³ Berkowitz, amongst others, argues that virtue played a significant role in Locke’s philosophy. He states, for example, that Locke devoted his pamphlet *Letter Concerning Toleration* (1689) to the defence of a single virtue, “...and wrote an entire book, *Some Thoughts Concerning Education* (1693), to enumerate a catalog of virtues that support a life of liberty, and to spell out the most appropriate manner to instil them.”¹⁴⁴ Locke counted virtue as the “first and most necessary” of endowments obtaining to “gentlemen,” followed, in their turn, by “wisdom, breeding and learning.”¹⁴⁵ Anderson notes that “Locke had observed that, at least in the contemporary age, failures of goodness and virtue posed a greater threat to the security of the commonwealth than failures of wisdom...[and that]...the importance

¹³⁸ Dunn, J. (1984) *Locke*, at p.52.

¹³⁹ Anderson, C. (1992) “Safe Enough in His Honesty and Prudence: The Ordinary Conduct of Government in the Thought of John Locke” in XIII(4) *History of Political Thought* 605 at p.607.

¹⁴⁰ Berkowitz, P. (1999) at p.75-6.

¹⁴¹ *Ibid.* at p.76.

¹⁴² *Ibid.* at p.75.

¹⁴³ Devine, D. (1978) at p.251

¹⁴⁴ Berkowitz, P. (1999) at p.84.

¹⁴⁵ Locke, J. (1693) *Some Thoughts Concerning Education*, at p.115.

Locke places on virtue...corresponds to Locke's concern for the honesty and integrity of the governors of a commonwealth."¹⁴⁶

Fundamental to Locke's philosophy is his Christian ethic. Anderson notes that the question of individual salvation was central to his philosophy, and that he was concerned that his theory remained consistent with Christian virtues.¹⁴⁷ And this goes some of the way towards illuminating the basis upon which Locke can be distinguished from Aristotle. Devine notes that Christ separated Caesar (i.e., government) from virtue by making men take into account the rewards and punishments of heaven and hell in an afterlife.¹⁴⁸ Whereas virtue was an inseparable component of politics for Aristotle, Locke considered that the government's only morality arose in regard to the moral conduct of its own affairs; otherwise, politics had little to do with virtue, which was a matter left to individuals in society.¹⁴⁹

It is here that contrasts can also be drawn between Locke and Hobbes as regards the place of virtue in politics. Kahn argues that the publication of *Leviathan* in 1651 proved to be a watershed in the new political subject of contract.¹⁵⁰ She states,

Leviathan was the turning point because it emphasized the fictional dimension of contract to a greater degree than before...Hobbes used his fiction of the state of nature and the political contract to trump competing versions of contract that derived from constitutionalism, covenant theology and natural law jurisprudence....At the same

¹⁴⁶ Anderson, C. (1992) at p.623

¹⁴⁷ *Id.*

¹⁴⁸ Devine, D. (1978) at p.249.

¹⁴⁹ *Ibid.* at p.252.

¹⁵⁰ Kahn, V. (2004) at p.6.

time...[he]... presented his readers with a dramatically compelling fiction of the state of nature, an eloquent story of how obligation came to be, and a vivid illustration of the poetic power of contract to bring political obligation into existence *ex nihilo*.¹⁵¹

Hobbes' conception of government favoured monarchy over aristocracy and democracy, and, in this, "...surreptitiously presupposed virtuous monarchs" according to Berkowitz.¹⁵² But whereas, according to Dunn and Anderson, trust was the basis of legitimate government for Locke,¹⁵³ for Hobbes, legitimate government could only be in the form of an absolute monarch, and only for the purposes of achieving peace.¹⁵⁴ Hobbes' preoccupation is with the circumstances that would allow men to escape the state of nature. Berkowitz argues that "Hobbes' *Leviathan* is firmly grounded in reflections on the virtues that conduce to peace."¹⁵⁵ Hobbes argued that human beings are endowed with certain natural and inalienable rights and his conception of the sovereign is one who permits his subjects freedoms, including liberty of commerce and contract, and choice of profession, where to live and how to raise children.¹⁵⁶ Hobbes contends that man requires virtue to escape the state of nature, and that it is a leading task of the sovereign to safeguard the virtue of his subjects to ensure there is no return to the state of nature.¹⁵⁷ As he states in *Leviathan*:

The office of the sovereign...consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of the people; to which he is

¹⁵¹ *Id.*

¹⁵² Berkowitz, P. (1999) at p.67.

¹⁵³ *Supra* text associated with notes 140, 141.

¹⁵⁴ Berkowitz, P. (1999) at p.39

¹⁵⁵ *Ibid.* at p.38.

¹⁵⁶ Berkowitz, P. (1999) at p.36.

¹⁵⁷ *Ibid.* at p.64.

obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him.¹⁵⁸

For Hobbes, the laws of nature, which he expounded in chapters XIV and XV of *Leviathan*, are fundamental to the moral life, notably covering the same ground as the virtues,¹⁵⁹ and he states in the latter chapter:

...all men agree on this, that peace is good; and therefore also the way or means of peace (which, as I have shewed before are *justice, gratitude, modesty, equity, mercy*, and the rest of the laws of nature) are good (that is to say, *moral virtues*) and their contrary *vices*, evil. Now the science of virtue and vice is moral philosophy; and therefore the true doctrine of the laws of nature is the true moral philosophy.¹⁶⁰

The distinction drawn by Hobbes between his representation of the laws of nature, according to Schneewind, and that of earlier philosophers, is that whilst older writers placed virtue in “a mediocrity of passions”, he contends he is the first to see that the real source of their praiseworthiness is that they are “meanes of peaceable, sociable, and comfortable living.”¹⁶¹

Will, consent, and liberal-democracy

Despite, however, Locke’s and Hobbes’ theoretical intersections with Aristotle insofar as their reliance on virtue is concerned, crucial aspects of their contractarian ideas draw a significant

¹⁵⁸ Hobbes, T. (1990) at p.153.

¹⁵⁹ Schneewind, J. (1998) at p.92.

¹⁶⁰ Hobbes, T. (1990) at p.96.

¹⁶¹ Schneewind, J. (1998) at p.93

separation between Aristotle's political theory and theirs. At base, the idea of consent, which is central to the contractarian ideas of both Locke and Hobbes, connotes a voluntarist idea not evident in Aristotle's theories. Riley asserts that "it is inescapably the case that the central concept in social contract theory is will."¹⁶² He says,

Since Plato's *Crito* it has been a permanent question whether the legitimacy of government and the responsibilities of citizens depend on some free human action, for example the voluntary acceptance of benefits such as security and education, when one could have departed.¹⁶³

Adkins notes that virtue is concerned "with passions and actions, and since praise and blame are bestowed upon such as are voluntary, while to such as are involuntary pardon is granted, and sometimes pity, it is presumably necessary for those who are enquiring about virtue to distinguish between the voluntary and the involuntary."¹⁶⁴ But Riley observes that Aristotle did not admit of voluntarism of this sort into his conception of politics.¹⁶⁵ He states that Aristotle never suggested a theory of moral personality that required all legitimate actions to be voluntary, or chosen by private individuals.¹⁶⁶ But will - as has already been referred to - came to be the fundamental basis for contractual relations, particularly after Grotius, and was linked fundamentally to notions of consent much earlier. Gilbert states that the Greeks had recognized diverse "wishes," which in any particular case may or may not have been endorsed by reason.

¹⁶² Riley, P. (1982) *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel*, at p.viii.

¹⁶³ Riley, P. (1982) at p.ix

¹⁶⁴ Adkins, A. (1960) at p.8.

¹⁶⁵ Riley, P. (1982) at p.4.

¹⁶⁶ *Id.*

But, for the first time, Augustine conceived of a unified will, which could be good or bad, reflecting Augustine's own identification with the divided self (an issue addressed in more detail in Chapter 3).¹⁶⁷ St Augustine appropriated the *bona voluntas* of Cicero and Seneca and deepened it into a central moral concept.¹⁶⁸ In what was a departure from Stoic ideas, Augustine argued in *On the Spirit and the Letter* that consent and refusal was a matter not of intellect, but of will, and that "consent is necessarily an act of will."¹⁶⁹ Riley argues that this connection forged by Augustine, casting consent in terms of will, is crucial to the social contract; in his view, for this reason, Rousseau is not conceivable without Augustine.¹⁷⁰ Aristotle, to be sure, had a limited doctrine of voluntary action, but it was enlarged and deepened by Augustine, and St Thomas Aquinas would later apply the concept not only to the law (culminating ultimately in the modern legal doctrine of *mens rea*) but also to good and bad acts.¹⁷¹

But notwithstanding the elevation of notions of individual autonomy – some, indeed, have attributed to Augustine the birth of the *individual*¹⁷² - this did not constitute a departure from Aristotelian ideas of the common good and virtue which were central to his conception of politics. Augustine conceived of human perfection, but concluded it to be unattainable.¹⁷³ He urged the cultivation of a "good will" which he equated with wishing to live a right and honourable life, and which inheres all four of the cardinal virtues that could not "will any evil to anybody."¹⁷⁴

¹⁶⁷ Gilbert, N. (1963) "The Concept of Will in Early Latin Philosophy" in 1(1) *Journal of the History of Philosophy* 17 at p.32.

¹⁶⁸ Riley, P. (1982) at p.4.

¹⁶⁹ *Ibid.* at p.33.

¹⁷⁰ Riley, P. (1982) at p.5.

¹⁷¹ *Id.*

¹⁷² Seidentop, L. (2014) at p.101

¹⁷³ *Id.*

¹⁷⁴ Gilbert, N. (1963) at p.31.

Nonetheless, Augustine drew a distinction between the natural order and that ordained by God. He considered government to be a human product; and the state an “association of a multitude of rational beings united by a common agreement on the objects of their love.”¹⁷⁵ Whilst secondary to the love of God, he considered that states could ensure a degree of peace and security, which he viewed as a prerequisite for social existence.¹⁷⁶

Riley argues that it is commonly recognized “that consent or agreement based on will, understood as a moral faculty, came to occupy a place in political philosophy in the seventeenth, and eighteenth, and early nineteenth centuries, that it had never occupied so completely before – not, at least, in the political, as distinguished from the moral and legal, realms.”¹⁷⁷ Rousseau states for example, “I owe nothing to those whom I have promised nothing....civil association is the most voluntary of all acts. Every man being born free and his own master, no one, under any pretext whatsoever, can make any man subject without his consent.”¹⁷⁸ Similarly, Hobbes states in relation to the making of government, it is human wills “which make the essence of all covenants.”¹⁷⁹ At chapter 21 of *Leviathan*, he states:

Liberty and necessity are consistent: as in the water that hath not only liberty, but a necessity of descending by the channel; so likewise in the actions which men voluntarily do, which, because they proceed from their will, proceed from liberty...¹⁸⁰

¹⁷⁵ Morrow, J. (1998) *History of Political Thought: A Thematic Introduction*, at p.26.

¹⁷⁶ *Ibid.* at p.27.

¹⁷⁷ Riley, P. (1982) at p.8.

¹⁷⁸ Rousseau, “The Social Contract” in Hutchins, R. (Ed)(1952) *Great Books of the Western World Volume 38 Montesquieu, Rousseau, Second Edition*, at pp. 399, 426.

¹⁷⁹ Hobbes, T. (1990) at p.199; Riley, P. (1982) at p.9.

¹⁸⁰ *Ibid.*, at p.113.

However, as Damrosch notes, ideas of free-will were bound-up with theological conceptions of human agency that brought with them the capacity to confound the conception of free-will with elements of determinism. Hobbes continues:

...and yet, because every act of man's will, and every desire, and inclination proceedeth from some cause, and that from another cause, in a continual chain, whose first link is the hand of God the first of all causes, [they] proceed from *necessity*.¹⁸¹

Hobbes' notion of will is deterministic. For Damrosch, Hobbes' mechanistic psychology places emphasis more heavily on the unbroken coherence of the causal chain than on its origin in God the First Cause.¹⁸² He argues:

The will is merely one effect among many, 'power' being identified with 'cause' and 'act' with 'effect,' and any motion being the effect of that which preceded and the cause of that which follows.¹⁸³

Riley argues that these ideas of will and voluntary acts, as are expressed by Hobbes in *Leviathan*, colour and shape the notions of covenant, ought, duty, justice and right, which are therein used by him.¹⁸⁴ In relation to will, Locke states "God having given Man an Understanding to direct his Actions, has allowed a freedom of Will, and liberty of Acting." In a similar vein to Hobbes, Locke

¹⁸¹ *Id.*

¹⁸² Damrosch, L. (1979) "Hobbes as Reformation Theologian: Implications of the Free-Will Controversy" in 40(3) *Journal of the History of Ideas* 339 at p.339.

¹⁸³ *Id.*

¹⁸⁴ Riley, P. (1982) at p.23.

argued for the compatibility of human free will and divine omniscience, although, Dunn notes, he could not see how that was so.¹⁸⁵

The trajectory of these developments into the seventeenth-century represented a novel project on the part of natural lawyers preoccupied with the intellectual enlightenment of society; and in the process, says Doris, the moral authority of Aristotle and Aquinas was displaced by an ideology which stressed the sovereignty of the individual.¹⁸⁶ The reconfiguration of the individual's place within social structures that had stood for hundreds of years, culminating in the *Military Tenures Abolition Act* 1660, which abolished tenure by knight-service and its incidents and grand serjeanty, would see the demise of feudalism in England.¹⁸⁷ As concomitant tensions played out so as to reconfigure, also, the nature of the King's source of entitlement to his kingdom, the subtle adjustments to the individual's own entitlements, as a subjective source of experience and engagement, would come to be evidenced in the manner in which the evolving English language accommodated and inspired these changes. In the seventeenth-century – for the first time – the language evidenced examples of external things described not objectively (i.e., from their own point of view), but purely by the *effects* produced by them on the observer.¹⁸⁸ These and other social and cultural trajectories would intersect in ways by the late seventeenth-century that would see England transformed, and virtue with it.

¹⁸⁵ Dunn, J. (1969) *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'*, at p.193.

¹⁸⁶ Doris, M. (2005) at p.367.

¹⁸⁷ Baker, J. (1990) *An Introduction to English Legal History*, 3rd - Edition, at p.294.

¹⁸⁸ Barfield, O. (1967) *History in English Words*, at p.170.

CHAPTER 3 – GLORIOUS REVOLUTION TO THE WESTMINSTER TRADITION

The conception of the individual, the invocation of will and the possibility of freedom

Paul Halliday observes that the writ of habeas corpus, which has served in Anglophone legal cultures for more than four centuries, is the judicial practice by which a prisoner is brought before a judge in order “to signify the crimes laid against him,” and thereby to ensure the law is honoured in holding or releasing him.¹ But, he notes, its grander justification “...is told as the tale of liberty: ‘The Great Writ of Liberty,’ as we have called it for three hundred years.”² Habeas corpus is but one strand of several which make up the concept – foundational in the liberal-democratic project – of the rule of law. And, fundamental to that great project, as it is to habeas corpus itself, is the presumption that all citizens enjoy freedom to go about their business unhindered by the state, subject always to the limited confinements laid down by the state’s laws and regulations. And whilst, as Joyce Lee Malcolm notes, freedom and the rule of law seem opposites at first blush, the English, through their experiences as constitutional forebears to many, “...knew firsthand that freedom without law was no freedom.”³

The rise of the modern conception of the citizen–as-*individual* and, more crucially, as the embodiment of this liberty, is argued by Larry Siedentop to be ontologically founded upon the Christian conception of God, first as a moral status, thence, centuries later, as the primary social role.⁴ He observes Jesus’ insistence that ‘the kingdom of God is within you’ was designed to

¹ Halliday, P. (2010) *Habeas Corpus: From England to Empire*, at pp.1-2.

² *Ibid.*, at p.2.

³ Malcolm, J. “Freedom and the Rule of Law: The Ingenious English Legacy” in Peacock, A. (2010) *Freedom and the Rule of Law*, at p.23.

⁴ Siedentop, L. (2014) at p.353.

create an individual will; the interiority of Christian belief and its insistence that the quality of *personal intentions* is more important than any fixed social rules, he argues, is reflected in this.⁵

The possibility which arises, of course, is that of *good will*, and, necessarily, its obverse. Riley states that the freedom to conform voluntarily (i.e., to some standard) - and including to that of an absolute standard - was always important in Christian doctrine.⁶ In an attempt to provide a legitimate philosophical account of this notion, Gottfried Leibniz articulated a conception of the individual as comprising contingent possibilities in terms of his or her agency which are not determined by necessity (i.e., not foreknown by God).⁷ Seigel notes that Leibniz' conception of contingency in this sense "...left freedom both for the creature to possess responsibility for its acts, and for the Creator to respond to his creature's deeds."⁸

These descriptions of the Christian conception of the *individual* provide for the possibility of the attribution of responsibility in respect of an *agent*. Thus, in legal positivist terms - and discounting such concepts as strict and absolute liability and the like - such attributions are generally (although, not always) in respect of an individual's actions. H. L. A. Hart observes that the law excuses certain "mental" mitigating factors such as mental disease, for example, or, say, where the performer of the subject act was unconscious at the time of performance. Otherwise, he states, "[i]f an individual breaks the law when none of the excusing conditions are present, he is ordinarily said to have acted of 'his own free will,' 'of his own accord,' 'voluntarily'; or it might be

⁵ *Id.*

⁶ Riley, P. (1982) at p.2.

⁷ Leibniz, G. (1934) *Philosophical Writings*, at pp. 61ff., esp. 71ff.

⁸ Seigel, J. (2005) *The Idea of the Self: Thought and Experience in Western Europe Since the Seventeenth Century*, at p.79.

said 'He could have helped doing what he did.'"⁹ Whilst it is eminently contestable from a legal positivist standpoint that the law could necessarily satisfy certain demands of morality,¹⁰ the concept of free will, in itself, certainly has significant moral implications. The idea that an agent is morally responsible for what he has done only if he *could have done otherwise* - otherwise known as the Principle of Alternative Possibilities¹¹ - resonates with commonplace ideas about one's place in the world and normative conceptions of responsibility. That idea, to be sure, has long been the subject of considerable disputation on the battleground of causal determinism, between compatibilists and incompatibilists, among others. And out of those disputes, significant challenges are levelled fundamentally at the very *possibility* of both legal and moral liability of the individual in *any* context. That the very idea of "free will" might rest upon ontologically tenuous foundations is arguably signalled by Herbert Packer's concession, that "[v]ery simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were."¹² As Hart observes, determinists generally make two claims about free will. Firstly, human conduct, in terms of both its physical and mental elements, is subject to certain scientific laws. And secondly, if human conduct is so-subject, the distinction that is drawn by the criminal law between "...one who acts under excusing conditions¹³ and one who acts when none are present becomes unimportant, if not absurd."¹⁴ For Hart, the consequences of such a regime, in which liability is attributed subject to certain exceptions and punishment is determined

⁹ Hart, H. L. A. "Legal Responsibility and Excuses" in Hook, S. (1961) *Determinism and Freedom: In the Age of Modern Science*, at p.95.

¹⁰ See Hart, H. L. A. (1961).

¹¹ See Frankfurt, H. (1969) "Alternate Possibilities and Moral Responsibility" in 66 *Journal of Philosophy* 829.

¹² Packer, H. (1968) *The Limits of the Criminal Sanction*, at pp.74-5.

¹³ See text associated with n.9, this chapter.

¹⁴ Hart, H. L. A. (1961) at p.96.

therefrom, are “...absurd, meaningless, irrational, or unjust, or immoral, or perhaps all of these at once.”¹⁵ The “scientific laws” Hart refers to may be loosely stated in terms of the thesis that any particular state of affairs which obtains in the future will be necessarily consequent upon the conjunction with the laws of nature of all those states of affairs which are precedent to it.

An agent’s capacity for voluntary action, necessarily presumed, as it is, by the law, is an idea which is assailed from many quarters. That this might be so is not surprising, given the significant complexity by which human acts are made manifest, as has been shown by John Austin.¹⁶ Dan-Cohen argues, in what he refers to as the *free will paradigm*, that morality is the primary source for understanding responsibility consequent upon an attribution, be it legal or otherwise.¹⁷ And Saul Smilansky observes in relation to such attributions that free will is notionally based upon a basic intuition that a person’s control over their actions is a concept of significant importance to us.¹⁸ From the standpoint of his thesis, he argues that the maintenance of what he refers to as “this mistaken belief” - that we possess libertarian free will - is an illusion facilitated by means of general mystification and self-deception on the part of the non-cognoscenti who harbour this view.¹⁹ Hannah Arendt rejects the contention that freedom is constituted by anything comprising attributions of *will*; for her, freedom is a function of politics – and freedom and politics are “...related to each other like two sides of the same matter.”²⁰ She notes that the concept of a will was largely unknown to the ancients; Albrecht Dihle observes that it is generally accepted

¹⁵ *Id.*

¹⁶ See generally: Austin, J. (1956-7) “A Plea for Excuses” in 57 *Proceedings of the Aristotelian Society* 1.

¹⁷ Dan-Cohen, M. (1992) “Responsibility and the Boundaries of the Self” in 105(5) *Harvard Law Review* 959 at p.959.

¹⁸ Smilansky, S. (2000) *Free Will and Illusion*, at p.2.

¹⁹ Double, R. (2001) “Free Will and Illusion by Saul Smilansky” in 110 (437) *Mind* 271 at p.272.

²⁰ Arendt, H. (1968) *Between Past and Future*, at p.147.

that “...the notion of will, as it is used as a tool of analysis and description in many philosophical doctrines from the early Scholastics to Schopenhauer and Nietzsche, was invented by St. Augustine.”²¹ However, Arendt argues it is absurd to suggest that citizens did not know freedom in the polis.²² Significantly, she contends that freedom does not appear until it is actualized; that it is a product of action, not abstraction, and that this is revealed, perhaps most effectively, in Machiavelli’s concept of *virtù*: “...the excellence with which man answers the opportunities in the world opens up before him in the guise of *fortuna*.”²³ But she is particularly interested in narratives in which the will prevails over a base appetite and in so doing, achieves self-mastery; appetites rightly-ordered, such as in the New Testament writings of St. Paul, including Romans vi-viii, and Galatians v. The Stoic, Epictetus, also, articulates this view; that one’s *prohairesis*, or moral identity, can be wholly under one’s control: he says “...it is the decision of your own will which compelled you, that is, moral purpose compelled moral purpose...if you *will*,²⁴ you are free.”²⁵ It is in these and like arguments, she notes, that free will and freedom became synonymous,²⁶ and complete freedom “...was experienced in the intercourse between me and myself, and outside of the intercourse between men.”²⁷

²¹ Dihle, A. (1982) *The Theory of Will in Classical Antiquity*, at p.123.

²² Arendt, H. (1968) at p.156.

²³ Arendt, H. (1968) at p.151.

²⁴ My emphasis.

²⁵ Epictetus (1929) *Epictetus: The Discourses as Reported by Arrian, the Manual and Fragments*, at p.121 (i.e., Book I, Ch. XVII).

²⁶ Arendt, H. (1968) at p.156.

²⁷ *Id.*

The Self and will to virtue: from cosmic order to political choice

Arendt's observation introduces a second, albeit related, consequence of the invention of the individual - in the form of the *self*; in its Western configuration, a socio-cultural construct emphasizing individualism and autonomy.²⁸ Tracy Strong argues that Plato was perhaps the first to have written theoretically about the relation of the self specifically in the context of the political order (although he was not the first to raise the question).²⁹ He observes that while Plato's *Republic* is the first book to systematically address the multiplicity of human political arrangements that are possible, he does not approach this question in terms of the constitutive elements giving life to the *relationship* between the individual and the state, but, rather, in terms of the discretely-drawn *constitutions* respectively of the individual (i.e., the *self*) and the polity (i.e., the *order*).³⁰

Augustine's role was particularly important in the development of the concept of the self in Western culture. Charles Taylor notes that, for Augustine, the Christian opposition between spirit and flesh was to be understood with the assistance of the Platonic distinction "...between the bodily and the non-bodily."³¹ Augustine recognized in Plato's conception of cosmic order - as is articulated in the *Timaeus* (and briefly described in chapter 1)³² - a created world exhibiting a meaningful order; and for Augustine, as for Plato, the vision of cosmic order is the vision of reason, and the good for humans is in seeing and loving this order.³³ But, in contrast to Plato,

²⁸ Berrios, G., & Markova, I. "The Self and Psychiatry: A Conceptual History" in Kircher, T., & David, A. (Eds.) (2003) *The Self in Neuroscience and Psychiatry*, at p.9.

²⁹ Strong, T. (1992) *The Self and the Political Order*, at p. 4.

³⁰ *Ibid.*, at p.3.

³¹ Taylor, C. (1989) *Sources of the Self: The Making of the Modern Identity*, at p.127.

³² See Chapter 1, text associated with note 17 ff.

³³ Taylor, C. (1989) at p.128.

Augustine looks inwards to find a sense of this order because, as he states in his *De vera Religione*, “Noli foras ire, in teipsum redi; in interiore homine habitat veritas” (“Do not go outward; return within yourself. In the inward man dwells truth.”)³⁴ Both Plato and Aristotle, on MacIntyre’s account, saw reason as independently motivating and with its own ends, towards which those who have reason are impelled.³⁵ Any deviation from this end could be explained only by some imperfection in the subject person’s knowledge at the time as to what is good, or best, or by an imperfection in the education and disciplining of the passions; and, on that account, he observes, “[t]here is no third possibility.”³⁶ But, for Augustine, the human will is the ultimate determinant of human action, and when it is diverted, it is systematically diverted in such a way that is not within its own power to change.³⁷

The self was originally intended by Augustine, according to Berrios and Marková, to be no more than a metaphorical or virtual space within which theological models of responsibility, guilt, and sin, could be played out.³⁸ Its significance for Arendt is in Augustine’s realization, made explicit in his *Confessions*, of the recalcitrance of his will, to take the description of Edward Hundert;³⁹ viz: “Whence is this monstrosity? And to what end? The mind commands the body, and it obeys instantly; ...the mind commands the mind, its own self, to will, and yet it doth not.”⁴⁰

But, moreover, as Augustine’s account of his theft of pears in Book II of the *Confessions* shows, the will is susceptible to more than simple recalcitrance: “...that I might be evil without any

³⁴ See Burleigh, J. (Ed.) (1953) *Augustine: Earlier Writings*, at p.262

³⁵ MacIntyre, A. (1988) at p.156.

³⁶ *Id.*

³⁷ *Ibid.*, at p.157.

³⁸ Berrios, G., & Markova, I. (2003) *The Self in Neuroscience and Psychiatry*, at p.9.

³⁹ Hundert, E. (1992) “Augustine and the Sources of the Divided Self” in 20(1) *Political Theory* 86 at p.86.

⁴⁰ Saint Augustine, *Confessions*, Translated by Vernon J. Bourke, at p.217.

compensation and that for my evil there might be no reason except evil. It was filthy and I loved it. I loved my own destruction. I loved my own fault..."⁴¹ As John Martin Fischer describes it,

Augustine's reflections are disturbing precisely because they exemplify one man's ability not only to do something he takes to be morally indefensible, but to be drawn to the action precisely because it is so indefensible.⁴²

What these conundrums reveal insofar as their implications for virtue, in the eyes of Augustine, is the necessity of grace for the redirection of the will, and the assent of the will to divine grace.⁴³

MacIntyre states that, from Augustine's standpoint, the fundamental human virtue is a virtue of the will in its return to freedom, so divesting the will of its self-enslaved vice.⁴⁴ Herein, it is through the fundamental virtue of *humilitas* that God's love is regained so that other virtues are possible. Augustine identifies pride as humility's corresponding vice:

If...[the mind] gets in its own way, so to speak, and it pleases it to imitate God perversely so that it wills to enjoy its own power, it becomes lesser to precisely the extent that it desires itself to be greater. And this is: "Pride is the beginning of all sin"...and "The beginning of pride is when one departs from God."⁴⁵

The nomination of humility as a virtue has been widely criticized; Hume called it a monkish virtue which served no manner of purpose, and which could "neither advance a man's fortune in the world, nor render him a more valuable member of society."⁴⁶ And, Cooper notes that Spinoza

⁴¹ *Ibid.*, at p.41.

⁴² Fischer, J. (1994) *The Metaphysics of Free Will*, at p.56.

⁴³ MacIntyre, A. (1988) at p.157.

⁴⁴ *Id.*

⁴⁵ Saint Augustine (2010) *On the Free Choice of the Will, On Grace and Free Choice, and Other Writings*, at p.125.

⁴⁶ Hume, D. (1890) *Hume's Essays, Literary, Moral and Political*, at p.469.

declared humility to be no virtue, whilst Machiavelli worried that humility saps martial valour.⁴⁷ Keys⁴⁸ argues that these theorists were most concerned that humility jeopardized a correct estimation and valuation of Aristotle's 'Crown of the virtues,' *Greatness of Soul*, or, *magnanimity*, in its conventional guise. Thomas Aquinas had directly addressed this objection to the proposition that humility could be a virtue in his *Summa Theologiae*, noting that no virtue is opposed to another virtue. He answered that humility restrains the appetite from aiming at great things against right reason, while magnanimity urges the mind to great things in accordance with right reason.⁴⁹ As observed by Keys, Aquinas considered humility a virtue because, like all moral virtues, it disposes appetite to be guided by the rule of reason.⁵⁰

Unlike Plato's ideas about virtue, however, Aquinas considered that humans should not aim inordinately at being like God.⁵¹ Significantly, insofar as human will is concerned, he argued that Adam had sinned because he coveted God's likeness as regards his own power of operation, in that, by his own natural power, Adam might be given to decide what is good and what was evil for him to do.⁵² Aquinas argued,

We may consider two things in man, namely that which is God's, and that which is man's. Whatever pertains to defect is man's: but whatever pertains to man's welfare and perfection is God's.⁵³

⁴⁷ Cooper, J. (2013) *Secular Powers: Humility in Modern Political Thought*, at p.70.

⁴⁸ Keys, M. (2008) "Humility and Greatness of Soul" in 37(4) *Perspectives on Political Science* 217 at p.218.

⁴⁹ Saint Thomas Aquinas, *Summa Theologiae*, II – II, Question 161 "Of Humility" (online).

⁵⁰ Keys, M. (2008), at p.218.

⁵¹ *Ibid.*, at p.219.

⁵² Saint Thomas Aquinas, *Summa Theologiae*, II – II, Question 162, *Supra* 49.

⁵³ *Ibid.*

As Keys describes it, “[b]y expelling pride, humility opens up an interior space that God can fill with grace and the ‘infused’ moral virtues.”⁵⁴

Aquinas’ conception of God’s intrinsic *continuity* in the life of the individual - within that interior space (and, quite apart from what it implies for the integrity of the human *self* and its interiority) - does not fit easily with Aristotle’s Great-souled man, as Keys points out:

The Aristotelian magnanimous man could not be too pleased to learn that what is properly speaking his...is “defect”...whereas “whatever pertains to man’s welfare and perfection is God’s.”⁵⁵

But, it does, however, coincide, in some way, with Plato’s conception, not only of one’s likeness to God, but also his idea of the self (or, more properly, the soul), which finds its authentic fulfillment “...in its participation in or identification with an order of things that exists outside itself, *and in the creation of which it plays no part.*”⁵⁶ However, Zetterbaum identifies a much more significant point than the contrasted distinctions of Aquinas’ Christian morality against the philosophies, respectively, of Plato and Aristotle. For, as he notes,

But this sense of an external and eternal order of things in which man may be said to locate his natural home and the authority for his self-quest is not a part of the shared consciousness of contemporary man. It is possible to condense three centuries of thought

⁵⁴ Keys, M. (2008), at p.219.

⁵⁵ *Ibid.*, at p.220.

⁵⁶ Zetterbaum, M. (1970) “Self and Political Order” 1(2) *Interpretation* 233 at pp. 233-4.

and history by simply taking cognizance of the fact that for modern man his natural home, indeed his only home, is his self.⁵⁷

This, of course, illuminates that conundrum of the secularized and unitary emotivism that Alasdair MacIntyre opines.⁵⁸ Berrios and Marková observe that it was during the seventeenth-century that the metaphors of the Reformation became secularized and built into liberalism and capitalism, and that Augustine's conception of a *self*, further reified and developed by Luther, became a conceptual prop for bourgeois notions such as individual ownership, natural rights and democracy.⁵⁹ In its twentieth-century form, the political self had been transformed into a psychological entity, reified into – among other things – a belief that a 'self' actually existed inside the European mind and brain.⁶⁰ But the embryonic political self of the seventeenth-century, at the commencement of the three centuries of thought and history averred to by Zetterbaum, was something of a different order.

This point of commencement, of course, coincides with the events surrounding the Restoration and the Glorious Revolution. It was a time at which the anonymous English *individual*, faced with conflicting and equally legitimate demands for allegiance, was implicated in serious matters that arose at the conceptual intersection of the evolving ideas of *trust*, *legitimacy*, and *consent*. As J. G. A. Pocock states it:

Two entirely legitimate authorities were at war and the questions for discussion were matters of allegiance, conscience and choice – in such a *casus* what was the subject and

⁵⁷ *Id.*

⁵⁸ See text associated with footnote *supra* 210, chapter 1, herein.

⁵⁹ Kircher, T., & David, A. (Eds.)(2003), at p.9.

⁶⁰ *Id.*

the Christian to do? Two lawful authorities were competing for his allegiance and neither could destroy the legitimacy of the other; to decide that one or the other was not lawful was, in a traditionalist society, almost certainly to conclude that it had never been, and so to destroy tradition. The subject was driven to rely on his own conscience...⁶¹

Questions of allegiance had become greatly problematic by the seventeenth-century. Jones notes that during the course of the sixteenth-century, Tudor officials had developed both the doctrine of an English *imperium*, together with that of divine right, to explain the supreme authority of the Crown in church and state. By the first decade of the seventeenth-century, it had become official dogma that the lawful monarch was God's lieutenant on earth, with or without coronation, such that all subjects owed loyalty both by natural law and divine injunction to the hereditary descendant of the blood royal of the kingdom.⁶² As William Dunham points out, the subject's attachment to the monarch's *person* was, in medieval England, the essence of allegiance.⁶³ *Calvin's Case* had set this in English law in 1608.⁶⁴ And it was of crucial significance in this that the monarch attempted to secure allegiance by way of vows, covenants and oaths. For, in medieval (and, casuist) England, allegiance to the person of the monarch was formally understood to be a matter of both law *and* conscience,⁶⁵ and it became a question of *conscience* that confronted the English subject when presented with a choice of allegiance, either to the King, or to the Parliament.

⁶¹ Pocock, J. (Ed.) (1977) *The Political Works of James Harrington, Part One*, at p.22.

⁶² Jones, D. (1999) *Conscience and Allegiance in Seventeenth Century England: The Political Significance of Oaths and Engagements*, at p.27.

⁶³ Dunham, W. (1951) "Doctrines of Allegiance in Late Medieval Law" in 26 *New York University Law Review* 41 at p.41.

⁶⁴ *Calvin's Case* (1608) *Co Rep 1a 77 ER 377*.

⁶⁵ Dunham, W. (1951) at p.41; Jones, D. (1999) at p.102.

Conscience, Casuistry, And Oath-As-Allegiance – The Means to Moral Choice and Virtue

D’Arcy notes that, in its moral usage, only a conscience he labels “judicial” is to be found in pre-Christian writers – prior to St. Paul – including in the writings of Aristotle.⁶⁶ Ramsay notes that the ancient Greek term *suneidesis*, as used by Democritus, Plato and Philo, could extend to account for the sense of a “guilty conscience.”⁶⁷ And, again, *conscientia*, as a moral account of human conduct in the writings of Cicero and Seneca.⁶⁸ It was, he says, St. Paul who first used conscience *legislatively* to demarcate a rule of conduct; to direct in advance of action.⁶⁹ As D’Arcy describes it, St. Paul used the term as well in its earlier form, in which “...it has the meaning and function which it had in the pagan writers: an interior witness and judge of one’s past actions and motives.”⁷⁰ But, he notes, in its new form, it brought with it both the authority to legislate, and the capacity to be in error.⁷¹

So much being so, as Langston points out, Bonaventure, for example, discussed in some detail whether one should always follow one’s conscience. He identified that conscience may dictate three types of actions: those in conformity with God’s law; those in addition to God’s law; and those contrary to God’s law.⁷² Langston states that Bonaventure, who was a Franciscan thinker in the thirteenth-century, placed conscience squarely within the rational faculty, specifying it as a part of practical reason, and that it is connected to both the will and the emotions.⁷³ The

⁶⁶ D’Arcy, E. (1961) *Conscience and its Right to Freedom*, at p.4-5.

⁶⁷ Ramsay, H. (2001) “Conscience: Aquinas – With a Hint of Aristotle” in 40(2) *Sophia* 15 at p.15.

⁶⁸ *Id.*

⁶⁹ *Ibid.*, at p.15-6.

⁷⁰ D’Arcy, E. (1961) at p.8.

⁷¹ *Id.*

⁷² Langston, D. (2001) *Conscience and Other Virtues: From Bonaventure to MacIntyre*, at p.27.

⁷³ *Ibid.*, at p.25.

question for Bonaventure was how did human will become depraved if conscience always dictated good and 'synderesis' inclined one towards good and away from evil?⁷⁴ He says that conscience, for Bonaventure, constituted a dispositional potentiality, which operates as a dynamic faculty, depending upon whether the individual develops it or allows it to weaken.⁷⁵ In this way, the erroneous application of a (weakened) conscience could dictate a path against God's law.

Aquinas went on to develop these ideas of conscience, although not always consistently with Bonaventure's conception of it. He considered conscience to be binding, on the basis that it constitutes the voice of God.⁷⁶ But rather than seeing conscience as derived from the rational faculty (and synderesis as derived from the affective) as did Bonaventure, Aquinas saw that synderesis was the basis upon which reason grasps general principles. It was Albert the Great, Aquinas' professor at Cologne, who suggested that synderesis is the faculty by which we grasp moral universals which are then formulated by the practical reason as premises which ultimately conclude in deliberations of conscience.⁷⁷ For Aquinas, synderesis constitutes a rational habit that is distinguished from *consentia* - which is itself an intellectual act of judgment: the application of general moral principles to a particular case.⁷⁸ This is the methodology known as casuistry, or, the study of 'cases of conscience,' described by Edmund Leites as the resolution by expert minds of difficult moral cases.⁷⁹ Aquinas, and writers who followed, including Scotus,

⁷⁴ *Id.*

⁷⁵ *Ibid.*, at pp.25-29.

⁷⁶ *Ibid.*, at p.40.

⁷⁷ Ramsay, H. (2001) at p.16.

⁷⁸ *Id.*

⁷⁹ Leites, E. (1988) *Conscience and Casuistry in Early Modern Europe*, at p.119.

Ockham, and Luther, linked conscience with virtue in their writings.⁸⁰ Langston notes that, after Aquinas, discussions about conscience were integrally linked with issues concerning the development and cultivation of the virtues.⁸¹ Notwithstanding disagreements between Luther and Calvin regarding the relation between the inward state of grace and external actions, a sufficient number of important Protestant clergy in England embraced casuistry, thus elevating the place of conscience in determinations about morality.⁸² In its application in the hands of the clergy, Langston states:

It was intended to determine whether an already completed action was a serious (mortal) or minor (venial) sin. Such advice, given after the performance of actions, would undoubtedly have the effect of making the layperson more contemplative about the nature of his or her actions. It would undoubtedly affect future behaviour. Casuistry practiced in this way seems on a line with issues of the development of the virtues, and this connection helps to explain casuistry's continued importance for Catholic and Protestant thought.⁸³

The social ramifications which came from Henry VIII's decision to break with the authority of Pope Clement VII, so as to enable his divorce from Katherine of Aragon in 1533 in order that he might marry Anne Boleyn⁸⁴ (and taking the Anglican Church, as he did, with him), had direct implications for his English subjects. The *Act of Succession* formalized Henry as the only supreme head of the Church of England the following year. Those who spoke against these arrangements

⁸⁰ See, generally, Langston, D. (2001), Part I.

⁸¹ *Ibid.*, at p.8.

⁸² *Ibid.*, at p.78.

⁸³ *Id.*

⁸⁴ Baker, J. (1990) at pp.562-3.

were guilty of statutory treason⁸⁵ under expanded laws.⁸⁶ Moreover, Jones notes that, between 1534 and 1536, Parliament introduced two oaths, reportedly intended “to bring home to everyone where their duty of loyalty now lay.”⁸⁷ Whereas previously the English subject owed a natural allegiance to the king, confirmed in the traditional oath of allegiance, and a spiritual allegiance to the universal church and its head, the Pope, things were now changed.⁸⁸ Spurr refers to the ad hoc oath contained in Henry VIII’s *Act of Succession* as “...the first attempt to shackle subjects by their oaths.”⁸⁹ He states:

The Tudor state had succeeded to the church’s role as arbiter of the individual conscience and then set about investing loyalty oaths with obligations arising from conscience.⁹⁰

Prior this, in the English context, he states that clerical authority in the fourteenth century seemed to be bearing down on the concept of swearing oaths, so utilizing them increasingly to its ends. By contrast, political authority had not yet managed to harness the power of oaths.⁹¹

The question of the marriage of Mary I to Philip II of Spain in 1554 proved to be the lightening-rod that would see the monarch and the nation cast as bound in a covenant with God. Hugh Latimer, at the court of Edward VI, warned of the dire consequences that would befall England if the next in line to the throne should marry a foreign prince, presenting such a match as the likely

⁸⁵ *Ibid.*, at p.563.

⁸⁶ Jones, D. (1999) at p.30.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Spurr, J. (2000) “A Profane History of Early Modern Oaths” in 11 *Transactions of the Royal Historical Society (Sixth Series)* 37 at p.59.

⁹⁰ *Id.*

⁹¹ *Id.*

outcome if the nation failed to suppress covetousness and vice.⁹² On the return of Catholicism to England, reformers fled the country and adopted the idea of a covenant as a part of their concept of resistance. It is among these “Marian exiles” that the first discussions of the idea of a national covenant are found.

Rampant inflation, poor harvests, plague, and famine, provided further arguments for the clerics, “who readily adopted the role of Old Testament prophets, calling on Israel to repent”.⁹³ The concept of a national covenant provided a basis to circumvent the legal establishment of Catholicism in England and the constitutional propriety of Mary’s accession. Exiles argued that the nation’s apostasy from the Protestant religion and the rule of a Catholic woman in place of a Godly prince was a divine judgment from God for England’s retreat from God. One argued God “had placed an infidel woman over us, to return us to our ‘olde vomite’”.⁹⁴ Through this device, it was argued that England’s relationship with God was identical to that between God, Moses and the Israelites. All persons were under a duty to obey magistrates who upheld God’s law; magistrates who violated God’s law were to be resisted.

Henry VIII’s *Act of Succession* was succeeded by further loyalty oaths in the form of the Elizabethan *Act of Supremacy* in 1559, and then the Jacobean *Oath of Allegiance* in 1606. Kahn states,

In the reigns of Elizabeth and James I, Englishmen were repeatedly asked to swear oaths of allegiance, a fact that might seem to indicate the importance of consent. Such consent,

⁹² Vallance, E. (2005) *Revolutionary England and the National Covenant: State Oaths, Protestantism and the Political Nation, 1553 – 1682*, at p.7.

⁹³ *Ibid.*, at p.8.

⁹⁴ *Ibid.*, at p.10.

however, did not entail a contractual view of the origins of government. Rather, Tudor and Stuart apologists represented the political subject as assenting to what was already the case: his divine, natural, and historical subjection to the sovereign. The thirty-nine Articles of the Anglican Church (1563) located the authority of government in “the queen’s majesty” – that is, the “prerogative, which we see to have been given always to all godly princes in Holy Scripture by God himself, [to] rule all estates and degrees committed to their charge by God.”⁹⁵

Between May 1641 and September 1643, the Long Parliament imposed three main loyalty oaths: the *Protestation*, the *Vow and Covenant*, and the *Solemn League and Covenant*. By this time, oaths had evolved to become a means of testing political trustworthiness and ideological commitment.⁹⁶ This evolution saw oaths move from being the preserve of the church to being a device used by *both* the Parliament and the King to attempt to ensure political loyalty. As Jones contends, in developing the official theory of the oath, “state casuists” attempted to prove that any resistance to a lawful ruler was unlawful.⁹⁷ Tudor-Stuart officials, he states, “...elaborated a political theory of conscience that required subjects to conceive their political identity in terms of performative acts reinforcing...[their]...natural duty.” The real purpose of the oath, then, he argues, was to cement a loyal and homogenous political community that rendered the idea of legitimate opposition inconceivable.⁹⁸ These oaths and covenants applied to significant sections of society. But through the course of the unfolding conflict between the Parliament and the

⁹⁵ Kahn, V. (2004) at p.9.

⁹⁶ Spurr, J. (2000) at p.59.

⁹⁷ Jones, D. (1999) at p.263.

⁹⁸ *Id.*

Monarch, it would come to pass that loyalty to the King would be made subject to the contingency of the King's compliance with 'the law of God'.

Character and the Rise of the Conscientious Individual – Bridge to Political Choice

Jones is at pains to elucidate an interpretation of this trajectory that does not rely upon any idea of competing ideologies. The rise of casuistry as a respectable branch of moral theology⁹⁹ facilitated the evolution of discursive practices in which conscience, as an idiom, according to Jones, led to a developing understanding of moral and political *character* that, in turn, had ramifications for political behavior and the evolving understanding of political obligation.¹⁰⁰ To consider this trajectory as the result of ideological oppositions would be anachronistic, he says, given the concept of a political position based upon an ideology had not yet evolved.¹⁰¹ The outcome of such discursive practices was very much an architectonic process; contingent upon how "conscience" would come to be employed in the language, and its impact upon those employing it. As Herrick notes (although, in the context of rhetoric), it is language – and, specifically, the use of it - that organizes and gives structure to other arts and disciplines; and, as noted by Michael Oakeshott, morality is neither a system of general principles nor a code of rules, but a *vernacular language* – it is made by speakers.¹⁰² And speakers are not neutral entities here. As Greenblatt argues, "...in sixteenth-century England there were both selves and a sense that

⁹⁹ Rose, E. (1975) *Cases of Conscience: Alternatives to Recusants and Puritans Under Elizabeth I and James I*, at p.71.

¹⁰⁰ Jones, D. (1999) at p.10.

¹⁰¹ *Ibid.*, at p.7.

¹⁰² Oakeshott, M. (1975) *On Human Conduct*, at p.78.

they could be fashioned” – be that by oneself, or by others.¹⁰³ The crystallization of *conscience*, therefore, according to Jones, “...was also a matter of self-fashioning, creating selves possessing consciences that were capable of responding to feelings of guilt and shame,” and constitutive of a “...new interiority that made possible the conscientious individual, bridled by the performative enactment of the oath.”¹⁰⁴ This crystallization of conscience through an evolutionary trajectory effectively constituted by the linguistic engagement of the English political nation and - to borrow, again,¹⁰⁵ from Victoria Kahn - “[t]he new fiction of the autonomous political subject” – to whose *interests* appeal could now be made - certainly mirrors that process which attended the evolution of the term *interests* earlier described in Chapter 2.¹⁰⁶

The English crown jurists under Elizabeth I, in their attempt to consolidate the monarch’s absolutist authority, had articulated the definitions and royal capacities of kingship by resort to a concept known as the *King’s Two Bodies* in Plowden’s Reports in 1571, thus:¹⁰⁷

...that by the common Law no Act which the King does as King, shall be defeated by his Nonage. For the King has in him two Bodies, viz., a Body natural, and a body politic....what the King does in his Body politic, cannot be invalidated or frustrated by any Disability in his natural Body.¹⁰⁸

Kantorowicz notes that it is by way of this transcendental contrivance, or “mysticism,” that the Elizabethan judges established the King’s Two Bodies as whole; indivisible, with each fully

¹⁰³ Greenblatt, S. (1984) *Renaissance Self-Fashioning from More to Shakespeare*, at p.1.

¹⁰⁴ Jones, D. (1999) at p.11.

¹⁰⁵ Refer to footnote 108 in ch.2.

¹⁰⁶ See Chapter 2; text associated with notes 101 – 110.

¹⁰⁷ Kantorowicz, E. (1957) *The King’s Two Bodies: A Study in Mediaeval Political Theology*, at p.7.

¹⁰⁸ Plowden, E. (1816) *Commentaries or Reports, Part I*, at p.212a

contained in the other. However, he notes, "...doubt cannot arise concerning the superiority of the body politic over the body natural."¹⁰⁹ This idea was one of an immortal "political body," which Stuparu notes is itself a theological-political idea that comes from the secularization of the conception of the church as *mysticum corpus*, such as was promoted by St. Paul.¹¹⁰ William Searle Holdsworth states that the law attributed the predominant station in the arrangements of the English state to the prerogatives of the King, albeit stopping short of assigning absolute power to him.¹¹¹ But in abstracting the place of Parliament in the theory of state, an abundance of mediaeval ideas were retained, in contrast to continental kingdoms that were contemporaneously attaining unity through royal absolutism.¹¹² Consequently,

It was thus difficult to state altogether clearly either the position of the king or the theory of the state which was emerging at the close of the sixteenth century; and it was the obscurity upon these fundamental matters which, the following century, made it possible for the supporters of king and Parliament to take diametrically opposite views upon these questions.¹¹³

Dunham notes that when a divergence between a community's desires and the sovereign's will materialized, conflicted loyalties resulted in the need for a subject to choose between sworn allegiance and instinctive loyalty to community.¹¹⁴ Under the Tudor-Stuart monarchy, the regular discovery of plots and the periodic outbreak of rebellion showed that the sovereign's hold over

¹⁰⁹ Kantorowicz, E. (1957) at p.9.

¹¹⁰ Stuparu, L. (2015) "The Idea of Legitimacy and the Two Bodies of Political Man" in 12(2) *Romanian Review of Political Sciences and International Relations* 37 at p.40.

¹¹¹ Holdsworth, W. (1921) "The Prerogative in the Sixteenth Century" in 21(6) *Columbia Law Review* 554 at p.554.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Dunham, W. (1951) at p.51.

the hearts and minds of the people was less than complete.¹¹⁵ In fact, Dunham points out that from as far back as the fourteenth-century, Englishmen were becoming self-consciously aware of a second loyalty – to the kingdom, a nascent nationalism within which the Englishman was given to situate *himself*.¹¹⁶ But, given that obligations of allegiance were afforded legal weight through oaths, Jones notes that, by the end of the fifteenth-century, the problem of lawful obligation had become so acute and confused that, by the time of the battle of Bosworth Field in 1485, for example, subjects had difficulty identifying who exactly was the lawful superior to whom they owed their allegiance.¹¹⁷

As the King's discrete, unitary *interests* - cast, as they were, in absolutist terms - gave way to the evolving, differentiated interests of his subjects¹¹⁸ - and this reflected also in the rise of *party* interests in the Parliament (of which the King's interests ultimately became just one of several) - so too, a changed attitude to conscience came about; "...not as a shared common code [i.e., as defined by the state casuists], but as an individual and autonomous entity from which men derived moral principles: that side or space that came to be called 'character'."¹¹⁹ Langston makes the point, in respect of this development, that the Aristotelian account of the virtues describes two developmental components in the virtues, which he labels *formal*, and *material*. Casuistic advice, he says, emphasized the material aspect, which accounts for the development of virtuous habits; which development is consequent upon the performance of virtuous acts.

¹¹⁵ Jones, D. (1999) at p.29.

¹¹⁶ Dunham, W. (1951) at p.41.

¹¹⁷ Jones, D. (1999) at p.22.

¹¹⁸ *Supra*, chapter 2, f/n 110.

¹¹⁹ Sharpe, K. (1997) "Private Conscience and Public Duty in the Writings of Charles I" in 40(3) *The Historical Journal* 643, at p.665.

However, he says, casuists downplayed the formal aspect, constituting the *internal* state of the agent, i.e., whether the acts are performed with the right intentions and consciousness.¹²⁰ The effect of the casuists' approach, as Jones observes, was the maintenance of a clear separation of will and reason.¹²¹ He notes that Leites identifies the evolving sensibility of moral autonomy as having a determinative emphasis in this conflict.¹²² Leites states that the methods of casuistry, however, had never meant to create or transform character...they generally dealt with questions about what was forbidden or permitted, rather than about what it would be morally and spiritually best for the individual to do.¹²³ Whereas conscience, in the hands of the state casuists, had been a vehicle for the marshalling of allegiance, as Sharpe says, "[b]oth for rulers and rebels, conscience was no longer the central discourse of the public sphere; conscience had been privatized."¹²⁴ It is Leites' contention that casuistry was "...explicitly rejected out of a concern for character"¹²⁵ on the basis that,

the conviction that a chief property of a truly moral will was its rationality and the belief that no one, however proper his intentions, could claim rationality for his will if he was governed by external authority.¹²⁶

¹²⁰ Langston, D. (2001) at p.79.

¹²¹ Jones, D. (1999) at p.99.

¹²² Langston, D. (2001) at p.79.

¹²³ Leites, E. (1988) at p.120.

¹²⁴ Sharpe, K. (1997) at p.665.

¹²⁵ Leites, E. (1988) at p.120.

¹²⁶ *Id.*

The Glorious Revolution, the individual and the autonomous exercise of his right of freedom

Social forces were being unleashed to transformative effect. That process began with the revolution that was the Reformation. Nelson argues that the consequent effects of the Reformation, seen in the breakdown and reconstruction of the Court Christian and the recasting of the received logics of moral decision, should properly be understood as attended, contemporaneously, by a second revolution, i.e., that which is commonly recognized as the scientific revolution.¹²⁷ He notes that all of the proponents of both revolutions, including Luther, Calvin, Galileo, Descartes, and Pascal, attacked the Establishment casuistry and its claims to proof, factionalism, and probabilism (i.e., the doctrine that an individual could freely choose any “probable” response to a moral dilemma, even if the course chosen appeared less probable than another course), at its roots.¹²⁸ What this brought, he states, was decisive change in the culture and administration of “conscience-casuistry-cure of souls” which implied profoundly radical changes in images of self, cultures of spiritual self-realization, and systems of spiritual direction.¹²⁹ Wood notes that by 1647, a wide-ranging program of political reform was taking root in the New Model Army. Issues such as irregular pay, and rank-and-file discontent with the parliamentary oligarchy, led to a fear on the part of parliamentarians of rising military radicalism by the ‘rabble of ordinary soldiers, with calls that the army be disbanded; calls which the army successfully resisted.¹³⁰ Both the Royalists and the Parliament had sought to recruit the English

¹²⁷ Nelson, B. (1969) “Conscience and the Making of Early Modern Cultures: ‘the Protestant Ethic’ Beyond Max Weber” in 36(1) *Social Research* 4 at p.11.

¹²⁸ *Ibid.*, at p.12.

¹²⁹ *Ibid.*, at p.16.

¹³⁰ Wood, E. (2012) *Liberty & Property: A Social History of Western Political Thought from Renaissance to Enlightenment*, at p.231.

subject to their respective partisan causes but, in the end, the English subject was recruited to his own cause – and this, even if the Levellers *had* in the end been put down in short order by Cromwell. The distance between the causes of the Royalists and Parliament (which converged significantly in the desire to protect the interests of the propertied classes), and that of the *interests* of the English subject (or, at least, a broader cohort of Commoner), is dramatically illuminated in the famous statement of the Leveller, Edward Sexby, at the Putney Debates:

There are many thousands of us soldiers that have ventured our lives; we have had little propriety in the kingdom as to our estates, yet we have had a birthright. But it seems now, except a man hath a fixed estate in this kingdom, he hath no right in this kingdom. I wonder we were so much deceived.¹³¹

Leites contends that the Levellers' argument for an expanded (though, still limited) suffrage is conceived in terms of (and so, concomitantly operates to legitimate) the notion of an individually-exercised will. He notes this is evidenced, for example, in the view of Leveller, Maximillian Petty, that those classes who had abandoned their own will to that of another, such as servants and apprentices, in so doing, forfeited their vote.¹³² The belief, that judging for oneself was a necessary element of a rational and moral will, he contends, became a weapon against limitations on suffrage and against casuistry itself. For the Levellers, moral issues had to be simple enough to permit a plain person to judge as well as anyone.¹³³ In contrast to this, the oath operated "as an apparatus binding the swearer internally through the inculcation of the practice

¹³¹ Brailsford, H. (1961) *The Levellers and the English Revolution*, at p.275.

¹³² Leites, E. (1988) at p.122.

¹³³ *Ibid.*, at pp. 122, 123.

of conscience which, in turn, was externally monitored through the judicial and religious machinery of church and state.”¹³⁴

Ultimately, according to Jones, the inability to negotiate an elite consensus after 1688 necessitated both a new moral psychology and an allied political pluralism.¹³⁵ In the words of Nelson, “[t]he way was open for the progress of newer philosophies of the Inner Light, the light of Pure Reason, along with newer sanctifications of positive civil law...”¹³⁶

The Glorious Revolution culminated ingloriously in King James II’s ‘abdication’ consequent upon his departure from London and attempt to flee England on 11 December 1688. William of Orange, the husband of King James II’s daughter, Mary, had landed with an army at Torbay, Devon, on 5 November 1688. The King’s forces were subsequently defeated in little time and with little blood spilt. A declaration by twenty-nine peers - “Lords Spiritual and Temporal in and about the Cities of London and Westminster” - who assembled at Guildhall on 11 December 1688, acknowledged James’ abandonment of the Crown, and endorsed the new claim to the Crown made by the Prince of Orange. In so doing, they declared their “hearty and zealous” concern “...for the Protestant Religion, the Laws of the Land, and the Liberties and Properties of the Subject.”¹³⁷

A Declaration affirming the rights and liberties of the people and conferring the crown upon William and Mary was published as a proclamation and enacted in the form of the Bill of Rights

¹³⁴ Jones, D. (1999) at p.103.

¹³⁵ *Ibid.*, at p.268.

¹³⁶ Nelson, B. (1969) at p.16.

¹³⁷ A Collection of Papers Relating to the Calling and Holding the Convention of Estates of England, at Westminster Upon the 22d. of January 1688/9 and the Meeting of the Estates of Scotland at Edinburgh the 14 of March 1689 and the Procedures in the Conveyances of the Crowns of Great Britain to which is Prefixed an Index of the Said Papers, Edinburgh (1689).

1688. These acts of the Parliament were ratified and confirmed by the *Crown and Parliament Recognition Act* 1689. The document incorporated the Declaration of Rights, which enunciated the “misdeeds” of James II, and articulated 13 articles defining the limitations of the Crown and confirming the rights, respectively, of Parliament, and the individual. As with the Magna Carta before it, the Bill of Rights was intended as a curb on future arbitrary behavior by the Crown.¹³⁸

In the context of English legal history, the Magna Carta stands as perhaps the most emblematic example of an attempt to confine the powers of the sovereign in any formal sense. On 15 June 1215, wearing the imperial robes and regalia of his grandmother, the Empress Matilda, John, King of England, Lord of Ireland and Duke of Aquitaine, had proclaimed his commitment to the gist of the Charter by swearing a binding oath.¹³⁹ The following month, he wrote to Pope Innocent III and sought its annulment,¹⁴⁰ which was granted at the end of September on the basis that it was an agreement exacted by force, and that it was shameful, demeaning, illegal, unjust, and derogatory, to the King’s rights and dignity.¹⁴¹

The so-called *rights* generally held to be enshrined in the Magna Carta are rights that were never intended by the barons who drafted the document in 1215.¹⁴² Its beneficiaries were “free men,” i.e., noblemen. Following the death of King John, the Charter was re-issued by his son in 1216, and was then used in modified form as the basis of a treaty concluding the war with the barons that had been triggered by Pope Innocent III’s annulment of the 1215 document. The Magna

¹³⁸ Lock, G. (1989) “The 1689 Bill of Rights” in 37(4) *Political Studies* 540 at p.540.

¹³⁹ Starkey, D. (2015) *Magna Carta: The True Story Behind the Charter*, at pp. 53, 54.

¹⁴⁰ Holt, J. (1992) *Magna Carta 2nd Edition*, at p.370.

¹⁴¹ *Ibid.*, at p.374.

¹⁴² *Ibid.*, at p.9.

Carta was reissued in 1225, this time as law,¹⁴³ and again in 1297. But it would not be until Parliament's enactment of a series of six statutes between 1331 and 1368, clarifying the legal interpretation of *capitula* 29 of the 1297 document (i.e., *capitula* 39 of the 1215 Magna Carta) that the words 'no man whatever estate or condition he may be' would come to supplant the words 'free men.'¹⁴⁴ It would prove to be of momentous significance that the amendment so-applied was in respect of the clause which constituted the original basis for the law of *Habeas Corpus*, and which relevantly read (in its original form):

No free man shall be arrested or imprisoned...except by the lawful judgment of his peers
or by the law of the land.¹⁴⁵

Sir Edward Coke was the personality most responsible for the resurrection of the Magna Carta as an important legal document¹⁴⁶ in the seventeenth-century. He referred to it as England's *ancient constitution*, but it was with the promulgation of the Bill of Rights in 1689 and the *Succession Act* 1701 that constitutional monarchy truly arrived in England.

The rise of constitutional freedom and the confinement of absolutism – social contract and the place of trust

Isaiah Berlin notes that the protean word *freedom* is recorded with more than two-hundred different uses by the historians of ideas.¹⁴⁷ The "sense" of freedom associated with habeas

¹⁴³ *Ibid.*, at p.397.

¹⁴⁴ *Ibid.*, at p.10.

¹⁴⁵ See Halliday, P. (2010) at p.15.

¹⁴⁶ Holt, J. (1992) at p.2.

¹⁴⁷ Berlin, I. (1969) "Two Concepts of Liberty" in *Four Essays on Liberty*, at p.121.

corpus had unfolded from the time of “immemorial Anglo-Saxon murk” across a long historical axis.¹⁴⁸ This sense of freedom was animated by the prerogative actions of kings which threatened both the property and the liberty of Englishmen and the ability of the law to protect either.¹⁴⁹ But, Hexter observes, the language of *this* sense of freedom did not typically incorporate in its discourses such ideas as ‘civic virtue,’ *zōon politikon*, participation, or corruption, characteristically preferring such terms as rule of law, limited government, authority, and obedience.¹⁵⁰ He notes that at least from after the Restoration, but most certainly from after the Glorious Revolution, ideas such as ‘freedom of worship,’ ‘freedom of speech,’ and ‘freedom of the press,’ became so established in the vernacular and the social consciousness that they “...have up to now survived social and economic transformations of an intensity and magnitude” that the likes of James Harrington and Thomas Jefferson scarcely dreamed of.¹⁵¹ It is this divergence that is articulated in Isaiah Berlin’s *Two Concepts of Liberty*, whose contrasting conceptions of *negative* and *positive* liberty (i.e., respectively, freedom *from* obstacles, barriers or constraints; and, freedom *to* take control of one’s life and realize one’s fundamental purposes),¹⁵² as is observed by Pocock, represents the philosophical separation between the Florentine conception of *vivere civile*, and that of the definition of liberty from outside interference in one’s private life, that would come to be established with the later rise of classical liberalism. Norman Davies says that in the years after the Glorious Revolution, the “burning issue

¹⁴⁸ Hexter, J. (1977) “Review of The Machiavellian Moment, by JGA Pocock” in 16(3) *History and Theory* 306 at p.335.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Ibid.* at p.336.

¹⁵² Carter, I. (2016) “Positive and Negative Liberty” in *Stanford Encyclopedia of Philosophy* (online).

of the age” was that of the right of all Christians to worship their God in peace¹⁵³ (i.e., a *negative* right). Berlin argues that out of the context of that time (which saw, incidentally, the establishment of the *Toleration Act* 1689) the rise and integration of concepts such as toleration – not as a utilitarian expedient but as “an intrinsic value” - and liberty and human rights (although comprising both positive rights and liberties) “as they are discussed today,” were emblematic of “...a great mutation in western thought and feeling that took place in the eighteenth century.”¹⁵⁴ For Berlin, this mutation is evidenced in such transformations as the rise of qualities such as *integrity* and *sincerity* as markers of virtue, to replace ancient and medieval obsessions with objective truth and correctness and uniformity, wherein the traditional view saw it “...that truth is one, error many.”¹⁵⁵

Pocock argues that the concept of negative freedom – the right to be left alone - was a freedom founded on *right* and *property*, as against a right to participation in self-rule.¹⁵⁶ That such a sensibility attended contemporary understandings of the relative stations of sovereign and subject was revealed in the utterance of King Charles I as he stood on the gallows, in which he declared his desire for liberty and freedom for his subjects,

¹⁵³ Davies, N. (1999) *The Isles: A History*, at p.614.

¹⁵⁴ Berlin, I. “Nationalism: Past Neglect and Present Power” in Hardy, H. (Ed.) (1980) *Against the Current: Essays in the History of Ideas*, at p.333.

¹⁵⁵ *Id.*

¹⁵⁶ Pocock, J. (1981) “Virtues, Rights, and Manners: A Model for Historians of Political Thought” in 9(3) *Political Theory* 353, at p.361.

...but I must tell you...(he continued)...that their liberty and freedom consists in having government...It is not their having a share in the government; that is nothing appertaining unto them.¹⁵⁷

Whatever was the English subject's entitlement, it was encapsulated in the uniquely English *birthright* (i.e., a juridical/political status based on their place of birth and parentage). This was reflected in a long tradition of English political thought in which individuals were conceived as the basic constituents of the feudal state, unmediated by corporate entities - unlike the situation on the continent. Thane notes that the British state had the will and the capacity to influence its citizens in a variety of ways, but it did so by methods markedly less visible than those of its continental counterparts, operating through decentralized channels with close links to central government.¹⁵⁸ Within this system a manorial scheme operated, comprising aristocratic landowners and their tenants.¹⁵⁹ Ellen Meiksins Wood argues that through the medieval period, and, in contrast to the ancient period, legal and political thought was preoccupied not with ideas of political transactions among citizens within a political community, but with mapping out the spheres of authority among overlapping and competing jurisdictions or negotiating interactions among them.¹⁶⁰ This uniquely unified system of law, operating within an unusually centralized state, was what had produced the English "freeman"¹⁶¹ that came to have such a definitive effect upon the relationship between ruler and ruled in England. And it was within this world and

¹⁵⁷ Gregg, P. (1981) *King Charles I*, at p.444.

¹⁵⁸ Thane, P. "Government and Society in England and Wales, 1750-1914" in Thompson, F. (Ed.) (2008) *The Cambridge Social History of Britain 1750-1950, Volume 3: Social Agencies and Institutions*, at p.5.

¹⁵⁹ Wood, E. (2012) at p.10.

¹⁶⁰ *Ibid.*, at p.19.

¹⁶¹ *Ibid.*, at p.12.

variously through these elements that law rose to define this relationship. In fact, the effect of *Calvin's case* was to crystallize in English law the medieval concept of loyalty between subject and sovereign - *just soli* - that had operated since those times. Shachar notes that, under this principle, "[t]he sovereign owed the subject physical protection, just governance, and "all the rights and liberties of an Englishman," whereas the subject owed the sovereign complete loyalty, obedience, and service. Neither party could break this bond of allegiance."¹⁶² The oaths sworn in England for a thousand years had, in large part, comprised reiterations of this principal in one way or another. The question of so-confining the sovereign's powers had been an ongoing feature of the disputations between Parliament and the monarch. But even in the latter stages of that millennium, legitimate claimants on the English commoner's allegiance had contended that their own actions should not be confined by law. In 1539, for example, King Henry VIII had ordered Parliament to pass a law saying his decrees had the force of law, which Parliament consequently enacted in the form of the *Statute of Proclamations*. And, for Parliament's part, it was argued both in the Commons, and on behalf of the Commons in the courts, that Parliament might imprison a subject without showing cause and not be in breach of the Magna Carta because, at least, in some circumstances, "[p]arliaments are confined to no rules or precedents."¹⁶³ But it now transpired, in the aftermath of the Revolution, that sovereign demands for allegiance began to disappear, and state oaths (i.e., of allegiance) - in the end - came to be sworn only by the political elite.¹⁶⁴ Such a result accords, as Jones notes, not with the

¹⁶² Shachar, A. "The Thin Line Between Imposition and Consent: A Critique of Birthright Membership Regimes and Their Implications," in Minow, M. (2003) *Breaking the Cycles of Hatred: Memory, Law, and Repair*, at pp.212-3.

¹⁶³ See Halliday, P. (2010) at p.232.

¹⁶⁴ Jones, D. (1999) at p.259.

intentions of the initial framers of the state oaths;¹⁶⁵ nor, indeed, with any form of governance framed by Hobbesian absolutism. To the extent, however, that it diverges from Tudor-Stuart absolutist conceptions of allegiance, it nonetheless finds resonance with the sentiments expressed in Locke's *Two Treatises*:

But yet it is to be observed, that though oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law, made by a joint power of him with others: allegiance being nothing but an obedience *according to law*,¹⁶⁶ which when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society, declared in its laws; and thus he has no will, no power, but that of the law.¹⁶⁷

Locke's statement is emblematic of the law-centered paradigm that came to be established in the wake of the Glorious Revolution, according to Pocock,¹⁶⁸ one otherwise argued to constitute the replacement by Locke of casuistic conscience with law.¹⁶⁹ In Jones' view, the state oaths, for Locke, constituted a performative enactment of consent to *lawful* rule. For Locke, as was discussed in Chapter 2, government constitutes a public *trust*. This idea of trust was not novel and was invoked in respect of alleged breaches of the sovereign's obligations to the kingdom. During the crisis of 1648, Charles I had been *legally* charged with a breach of trust, and his

¹⁶⁵ *Id.*

¹⁶⁶ My emphasis.

¹⁶⁷ Shapiro, I. (Ed.) (2003) *Two Treatises of Government and A Letter Concerning Toleration. Rethinking the Western Tradition*, at p.167.

¹⁶⁸ Pocock, J. (1981) at p.362.

¹⁶⁹ Jones, D. (1999) at p.233.

defence that he was responsible solely to God had been rejected.¹⁷⁰ However, de Wilde argues that trust as conceived by Locke is not to be understood narrowly as the common law doctrine of equitable trust. In his view, Locke intended a broader definition incorporating the Roman concept of *fides publica*. Giorgio Agamben notes that Cicero considered trust to be the basis of the oath, rather than fear of the god invoked in the curse sworn.¹⁷¹ *Fides*, constituted linguistically, comprises the originary features of the Greek term *pistis*, and the Roman, *fides*: personal loyalty; “[it] is the high esteem in which someone is held as a consequence of our having confidently given ourselves over to him, binding ourselves in a relationship of loyalty.”¹⁷² *Fides* has been referred to as “...the most important key to the roman value system.”¹⁷³ In this regard, *Fides Publica*, a function of positive law, held an exception to apply as regards pirates and tyrants, who, in Cicero’s words, were outside society, rendering promises to them null and void.¹⁷⁴ De Wilde states, “[t]he Romans considered *fides publica* a general standard of behaviour for all those invested with state power. It was regarded as a legal norm with moral connotations, which applied especially, though not exclusively, to exceptional situations, such as wars.¹⁷⁵ It was Grotius who rediscovered the notion as a fundamental norm of public law, although he demurred from Cicero, seeing *Fides* as derived from a basis of natural law and natural reason.¹⁷⁶ Locke adopted the concept, utilizing Cicero’s accommodation of grounds for exception, which he saw

¹⁷⁰ de Wilde, M. (2011) “*Fides Publica* in Ancient Rome and its Reception By Grotius and Locke” in 79 *Tijdschrift voor Rechtsgeschiedenis* 455 at pp.482, 475.

¹⁷¹ Agamben, G. (2011) *The Sacrament of Language: The Archeology of the Oath*, at p.23.

¹⁷² *Ibid.*, at p.25.

¹⁷³ See Nifong, W. (2000) “Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law” in 49 *Duke Law Journal* 1077 at p.1096, citing Pöschl, V. (1980) “Politische Wertbegriffe in Rom” in 26 *Antike Und Abendland* 1, at p.3.

¹⁷⁴ Eyffinger, A. (2015) “On Good Faith and Bad Faith: Introductory Note” in 36 *Grotiana* 79 at p.99; see Cicero (1928) *De Officiis*, at p.385.

¹⁷⁵ de Wilde (2011) at p.455.

¹⁷⁶ Eyffinger, A. (2015) at p.99.

as providing a basis for his argument that the people had a right of resistance in case the government structurally violated its trust by violating its obligations under the law.¹⁷⁷ Indeed, the concept came to be highly popular with the founders of new constitutional regimes; trust being seen as one of the normative foundations of a constitution that incorporated the ideals of limited government and the rule of law.¹⁷⁸ However, as noted, in early Roman law, *fides* was a concept founded on the idea of external constraint, rather than a moral norm. It constituted the external bondage of a person, i.e., to the gods, to whose sanctions one had subjected oneself by pledging an oath. It was only later that *fides* came to be based upon a moral imperative, such as the moral imperative to keep one's word,¹⁷⁹ and in his first work on good faith and perfidy, *De Fide et Perfidia*, written in about 1601,¹⁸⁰ Grotius contends that promises should be kept, even to heretics.¹⁸¹ *Fides* was essentially an open norm, according to de Wilde, connoting trustworthiness, loyalty, or fidelity to one's word; but it could not be fixed in any definition as it depended upon the norms in force.¹⁸² In *De Officiis*, Cicero states that *fides* is the foundation of justice, and is to be understood as truth and fidelity to promises and agreements,¹⁸³ and that oaths should be kept, even to enemies;¹⁸⁴ an expectation arguably tantamount to the mandate from Aristotelian virtue that promises must be kept.¹⁸⁵

¹⁷⁷ de Wilde (2011) at p.455.

¹⁷⁸ *Ibid.*, at p.483.

¹⁷⁹ *Ibid.*, at p.460.

¹⁸⁰ Dumbauld, E. (1982) "De Fide et Perfidia--Der Treuegedanke in den "Staatsparellelen" des Hugo Grotius aus Heutiger Sicht. by Wolfgang Fikentscher" in 76(1) *The American Journal of International Law* 219, at p.220.

¹⁸¹ Grotius, H. (2015) "Cap. VI: De Fide et Perfidia" in 36(1) *Grotiana* 106, at p.155.

¹⁸² de Wilde, M. (2011) at p.459.

¹⁸³ Cicero (1913) *De Officiis*, at p.24.

¹⁸⁴ *Ibid.*, at p.391, 393.

¹⁸⁵ See Chapter 2, text associated with note 54.

The mechanism of constraint characterizing *fides*' instantiation, in turn applied *as* constraint in Locke's commitment to trust as a *fiduciary* restraint upon the legislature,¹⁸⁶ is itself consistent with *fides* as applied (if not actually conceived) by the Romans. For Agamben notes Eduard Fränkel's observation that "the one who holds the *fides* placed in him by a man has this man at his mercy."¹⁸⁷ And despite there being involved a certain reciprocity and expectation of support, what is unavoidably evident is the inequality established by *fides* in what is, in consequence, now a relationship of authority,¹⁸⁸ in which freedom is imbued with competing tensions of constraint and emancipation. The mechanism of the *promise* would come to have fundamental importance in respect of the essential component of trust in the tripartite social contract. Locke's characterization of contractual relations between subject and sovereign were controversial, but his elevation of the place of the law as the fundamental means of mediating the relationship between king and subject gained political currency after 1689.¹⁸⁹

Declining virtue and the changing fate of virtue following the Glorious Revolution

Berkowitz makes the point that, from either a Hobbesian or a Lockean point of view, the natural freedom and equality of all people implies an obligation to obey the law, and that this perspective – legitimated, as it is, as a function of the (universally applied) rule of law, and the device of consent – is founded on the individual's ability to see the law as self-made or self-authored.¹⁹⁰

¹⁸⁶ Burt, E. A., (Ed.)(1994) at p.486.

¹⁸⁷ Agamben, G. (2011) at p.26.

¹⁸⁸ *Id.*

¹⁸⁹ Jones, D. (1999) at p.234.

¹⁹⁰ Berkowitz, P. (1999) at p.112.

Within this rubric, constraint on individual desire coming from an external source constitutes the antithesis of freedom in the eyes of Hobbes and Locke, but they consider that a governor's laws following from the sanction of consent constitutes desire, not constraint.¹⁹¹ This logic, at least insofar as Locke is concerned, necessitates that governors of a commonwealth acquit themselves with honesty and integrity,¹⁹² which is coincident with the fiduciary obligations that apply in the case of Locke's governor-trustee (and, by extension, promisor). It also comports with Enlightenment ideas of the mastery of reason over passion.

But the views of Locke and Hobbes each rely more fundamentally upon inferences about the nature of man which do not coincide, albeit that each view the impetus for man's moral connection with human society in equivalent terms: Hobbes' "Do not to another, which thou wouldst not have done to thyself" and Locke's "Do as thou wouldst be done unto"¹⁹³ being restatements of Jesus of Nazareth's Golden Rule.¹⁹⁴ In Hobbes' conception, the self-made man, escaped from the natural state of warre of all against all, stands in contrast against Locke's more Aristotelian conception - "...a creature born fit for society" in Hobbes' sarcastic take on it¹⁹⁵ - wherein natural relations between men bind individual to individual in a manner that is moral, despite that it is not yet political.¹⁹⁶ But in each conception, virtue retains some place, be it Hobbes' recast virtue in his *laws of nature* – contingent, as it is, upon consent to a sovereign, or Locke's conception of virtue as the first and most necessary endowment obtaining to

¹⁹¹ *Ibid.*, at p.113.

¹⁹² See text associated with note 148, Chapter 2.

¹⁹³ Locke, J. (1829) *An Essay Concerning Human Understanding*, at p.30.

¹⁹⁴ i.e., Matthew 7:12.

¹⁹⁵ Hobbes, T. "The Citizen: Philosophical Rudiments Concerning Government and Society" in Gert, B. (Ed.) (1991) *Man and Citizen (De Homine and De Cive)*, at p.110.

¹⁹⁶ Polin, R. "Locke's Conception of Freedom" in Yolton, J. (Ed.) (1969) *John Locke: Problems and Perspectives*, at p.8.

gentlemen.¹⁹⁷ Burttt argues that the question of the importance of virtue was energetically engaged following the Revolution and was claimed as the basis of various competing political perspectives.¹⁹⁸ The evolving political circumstances both in England and on the Continent were such, contends Walzer, that, particularly in Jacobin eyes, the role of citizenship was to replace religious faith and familial loyalty as the central motive of virtuous conduct.¹⁹⁹ In Jacobin ideology, all citizens were to serve the community.²⁰⁰ Burttt advances the thesis that the importance of civic virtue had been a comfortable commonplace of Restoration political thought, largely because little could be done in concrete terms to advance virtue under existing political arrangements. She argues that although a revived concern for both political and moral virtue followed the Revolution, there arose with it significant disagreement over what qualities were constitutive of the good citizen,²⁰¹ and what role government had in cultivating them; the politics of virtue had become contested ground.²⁰²

Augustan conceptions of virtue began to shift so as to account for the changes and pressures brought by rapidly advancing commerce, trade, and credit, which created a stratum of newly-wealthy citizens.²⁰³ Pocock observes that in the half-century following the Glorious Revolution, “...*zōon politikon* took on his modern character of participant observer in the processes of material and historical change fundamentally affecting his nature.”²⁰⁴ With the rise of commerce,

¹⁹⁷ Chapter 2, text associated with note 147.

¹⁹⁸ Burttt, S. (1992) *Virtue Transformed: Political Argument in England, 1688-1740*, at pp.150-1.

¹⁹⁹ Walzer, M. “Citizenship” in Ball, T., Farr, J., & Hanson, R. (Eds.) (1989) *Political Innovation and Conceptual Change*, at p.211

²⁰⁰ *Ibid.*, at pp.211-2.

²⁰¹ Burttt, S. (1992) at p.193.

²⁰² *Ibid.*, p.16

²⁰³ *Ibid.*, at p.30-1, 33.

²⁰⁴ Pocock, J. (1975) *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, at p.423.

and amidst new continental wars prosecuted by the newly-crowned King William III, Britain had become a trading nation, and from then, a “financial revolution” saw her national prosperity linked directly with the stability of the regime, expanding activities of government, and war.²⁰⁵ Specifically, Pocock contends that the establishment of the Bank of England and the National Debt in the 1690s marked a turning-point in modern English and Scottish political ideology because they created the image of rule by the possessors of a new form of property, *to wit*: paper promises to repay capital invested in the stability of government.²⁰⁶

Amidst this escalating transformation, as Bernard Mandeville’s *Fable of the Bees* rose to challenge the “particularly objectionable self-deception”²⁰⁷ (insisted upon by some English moralists and theologians) that the goods of civil society were to be obtained through the exercise of human virtue, so, it seemed, *homo oeconomicus* rose to challenge *zōon politikon*. Pocock doubts claims that the former ever supplanted the latter,²⁰⁸ but whether, or not, such an explanation is adequate, public virtue, in any event, declined. Burttt sees the effective demise of virtue as a perceived necessary component of political arrangements in England as having occurred by 1740.²⁰⁹ Despite the “virtually unanimous consensus”²¹⁰ about the need in England for some kind of public virtue that existed, according to Burttt, at the end of the seventeenth century, she argues that it could never be in a society, which makes claim to political liberty, that the incumbent subjects would “...opt for a political or social life in which the needs of the whole

²⁰⁵ *Ibid.*, at pp.424, 425.

²⁰⁶ Pocock, J. (1981) “The Machiavellian Moment Revisited: A Study in History and Ideology, 53(1) *The Journal of Modern History* 49 at p.64.

²⁰⁷ Burttt, S. (1992) at p.130.

²⁰⁸ Pocock, J. (1985) *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century*, at p.70.

²⁰⁹ Burttt, S. (1992) at p.27.

²¹⁰ *Ibid.*, at p.150.

are made precedent to their own struggles to achieve meaningful, decent, secure lives.”²¹¹ She says, “[w]hen people have a say over their own lives they do not usually choose to dedicate those lives to the public and its good.”²¹²

Burt’s thesis, which contends that what she calls *private* virtue evolved in the place of progressively defunct public virtue, is not simply a restatement of the *active – passive* binarization commonplace in accounts of citizenship. Pocock’s emphasis, on the other hand, effectively endorses the distinction between republicanism and liberalism in terms, respectively, of positive and negative liberty. The Old Whigs, he says, “...identified freedom with virtue and located it in a past; the Modern Whigs identified it with wealth, enlightenment, and progress towards a future. Around this antithesis, it is not too much to say, nearly all eighteenth-century philosophy of history can be organized [albeit with other precipitating causes in non-British contexts].”²¹³ It is Pocock’s thesis that, within this rubric, republican virtue “resurfaced” in the latter years of the eighteenth-century, a period otherwise characterized by a prevailing law-centered, king-centered, and God-centered mode of thought in Britain.²¹⁴ For Pocock, this development constituted a backward-looking defence of virtue in the face of social forces symbolized as “trading empire, standing armies, and credit.”²¹⁵ Its effect he describes as a “decisive turn towards social, cultural and commercial values.”²¹⁶ This new economics, which was radicalizing society and its relation to government, saw efforts by commercial interests to cast

²¹¹ *Ibid.*, at p.159.

²¹² *Id.*

²¹³ Pocock, J. (1985) at p.231.

²¹⁴ *Ibid.*, at p.46.

²¹⁵ Pocock, J. (1975) at p.458.

²¹⁶ Pocock, J. (1985) at p.235.

credit as virtue.²¹⁷ Pocock says that this concurrent attempt to frame virtue with a veneer that could assimilate commercial developments in society ultimately failed,²¹⁸ but not before it succeeded in galvanizing a Country opposition, borne of landed interests and fearing its own marginalization in the face of new “monied” interests.²¹⁹ To those who represented this Country ideology, these new monied interests represented (corrupting) patronage and relationships of exchange with government, brought about through the new phenomenon of government bonds and other forms of (financial) moveable property.²²⁰ But Pocock’s analysis favours structuralist considerations in which he sees that the place of the agent is fundamentally shifted through the elaboration of social conditions in the form of now-pervasive *laws*, “...the locus of whose sovereignty was extra-civic...[meaning that]...the citizen came to be defined not by his actions and virtues, but by his rights to and in things.”²²¹ Pocock’s argument attends to the futility – faced by those who were wedded to virtue as an institutional pillar - of accounting for history as an uninterrupted continuity of values.²²² In this paradigm, according to Pocock, the classical history of liberalism came to be “...the story of how rights became the precondition, the occasion, and the effective cause of sovereignty, so that sovereignty appeared to be the creature of the rights it existed to protect.”²²³ But the language of liberalism, grounded as it is in *rights*, is incommensurate with virtue, he contends; and despite that these ideas ran concurrently from the time of the Glorious Revolution to the late eighteenth-century, they could not be

²¹⁷ Pocock, J. (1975) at pp. 452, 456.

²¹⁸ *Ibid.*, at pp.458, 460-1.

²¹⁹ Pocock, J. (1985) at p.108; also, Burt, S. (1992) at p.101.

²²⁰ *Ibid.*, at p.130.

²²¹ Pocock, J. (1981) at p.360.

²²² Pocock, J. (1975) at p.458.

²²³ *Ibid.*, at p.361.

reconciled.²²⁴ However, rather than a supervening “private” virtue as proposed by Burt, Pocock contends that virtue would come to be succeeded by aid of the concept of *manners*.²²⁵

Virtue as contested space - the rise of polite society and manners

Richard Boyd argues that civil society represented one pole, in the thought of eighteenth-century thinkers, on a trajectory of which the opposite pole was constituted by its antonym, “barbarism.”²²⁶ On Pocock’s account,

When the polite man of commercial and cultivated society looked back into his past, what he necessarily saw there was the passions not yet socialized, to which he gave such names as “barbarism” and “savagery”; and his debate against the patriot ideal could be far more satisfactorily carried on if he could demonstrate that what had preceded the rise of commerce and culture was not a world of virtuous citizens, but one of barbarism.²²⁷

This narrative provided the basis for developing a defence of Whig commercial interests against those attacks which sought to resurrect the ideal of the ancient citizen whose political virtue is secured through land and the martial arts.²²⁸ Enlightenment writers drew a significant thread between a “free” (or, Republican) government, and commercial life and manners. Hume, for example, recognized that it was the conditions of moderated authority which encouraged

²²⁴ Pocock, J. (1985) at p.48.

²²⁵ *Id.*

²²⁶ Boyd, R. “Manners and Morals: David Hume on Civility, Commerce, and the Social Construction of Difference” in Wennerlind, C., and Schabas, M. (2008) *David Hume’s Political Economy*, at p.65.

²²⁷ Pocock, J. (1985) at p.115.

²²⁸ *Ibid.* at p.195.

commerce, and concomitantly, the “rise of politeness and learning;”²²⁹ and Montesquieu argued it was commerce which paved the way out of barbarism and provided a basis for the agreeable manners which everywhere attended it.²³⁰ In other quarters, the relation of human sociability to commercial development was largely agreed, although arguments persisted about whether manners preceded or were preceded by commerce.²³¹

In a world of rising culture and liberty, however, the prospect of the rigours and constraints which were seen to attend the obligations of civic humanism were, in any event, not enthusiastically embraced; in Pocock’s words: “[o]nce political virtue was declared to have an agrarian base, it was located in the past; and the movement of history toward credit, commerce, and the market was defined as a movement toward culture but away from virtue.”²³² But, at the same time, as Klein observes, the language of *politeness*, denoted by keywords including ‘refinement,’ ‘manners,’ ‘character,’ ‘breeding,’ and ‘civility,’ came in the late-seventeenth-century to represent the cultural indicia of the English gentleman, as culture evolved with the rise of commerce.²³³ This shift was very much discursive in nature and constitutive of a nascent values of civility, beyond its original, specifically courtly, domain. However, and crucially, it involved the assumption of ideological weight which saw ‘politeness’ – to use Klein’s description – come into conjunction with civic liberty, so that the virtuous manners of classical republicanism gave way to polite manners.²³⁴ Klein argues that the Earl of Shaftesbury, Anthony Ashley Cooper, was

²²⁹ Hume, D. (1890) *Essays, Literary, Moral, and Political*, at p.68.

²³⁰ Montesquieu, C. (1952) *The Spirit of the Laws*, at p.146.

²³¹ See (discussing Edmund Burke) Pocock, J. (1985) at pp.209-10.

²³² Pocock, J. (1985) at p.70.

²³³ Klein, L. (1989) “Liberty, Manners, and Politeness in Early Eighteenth-Century England” in 32(3) *The Historical Journal*, 583 at p.585.

²³⁴ *Ibid.*, at pp.584, 586.

influential in this regard²³⁵ in his strategic efforts to ameliorate the harsh civic mode of country whiggism.²³⁶

Indeed, several writers of the time, including Shaftesbury, Abel Boyer, Richard Steele and Joseph Addison, were giving an edge to late-seventeenth- and early-eighteenth-century discussions by encouraging a new 'polite' moral order sympathetic to political, social and cultural developments consolidated by the Glorious Revolution.²³⁷ But Shaftesbury's efforts were particularly apposite, according to Klein, in that he argued that all politeness was owing to *liberty*, and that those social and cultural dialectics constitutive of polite social intercourse did themselves constitute a form of liberty and, through this, liberty was assimilated into the notion of culture itself.²³⁸ Klein notes that the effect of this was to distance liberty from its specifically civic setting, affording civic liberty, what he calls, "...the aspect of a Machiavellian memento."²³⁹ His argument is that liberty was thereupon assimilated into culture itself, obviating the stressful relation between virtue and culture evident in the writings of Scottish Enlightenment writers, among others; "[a] truly polite people was no longer in danger of losing its liberty since that liberty was secured in the very fact of the people's being polite. Politeness was so thoroughly enmeshed in discursive and cultural liberty that politeness was not conceivable without such liberty."²⁴⁰ In relation to this transition, Pocock observes that culture would finally replace property by the nineteenth-century "...as the qualifying characteristic of the civic elite."²⁴¹ He argues that it was a defining development of the

²³⁵ See Carter, P. (2001) *Men and the Emergence of Polite Society, Britain 1660-1800*, at p.24.

²³⁶ Klein, L. (1989) at p.605.

²³⁷ Carter, P. (2001) at p.57.

²³⁸ Klein, L. (1989) at pp.602-3.

²³⁹ *Ibid.*, at p.603.

²⁴⁰ *Id.*

²⁴¹ Pocock, J. (1975) at p.500.

eighteenth-century that the enrichment of human intercourse and multiplying relationships borne of the escalation in commerce, leisure, and cultivation, were, significantly not political in character, but social. Because of this, the individual capacities thereupon developed were not called “virtues” but “manners.”²⁴² As Sheldon Rothblatt describes it, the “new cortegiano” of the eighteenth-century was “...far less political and far more social, concerned less with the rules of courtier, philosopher-king, or statesman, and far more with the qualities of appearance and good taste.”²⁴³ The genesis of that marginalization feared²⁴⁴ by, and so, inspiring, Country gentleman, he notes, had resulted from the scramble for power which followed the installation of William III, that saw their political influence, locally as well as in Parliament, reduced or neutralized.²⁴⁵ Most were not the great landed peers and rich influential gentry who extended their holdings during this time, but were lesser country gentlemen.²⁴⁶ In these circumstances, the path forward, towards the cultivation of social graces and the acquisition, improvement, and retention of reputation and *place*, were to be found through the social touchstones of civility, taste, liberality, and sociability; those things which conduced to polite intercourse, which could, in the words of Rothblatt, provide an anchor in uncertain London times, and promote opportunity.²⁴⁷ As he notes, “[n]ever before in English society had so many persons placed a premium on conversation as in the second half of the eighteenth-century.”²⁴⁸

²⁴² Pocock, J. (1985) at p.49.

²⁴³ Rothblatt, S. (1976) *Tradition and Change in English Liberal Education: An Essay in History and Culture*, at p.59.

²⁴⁴ See this chapter, text associated with note 217.

²⁴⁵ Rothblatt, S. (1976) at p.59.

²⁴⁶ *Ibid.*, at p.60.

²⁴⁷ *Ibid.*, at p.62, *passim*.

²⁴⁸ *Ibid.*, at p.63.

On their face, these changes spoke more to utility than teleology, and arguably distanced their enthusiasts from Aristotle's insistence that virtuous acts, to constitute virtue, must be chosen for their own sakes. As Morgan notes, for example, concern for reputation constituted "...a source of identity rooted in others' opinion of who one was and its cultivation and maintenance inevitably called for a slavish courting of public opinion."²⁴⁹ That such standards of social etiquette were eminently imitable - a fact about which many complained - was exemplified in the significant development of guides for social conduct in the form of the highly influential genre of the "courtesy book"²⁵⁰ or "conduct book"²⁵¹ (which was in turn superseded by 1780 by the "etiquette book");²⁵² emulation being their point. Morgan notes, for example, the disdain for the ease with which "pernicious disguising of social rank and moral character...[could be]...accomplished in cities."²⁵³ That one's social presentation could be so-managed, of course, is an indication of the potential for outer conduct divested of any connection with inner feeling; a potential which was recognized by renaissance writers, according to Carter.²⁵⁴ Carter notes that a tension existed between those who were concerned that guides to conduct might suggest that external manners might exist independent of true virtue, and commentators who believed that skills of ingratiating oneself through calculated self-presentation constituted a necessary element of the courtier's repertoire.²⁵⁵

²⁴⁹ Morgan, M. (1994) *Manners, Morals and Class in England, 1774 – 1858*, at p.64.

²⁵⁰ See Rothblatt, S. (1976) at p.60.

²⁵¹ See Morgan, M. (1994) at p.87.

²⁵² Rothblatt, S. (1976) at p.60; Morgan, M. (1994) at p.87.

²⁵³ Morgan, M. (1994) at p.54.

²⁵⁴ Carter, P. (2001) at p.57.

²⁵⁵ *Id.*

Another significant feature is seen in the gendered characterizations which came to be applied as moralizing attributions to various phenomena of the day. Pocock notes, for example, the propensity for whig writers to personify “Credit” in a feminized guise, in doing so, seeking to delegitimize monied interests with which they competed. This strategy Pocock identifies as the very idiom employed by Machiavelli to describe *fortuna*,²⁵⁶ to wit, Machiavelli said, in Chapter XXV of *The Prince*,

...I consider that it is better to be adventurous than cautious, because fortune is a woman, and if you wish to keep her under it is necessary to beat and ill-use her; and it is seen that she allows herself to be mastered by the adventurous rather than by those who go to work more coldly. She is, therefore, always, woman-like, a lover of young men, because they are less cautious, more violent, and with more audacity command her.²⁵⁷

19th century – self-sufficient virtue exemplified by manly character

Machiavelli’s sentiment might be argued to have been taken seriously by the nineteenth century. Historians recognize a significant distinction between Georgians and Victorians as regards the trajectory of their socio-cultural sensibilities, manifest in such terms as ‘politeness’ as it was used in the eighteenth-century, compared to its use in the nineteenth-century.²⁵⁸ As Tosh describes it, by the nineteenth-century, politeness, as a basis for social appraisal, came to have diminishing

²⁵⁶ Pocock, J. (1975) at p.453.

²⁵⁷ Machiavelli. (1961) *The Prince*, at p.133.

²⁵⁸ Tosh, J. (2002) “Gentlemanly Politeness and Manly Simplicity in Victorian England” in 12 *Transactions of the Royal Historical Society* 455 at p.456.

leverage; “[i]ts place as a marker of social and political virtue was taken by ‘manliness,’ defined in terms which emphasized the departure from polite standards.”²⁵⁹ The so-described²⁶⁰ mid-Victorian cult of manliness came to be a feature consistently invoked by the professional and preaching classes, in what Stephan Collini refers to as “character-talk,” representing a well-recognized mingling of ethical and physiological properties.²⁶¹ Many of the keywords which were associated with *character* were themselves constitutive of Victorian definitions of manliness, including, as noted by Susman: *citizenship, duty, democracy, work, conquest, morals, manners, honour, integrity*, “...and above all, *manhood*.”²⁶² Collini offers alternative descriptors which are recognizably resonant: *self-restraint* (i.e., checked passion), *perseverance, strenuous effort*, and *courage in the face of adversity*.²⁶³

In this vein, Tosh argues that nineteenth-century sensibilities came to see *action* as an imperative, the effect of which would be to contribute to marginalizing the eighteenth-century affinity with politeness.²⁶⁴ In this contention, the sociability of the ‘outward gentleman’ came to be eclipsed by the sterner, less-refined truthfulness of the ‘inward gentleman.’²⁶⁵ Arguably, this development represented the culmination of the process of ‘internalization’ that Owen Barfield identified; as he describes it, “...the shifting of the centre of gravity of consciousness from the cosmos around him into the personal human being himself.”²⁶⁶ The discourses of character that articulated this

²⁵⁹ *Id.*

²⁶⁰ Collini, S. (1991) *Public Moralists: Political Thought and Intellectual Thought in Britain, 1850 – 1930*, at p.186.

²⁶¹ Collini, S. (1985) “The Idea of Character” in Victorian Political Thought” in 35 *Transactions of the Royal Historical Society* 29 at p.40.

²⁶² Susman, W. “‘Personality’ and the Making of Twentieth-Century Culture” in Higham, J., and Conkin, P. (Eds.) (1979) *New Directions in American Intellectual History*, at p.214.

²⁶³ Collini, S. (1991) at p.100.

²⁶⁴ Tosh, J. (2002) at p.457.

²⁶⁵ *Ibid.*, at p.456.

²⁶⁶ Barfield, O. (1967) *History in English Words*, at p.171.

conception of the self-reliant nineteenth-century gentleman drew heavily upon human sciences discourses. These provided the means of stripping nineteenth-century conceptions of character of their “...romantic and religious claims to transcendence...[now] reduced to an objectified set of criteria,”²⁶⁷ thus more-closely approximating Zetterbaum’s aforementioned notion of *self*.²⁶⁸ In tracing the development of this trajectory, Barfield notes that self-consciousness as we know it was first evident around the time of the Reformation, after which, terminology hyphenated with the word *self* (e.g., *self-conceit*, *self-love*, and from the end of the sixteenth-century, *self-confidence*, *self-command*, *self-esteem*, and *self-knowledge*) came to be increasingly in evidence.²⁶⁹ During the rise of politeness in the eighteenth-century, masculine qualities of rationality and self-mastery had been increasingly considered prerequisites of men’s acquisition of refinement.²⁷⁰ For Victorian man, the shift to a now-consolidated centre of gravity ‘within’ was not great. However, this notion – which had been anticipated by the Third Earl of Shaftesbury in his *Inquiry Concerning Virtue or Merit* (1699) - that the virtuous agent is self-sufficient in his virtue (a condition consequent upon his’ bringing his *character* to it, observes Schneewind),²⁷¹ brought with it also the ambiguous foundation of a secularized free-will, which had been a contested concept for hundreds of years. This, perhaps, should be no surprise given that a *telos* – or, at least, an Aristotelian or Christian conception of it – was now absent;²⁷² as Collini states, character, by the nineteenth-century, “...could more readily be represented as an end in itself.”²⁷³

²⁶⁷ Goodlad, L. (2003) *Victorian Literature and the Victorian State: Character and Governance in a Liberal Society*, at p.39.

²⁶⁸ See this chapter, text associated with note 57.

²⁶⁹ Barfield, O. (1967) at p.170.

²⁷⁰ Carter, P. (2001) at p.74.

²⁷¹ Schneewind, J. (1998) *The Invention of Autonomy: A History of Modern Moral Philosophy*, at p.309.

²⁷² See, generally, MacIntyre, A. (1984) at pp.232-234.

²⁷³ Collini, S. (1991) at p.109.

MacIntyre argues that, historically, the abandonment of a *telos* always brought with it the substitution of some form of Stoicism,²⁷⁴ and he notes, as an example, Adam Smith's contention that Knowledge (i.e., virtue *is* knowledge: Plato)²⁷⁵ is an insufficient basis to ensure conformity with the virtues, necessitating the availability of the Stoic virtue of *self-command* to ensure the constraint of passion.²⁷⁶ And, certainly, in its nineteenth-century guise, character "...proposed a method for both mastery and development of the self...[and]...argued that its kind of self-control was the way to fullest development of the moral significance of self."²⁷⁷ Victorian character disdained *sentimentality*;²⁷⁸ ironically enough, given its apparent memory of the idea of martial virtue. Nineteenth-century character was now ineludibly oriented to *progress* and the future.²⁷⁹ It similarly - and for the same reasons - disdained leisure of the kind which enabled eighteenth-century sociability; *work* was now a necessary basis to even the possibility of character.²⁸⁰ Collini argues that the Victorian emphasis on character-formation involved a paradigmatic envisioning (think: *Colonial frontier*) of the hard-pressed *individual*, "...surrounded by those who seemed to have succumbed to various forms of temptation – confronting the task of maintaining his will in the face of adversity."²⁸¹ The nineteenth-century brought increasingly-secular expectations in which the future was now uncertain. As Gertrude Himmelfarb describes it, "...there were dire predictions, after the publication of Charles Darwin's *Origin of Species* in 1859, that the theory of

²⁷⁴ MacIntyre, A. (1984) at p.233.

²⁷⁵ See Chapter 1, text associated with note 94.

²⁷⁶ MacIntyre, A. (1984) at p.235.

²⁷⁷ Susman, W. (1979) at p.214.

²⁷⁸ Collini, S. (1991) at p.113.

²⁷⁹ See generally: Cain, P. (2007) "Empire and the Languages of Character and Virtue in Later Victorian and Edwardian Britain" in 4(2) *Modern Intellectual History* 249.

²⁸⁰ Tosh, J. (2002) at p.458, 459, 462.

²⁸¹ Collini, S. (1991) at p.114.

evolution, and the progress of science in general, would undermine not only religion, but morality as well.”²⁸² In travelling into such unknown futures, says Collini, a breakdown-free will was essential.²⁸³ And as Susman observes, “...as the rituals of the external church grew feebler, the needs of inner self grew stronger.”²⁸⁴ The arc of this development was reinforced and given objectified weight thanks to the burgeoning knowledge bases of the new human sciences, including medicine and psychology, which could now provide powerful tools for describing character.²⁸⁵

In its Victorian guise, as opposed to the value-free Aristotelian sense, character referred to the possession of certain highly-valued moral qualities which met with ethical approval.²⁸⁶ As Cain describes it, the notion of character was shot through with elements of languages of virtue and connected with discourses which defined virtue in terms of public service and military valour.²⁸⁷ Field states that character seems a highly-charged term, “...usually connoting portentous significance, whatever the context.”²⁸⁸ He goes on,

Its usages transmitted a sense of shared intellectual currency; as though, when “character” came up, everyone knew without further explanation what was being discussed and could in fact even anticipate the ensuing conclusions.²⁸⁹

²⁸² Himmelfarb, G. (1994) *The De-moralization of Society: From Victorian Virtues to Modern Values*, at p.26.

²⁸³ Collini, S. (1991) at p.113.

²⁸⁴ Susman, W. (1979) at p.212.

²⁸⁵ Goodlad, L. (2003) at p.39.

²⁸⁶ Collini, S. (1991) at p.96.

²⁸⁷ Cain, P. (2007) at pp.252-3.

²⁸⁸ Field, H. (1982) *Toward a Programme of Imperial Life: The British Empire at the Turn of the Century*, at p.26.

²⁸⁹ *Id.*

Ideas of Victorian character operated in mutual concatenation with nationalistic conceptions of a collective English identity, defined against continental 'Other'-ness, argues Goodlad, crystallizing "...the longstanding cult of Anglo-Saxon liberty" and reinforcing "England's singular claims to freedom."²⁹⁰ Victorian conceptions of class were also deeply implicated in complementary fashion in its justificatory colonial paternalism, effectively revealed in the title of Kipling's poem *The White Man's Burden*. Mehta finds the analogue of Kipling's message in John Stuart Mill's conception of progress, which he likens to "having a stalled car towed by one that is more powerful and can therefore carry the burden of an ascendant gradient."²⁹¹ He criticizes Mill's notion of character-development as bound within a rigid and crude typology "in which such development can occur in some societies through the initiative of individuals and in others only through imperial guidance,"²⁹² citing as an example Mill's conception of European character as against that of "the Hindus" inferior example.²⁹³ Goodlad argues that this conception of character as *Englishness* was also deeply intersected with the class and gender ideologies which provided defining weight to the evolving early- and mid-Victorian middle class and professional communities²⁹⁴ whose competition with the aristocracy for influence was a defining feature of nineteenth-century British politics.

²⁹⁰ Goodlad, L. (2000) "'A Middle Class Cut into Two': Historiography and Victorian National Character" in 67(1) *English Literary History* 143 at pp. 144, 145.

²⁹¹ Mehta, U. (1999) *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*, at p.94.

²⁹² *Ibid.*, at p.205.

²⁹³ *Ibid.*, at p.94.

²⁹⁴ Goodlad, L. (2000) at p.144.

The institutional virtue of character and the double-edged sword of habit.

The concomitantly rapid evolution of England's Westminster institutions of government and public administration were likewise comprehended through the prism of character. Mill, for example, argued that it was dispositions of character on a national scale that particularly suited England to representative government.²⁹⁵ Collini argues that Mill cast character as "the very bedrock" and the "chief explanatory concept" in his explanations for the comparative success of English representative government.²⁹⁶ Goodlad states that testaments to England's "robust individualism" were considered to include "Parliament, the English 'Constitution'" and Britain's history of central government and attendant institutional arrangements.²⁹⁷

The nineteenth-century language of character spoke in terms of *dispositions* – the Aristotelian basis to virtuous conduct. The utilitarian, Mill, no less than Aristotle, recognized the importance of habit in the ultimate determination of character and the importance, therefore, of engendering good habits in citizens. For Mill, the aspiration to such qualities was consistent with his principle of utilitarianism because it served as a vehicle for the acquisition of happiness - notwithstanding that the results of such aspiration could, he believed, evolve to be desired in their own right.²⁹⁸ Concern for the habits of obedience and acquiescence, upon which, it was considered, society depended, was widely discussed through the late-eighteenth- and early-nineteenth-centuries. And in this world of a still-restricted franchise, influential commentators

²⁹⁵ Mill, J. "Representative Government" in Hutchins, R. (Ed.) (1952) *Great Books of the Western World*, at p.354.

²⁹⁶ Collini, S. (1991)

²⁹⁷ Goodlad, L. (2000) at p.145.

²⁹⁸ Robson, J. (Ed.) (1969) *Essays on Ethics, Religion and Society by John Stuart Mill*, at p.236.

argued that the state of those governed implicated the state of government directly. Samuel Smiles, for example, contended,

Government, in the long run, is usually no better than the people governed. Where the mass is sound in conscience, morals, and habit, the nation will be ruled honestly and nobly. But where they are corrupt, self-seeking, and dishonest in heart, bound neither by truth nor by law, the rule of rogues and wire-pullers becomes inevitable. The only true barrier against the despotism of public opinion, whether it be of the many or of the few, is enlightened individual freedom and purity of personal character. Without these, there can be no vigorous manhood, no true liberty in a nation. Political rights, however broadly framed, will not elevate a people individually depraved.²⁹⁹

Samuel Taylor Coleridge proposed a set of requisites necessary to establish these habits: a system of education in discipline, a feeling of allegiance or loyalty, and a principle of social cohesion (i.e., a national sense or sense of community).³⁰⁰ And Mill considered that these requisites provided the basis for the formation of national character through education, thereby promoting permanence and progress.³⁰¹ Burt notes such a preoccupation with order in the earlier views of Henry St. John, First Viscount of Bolingbroke, who considered that a passion for the constitution before a general attachment to the public good evidenced the disposition that made Englishmen good citizens.³⁰² Mill considered the continuity of existence in the 'outward forms' of institutions a vital component in the development of habits conducive to national

²⁹⁹ Smiles, S. (1889) *Character*, The Pioneer Press, U.S.A., at p.39.

³⁰⁰ Robson, J. (1969) at p.xxxii.

³⁰¹ *Id.*

³⁰² Burt, S. (1992) at p.95.

character,³⁰³ although the fundamental mechanism remained, for him, the desire satisfied in consequence of the habit so-formed.³⁰⁴ Like Bolinbroke, however, Mill drew a line between this source of desire and any desire for a generalized public good, which he considered would involve a sacrifice not worth the effort to the individual.³⁰⁵

Unavoidably, the recognition of habit as a necessarily-attendant feature of character-development brought with it the ambiguities surrounding questions of voluntarism and determinism. The rising Renaissance dissatisfaction with “moralizing philosophy and religious precept,”³⁰⁶ as vehicles for restraining men’s passions, saw little alternative to conceptions of virtue being replaced by government as a means of *managing* passions; not of citizens, according to Pocock, but of rights-bearing and self-interested individuals.³⁰⁷ Herein lay the facility of Mill’s utilitarianism (and of that of Adam Smith’s *Invisible Hand*, and Bernard Mandeville’s *Private Vices and Publick Benefits*) in *harnessing* the passions; none of which, argues Hirschman, going so far as to articulate “...the conditions under which that marvellous metamorphosis of destructive ‘passions’ into ‘virtues’ actually takes place.”³⁰⁸ He notes that the idea was made palatable in Adam Smith’s substitution for terms such as ‘passion’ and ‘vice’ by comparatively bland terms: ‘advantage’ or ‘interest.’³⁰⁹ Thus domesticated, this form of passion, now reconfigured, was thereupon able to survive as a major tenet of nineteenth-century liberalism, says Hirschman.³¹⁰

³⁰³ Robson, J. (1969) at p.17.

³⁰⁴ *Ibid.*, at p.15.

³⁰⁵ *Id.*

³⁰⁶ Hirschman, A. (1977) *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph*, at p.14.

³⁰⁷ Burt, S. (1992) at pp.33-4; Pocock, J. (1975) at p.459.

³⁰⁸ Hirschman, A. (1977) at p.17.

³⁰⁹ *Ibid.*, at pp.18-9.

³¹⁰ *Ibid.*, at p.19.

Raab notes that 'interest' first came to have a specific economic meaning by the last decade of the seventeenth-century.³¹¹ And by the rise of manly character in the nineteenth-century, economic activity was widely portrayed as a proving-ground of moral discipline, where debt and bankruptcy, unemployment and destitution suggested financial imprudence grounded in poor habits, which represented moral failure.³¹² Social standing and the vagaries of opportunity, consequent upon birth and privileged access, therefore became implicated in the determination of character (i.e., virtue) through a socially-delineated and loaded process of responsabilization. Imputations of improper habits were thereby possible on the strength of perceived performance; candidates could be said to have been 'volunteered' in as much as the assumption was that their habits were a product of their voluntarism. So, for example, Sir Leslie Stephen observed,

Poverty and its attendant evils may be diminished, but diminished only by judicious measures, by looking beyond the momentary need, and especially by raising the moral standard of the poor themselves. Whoever professes to raise the position of a class without elevating its character is a charlatan.³¹³

The working-class were similarly morally implicated specifically in questions of economic progress in the same manner. Gareth Stedman Jones observes that the classical economist, John Elliot Cairnes, argued that the 'betterment' of the working-class would be impossible without substantial changes in their moral character.³¹⁴ But Collini rejects the oft-asserted view that character can simply be understood in terms of its utility as a device for imposing middle-class

³¹¹ Raab, F. (1964) *The English Face of Machiavelli: A Changing Interpretation, 1500-1700*, at p.237.

³¹² Collini, S. (1991) at p.105.

³¹³ Stephen, L. (1885) *The Life of Henry Fawcett*, Smith, at p.152.

³¹⁴ Jones, G. (1976) *Outcast London: A Study in the Relationship Between Classes in Victorian Society*, at p.4.

values upon a potentially disruptive or otherwise unmotivated working-class.³¹⁵ Character presupposed, in his words, an agreed moral code.³¹⁶ In *Lords of Misrule*, Anthony Taylor shows that class-based judgment of character cut both ways. In her private correspondence, Queen Victoria herself cautioned against “the immense danger and evil of the wretched frivolity and levity of the views and lives of the higher classes.”³¹⁷ Social movements during the nineteenth-century, which Taylor characterizes as “plebeian and middle-class radicalism,” sought to bring about a shift in the dominance of the aristocracy, which was viewed as a poorly-behaved special interest group “...comprising political transgressors who subverted the will of the people in government.”³¹⁸ Taylor further contends as meritorious the view that the middle-class was defined and, in part, created, by its opposition to the aristocracy; and it deliberately constituted its *superior* public character in opposition to it.³¹⁹

19th century transformation in government and public administration

The Industrial Revolution made dramatic strides through the course of the Napoleonic Wars; a series of conflagrations spanning the years 1793 – 1815, finishing in Napoleon’s defeat by the British at The Battle of Waterloo. Markets that had been artificially boosted in dramatic fashion by war industries contracted just as dramatically after the cessation of hostilities, with the wealth that had been generated becoming increasingly concentrated in the hands of employers and

³¹⁵ Collini, S. (1991) at p.30.

³¹⁶ *Ibid.*, at p.37.

³¹⁷ See, Taylor, A. (2004) *Lords of Misrule: Hostility to Aristocracy in Late Nineteenth- and Early Twentieth-Century Britain*, at p.18.

³¹⁸ *Ibid.*, at p.11.

³¹⁹ *Ibid.*, at p.10.

landlords.³²⁰ Raynor notes that, at the time, the Parliament was constituted exclusively by aristocrats and landlords – both Whig and Tory - who, buoyed by the political economy of Adam Smith's *Wealth of Nations* and Malthusian ideas about the effects of scarce resources upon populations, found economic arguments to support employers and landlords against the workers. The working classes were left “face to face with the ruthless force of competition,” many of them beyond subsistence, facing destitution and starvation.³²¹ Woodward observes that these events stood at the dawn of an age of reform.³²² In 1815, approximately one percent of the population enjoyed the vote.³²³ Woodward describes the drive for reform in terms of a “vague popular belief” that immense material improvements in people's lives were possible, subject only to the greed of the rich who were keeping this possibility from the poor.³²⁴ Similarly, Rayner describes a sense that little or nothing would be done for those who were subject to the law, but who were not enfranchised, until Parliament itself was reformed.³²⁵

The *Representation of the People Act 1832* (the *Reform Act*) initiated a profound transformation of the franchise that would unfold throughout the remainder of the nineteenth-century and into the twentieth-century. But despite the magnitude of this particular shift in Britain's constitutional arrangements, it is set among myriad changes that ultimately saw the *ancien régime* of the early-nineteenth-century eclipsed by the democratic institutions and welfare state of the twentieth-century. The power of the changes brought by the Industrial Revolution were fundamentally

³²⁰ Rayner, R. (1931) *Nineteenth Century England: A Political and Social History of the British Commonwealth, 1815 – 1914, Second Edition*, at p.30.

³²¹ *Ibid.*, at p.31.

³²² Woodward, L. (1962) *The Age of Reform 1815-1870, Second Edition*, at pp.40, 41.

³²³ Rayner, R. (1931) at p.36.

³²⁴ Woodward, L. (1962) at p.41.

³²⁵ Rayner, R. (1931) at p.36.

transformative. Specialization in labour, new occupational and industrial structures, and increasing mechanization and use of factories, saw phenomenal growth in production and greatly increased national wealth. It was amidst this transformation that the individual was placed in a new relationship with his fellow-man and the symbols of social authority, according to Fraser.³²⁶ He states that these achievements were seen as evidence of the place of individualism and *laissez-faire* as enabling virtues, available to any who wished to harness them and make his own way.³²⁷ Notwithstanding this, MacDonagh contends that the changes brought forth - from an administrative standpoint - destroyed any belief "...in the possibility that society did or should consist, essentially or for the most part, of a mere accumulation of contractual relationships between persons..."³²⁸ Ironically, however, according to MacDonagh, this outcome did not reflect an originating Benthamite influence on the direction of social and political discourse so much as the influence of a small number of doctrinaires inspired by Bentham, such as the hero of sanitation, Sir Edwin Chadwick, and the colonial legislator, James Fitzjames Stephen.³²⁹ He notes that the centralizing and consolidating trajectory of state machinery and its development through the course of the nineteenth-century – a trajectory which would culminate in a unified Civil Service - was punctuated by various factors which may be said to have influenced this change, including: the Northcote-Trevelyan inquiries and recommendations; the Crimean scandals; the doctrine of utilitarianism; the sentiment of humanitarianism; the new economic relationships and the living and working conditions born of wages contracts, urbanization and industrialized

³²⁶ Fraser, D. (1984) at p.5.

³²⁷ *Id.*

³²⁸ MacDonagh, O. (1958) at p.57

³²⁹ *Ibid.*, at p.65.

environments; and the implications for executive government of the process of political change initiated by “economical reform” - and all this in addition to the expansion of the franchise.³³⁰

The crystallization of the unified British Civil Service from the mid-nineteenth century coincided with the end of what had come to be known colloquially as the *Old Corruption*. Rubenstein observes that the term Old Corruption was used by radicals to mean not one, but a rather wide variety of practices which they held to be at the heart of much of what was wrong with Britain’s unreformed government.³³¹ The Old Corruption comprised systematized corruption which allowed the elite to enrich themselves at the expense of the state through sinecures, pensions, rewards and government contracts, and to populate Parliament by purchasing corrupt boroughs or otherwise manipulating elections. The expansion of state resources from approximately 1650 to 1750, along with an expanding economic spirit and a decline in religious uniformity, greatly augmented the opportunities available for the corrupt exploitation of state revenues, although the rise of these practices had in fact occurred over centuries.

The “old administrative system” which operated prior to the unification of the Civil Service has been described by Gerald Aylmer as being characterized by six principal features:

- i. Entry to office by means of patronage, patrimony, purchase, or some combination of these;
- ii. Tenure of office either for life or during pleasure;
- iii. Entry often through acquisition of a reversionary interest; venality; the treatment of offices as if they were subject to normal rights of private property;

³³⁰ *Ibid.*, at p.53.

³³¹ Rubenstein, W. (1983) at p.57.

- iv. The employment of deputies by part-time or wholly absentee office-holders and the (*de facto*) acceptance of sinecurism;
- v. The remuneration of officials by means of fees, gratuities and perquisites, as much as, often more than, by salaries, stipends or wages from the Crown or the State; and
- vi. The regarding of office as a private right or interest, rather than as a public service.³³²

These arrangements provided fertile ground for self-interested opportunism, with corruption becoming more entrenched and significant as state infrastructure developed. Rubenstein argues that there is good reason to take a broad reading of the definition of Old Corruption, to additionally include “the close involvement of many middle-class businesses and professions which...also benefited directly or indirectly...”³³³ The transition from this to mass enfranchisement has been accounted for, according to Taylor, in familiar narratives of liberty and reform that succeeded in curbing the politics of faction, patronage, and vested interests, that grew out of aristocratic concerns.³³⁴ In his view, “[p]arliamentary reform, then, purified the system of politics, expelled aristocratic influences, and professionalized political parties.”³³⁵ The death knell for Old Corruption, on his account,³³⁶ came with the introduction of the secret ballot in 1872,³³⁷ obviating the ability of landlords and employers to influence the votes of tenants and employees, and consolidating legislation subsequently introduced in 1883.³³⁸ In a comparatively expanded perspective, Philip Harling argues that the process of sanitizing government and

³³² Aylmer, G. (1980) “From Office-Holding to Civil Service: The Genesis of Modern Bureaucracy” in 30 *Transactions of the Royal Historical Society* 91 at p.92.

³³³ Rubenstein, W. (1983) at p.62.

³³⁴ Taylor, A. (2004) at p.9.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *The Ballot Act 1872.*

³³⁸ *The Corrupt and Illegal Practices Prevention Act 1883.*

legitimizing its political authority in fact spans a history which pre-dates the Whig reforms of the 1830s, and incorporates also subsequent Conservative reforms of the 1840s and Liberal reforms of the 1860s and 1870s.³³⁹

Among the many – and transformative – reforms introduced throughout this period, those credited to the so-called “Northcote-Trevelyan Report”³⁴⁰ have been referred to as

The greatest single governing gift of the nineteenth to the twentieth century: a politically disinterested and permanent Civil Service with core values of integrity, propriety, objectivity and appointment on merit, able to transfer its loyalty and expertise from one elected government to the next.³⁴¹

Such an epithet, if not a misstatement of the practical influence of the Northcote-Trevelyan report, in any event operates to obscure the complexity of factors which were operating upon the course of development of the British government. As MacDonagh puts it, a new sort of state was being born, evolving towards a dynamic role for government *within* society.³⁴² An example of the kinds of imperatives in this regard, which were ushered in by the changes brought by the Industrial Revolution, is seen in the increasingly proactive relationship with legislation taken by an increasingly centralized administration. The expansion of delegated authority and associated structural adjustments were addressed to a more active role in managing the operation of legislation.³⁴³ The very idea of *implementing* legislation only came to be with the appointment of

³³⁹ Harling, P. (1995) “Rethinking ‘Old Corruption’” in 147 *Past and Present* 127 at p.131.

³⁴⁰ Northcote, S., Trevelyan, C., and Jowett, B. (1854) *Report on the Organisation of the Permanent Civil Service*.

³⁴¹ Lord Peter Hennessy, Founder’s Day address, Hawarden Castle 8 July 1999, cited in Public Administration Select Committee (2013) “Truth to Power: How Civil Service Reform Can Succeed, HC74” at p.7.

³⁴² MacDonagh, O. (1958) at p.61.

³⁴³ *Ibid.*, at p.60.

executive officers in the early nineteenth-century.³⁴⁴ As Parris points out, the very idea of administrative machinery to enforce the law was a substantively foreign concept in the thought of eighteenth-century Britain. “The eighteenth-century notion of *ubi jus ibi remedia* in practice made the enforcement of the law depend on suits brought, for the most part, at the instance of private individuals.”³⁴⁵ This new approach, by comparison, was a radical development.

The establishment of the Westminster tradition and the place of continuity

The Northcote-Trevelyan Report recommended a system of examination ahead of entry to the civil service, and promotion on merit through open competition.³⁴⁶ The evil sought to be addressed by this recommendation was succinctly summed-up in Anthony Trollope’s 1858 novel *The Three Clerks*:

It was too notorious that the Civil Service was filled by the family fools of the aristocracy and middle classes, and that any family who had no fool to send, sent in lieu thereof some invalid past hope. Thus the service had become a hospital for incurables and idiots.³⁴⁷

The co-author of the report, Trevelyan, referred to the beneficiaries of patronage in like terms: “The idle and useless, the fool of the family, the consumptive, the hypochondriac, those who have a tendency to insanity, are the sort of young men commonly ‘*provided for*’ as the term is, in

³⁴⁴ *Ibid.*, at p.59.

³⁴⁵ Parris, H. (1969) *Constitutional Bureaucracy: The Development of British Central Administration Since the Eighteenth Century*, at p.164.

³⁴⁶ *Id.*

³⁴⁷ Trollope, A. (1958) *The Three Clerks*, cited in Winstone, R. (2003) “Wither Civil Service? Research Paper 03/49, at p.1.

a public office.”³⁴⁸ The contemporaneous event of the disaster in the Crimean War became emblematic of the evils to which the reforms recommended by the Northcote-Trevelyan Report were directed.³⁴⁹ As Kitson-Clark describes it, “...there came from the frozen mud of the Crimea the ugliest stories of callous official incompetence.”³⁵⁰ Significant maladministration in both military and civil administrations³⁵¹ precipitated disastrous circumstances in which many thousands of troops were left insufficiently supplied or logistically supported in the face of the winter of 1854-5. Nearly 20,000 men died as a direct consequence, from exposure, or diseases including cholera, dysentery, and malarial fever. Woodward notes that during January and February 1855, the number of men hospitalized rose to 14,000. And in one large hospital, more than half the patients died during the month of February.³⁵² The situation precipitated the resignation of the Prime Minister, Lord Aberdeen, and a commission of inquiry laid responsibility for the breakdowns in supply directly at the feet of the Cabinet.³⁵³ As to the civil service more generally, Compton observes that the Northcote-Trevelyan Report “...depicted a grim state of affairs: a service vitiated by corruption and enervated by lack of incentive.”³⁵⁴

But to many of those who populated Victorian institutions, the suggestion that the civil service might be staffed by an openly competitive process was highly controversial. Queen Victoria

³⁴⁸ Comments of Sir Charles Trevelyan extracted from Foreign Office Document 44580 §103 “Remarks by Capt. H. H. O’Brien, R.A., on Sir Stafford Northcote’s and Sir Charles Trevelyan’s Report upon the Reorganization of the Civil Service” cited in Hughes, E. (1949) “Sir Charles Trevelyan and Civil Service Reform, 1853-5 Part I” in 64 *English Historical Review* 53 at p.71.

³⁴⁹ Kitson-Clark, G. (1959) “‘Statesmen in Disguise’: Reflexions on the History of the Neutrality of the Civil Service” in 2(1) *The Historical Journal* 19 at p.22.

³⁵⁰ *Id.*

³⁵¹ Sutherland, G. (Ed.) (1972) *Studies in the Growth of Nineteenth-Century Government*, at p.58.

³⁵² Woodward, L. (1962) at p.285.

³⁵³ *Ibid.*, at p.286.

³⁵⁴ Compton, J. (1968) “Open Competition and the Indian Civil Service, 1854-1876” in 83(327) *The English Historical Review* 265 at p.265.

herself feared that competitive examinations would “fill the public offices with low people without the breeding or feelings of gentlemen.”³⁵⁵ Hughes records the views of one Captain H. H. O’Brien (to whose concerns Trevelyan offered replies) that public officers to whom attributions of high moral character could properly be made comprised persons who had been selected, not on the basis of learning they had undertaken, but because they were members of a class of society where such high character exists.³⁵⁶ Captain O’Brien continued: “In short, I would have Gentlemen in the public offices and I believe they can be obtained only by being selected as at present” (i.e., by patronage).³⁵⁷

Perhaps the most profound single change identified with the raft of changes often credited to Northcote & Trevelyan is the principle that a Minister of the government is responsible for the actions taken by his or her department on the basis that such acts constitute an expression of the Royal will.³⁵⁸ But Parris notes that the expression *Ministerial responsibility* is only a special application of the more general rule that every servant of the Crown is brought under the supremacy of the law of the land – the rule of law; its purpose being to distinguish Ministers from other servants in their unique responsibility to parliament; the retention of their office subject to their retention of the confidence of the government of the day.³⁵⁹ Parris notes that as late as 1830, servants subordinate to Ministers had sat in the House of Commons, notwithstanding legislation excluding ‘assistants’ from sitting in the House.³⁶⁰ The institution of the reforms in the

³⁵⁵ Briggs, A. (1955) *Victorian People: A Reassessment of Persons and Themes 1851-67*, at p.111.

³⁵⁶ Hughes, E. (1949) at p.72.

³⁵⁷ *Ibid.*, at p.73.

³⁵⁸ Dicey, A. (1915) *Introduction to the Study of the Law of the Constitution*, 8th Edition, at pp.321-2.

³⁵⁹ Parris, H. (1969) at p.81.

³⁶⁰ Kitson-Clark, G. (1959) at p.27.

1830s saw a gradual transition from a 'board' system to a 'ministerial' system, but did not see an automatic adoption of the principle of ministerial responsibility. Parris notes that it took many years for those populating the House of Commons to be convinced that the individual responsibility of ministers carried the best hope of ensuring administration would be carried out according to the wishes of government, given the realization that what the principle necessitated was the abrogation of the personal responsibility of those who sat below the minister.³⁶¹ Given the active and often interventionist role that civil servants had played until that time – often as agents for the King – the device that was necessary to ensure the Minister's responsibility-in-fact was the concomitant anonymity and neutrality of all those subordinate to the minister. But Parris states that these concepts were foreign to the traditions of the public officer of the nineteenth-century; "[i]t was difficult for them to accept the idea that the minister should be the sole channel between themselves and those to whom they felt an obligation."³⁶² Persuasion came in the form of permanence for the public official so-divested of his autonomy, which reformers had realized as early as the eighteenth-century could operate as a shield against Crown influence.³⁶³ Certainly, the concept was not a part of the Northcote-Trevelyan innovations, and many senior civil servants were unwilling to withdraw into comparative invisibility. Kitson-Clark notes that of the many civil servants whose conduct continued to diverge from the new precepts of anonymity and neutrality, Sir Charles Trevelyan himself was one of the most notable offenders.³⁶⁴

³⁶¹ Parris, H. (1969) at p.81.

³⁶² *Ibid.*, at p.94.

³⁶³ *Ibid.*, at p.36.

³⁶⁴ Kitson-Clark, G. (1959) at p.30.

More than simply a harbinger of the coming institution of Westminster principles of public administration, the Northcote-Trevelyan reforms are argued to have achieved “almost totemic status”³⁶⁵ insofar as the inception of that institution is concerned. A continuity of the modern institution of Westminster public administration with those principles is widely assumed. Marion, for example, argues that the reforms were not simply addressed to a desire for greater efficiency, but that the chief proponents were addressing “...a fundamental problem of liberal republics: how to insure competent and civilizing government in a nation-state in which modern liberal political ideas had been unleashed and were shaping both thought and action.”³⁶⁶ The answer provided by the report, he contends, was its emphasis - highlighted by the Prime Minister, William Gladstone - on

...the importance of strengthening the alliance between education and government to the end of establishing a political order committed to advancing a public interest defined broadly in terms of the general interests of Englishmen rather than narrowly in terms of the desires of the traditional aristocracy.³⁶⁷

Scions of the political establishment of the time, including Sir George Grey (brother of the former Prime Minister, Sir Charles Grey), and Chancellor of the Exchequer, Sir Charles Wood, contended openly that improved upper- and middle-class education was necessary to ensure good government; the stability and prosperity of the country relied upon ‘men of independent

³⁶⁵ Greenaway, J. (2004) “Celebrating Northcote/Trevelyan: Dispelling the Myths” in 19(1) *Public Policy and Administration* 1 at p.1.

³⁶⁶ Marion, E. (1993) “The British Civil Service: A Political Excavation and Review” in 24(4) *Administration & Society* 470 at p.472.

³⁶⁷ *Ibid.*, at p.481.

character' who were capable first of 'self-government.'³⁶⁸ These men, Wood said in 1849, must remain "the rock upon which the stability of all the institutions of this country rest."³⁶⁹

In Marion's argument, the anonymous and impartial *civil servant*, styled in the Northcote-Trevelyan Report in terms of:

...an efficient body of permanent officers, occupying a position duly subordinate to that of the Ministers who are directly responsible to the Crown and to Parliament, yet possessing sufficient independence, *character*, ability, and experience...³⁷⁰

is the essential component to achieving these ends. He cites a study of the Northcote-Trevelyan Report in making out this point, *viz*:

The principal means for implementation of the alliance...(i.e., of education and government)... [was] to be a classless class of well-bred men, educated but not hostile to popular government, liberal but not partisan, scholarly but not inactive, fit to rule but not unwilling to serve.³⁷¹

These means, of course, are resonant with the precepts upon which the image of the impartial civil servant is constructed in the modern Westminster tradition. But, more to the point, their constitutive element in the scheme of the Northcote-Trevelyan design is encapsulated in and legitimized by the concept of character. As Rhodes et al note, the Northcote-Trevelyan Report is still widely regarded as the main foundation for the principles that are considered touchstones

³⁶⁸ Parry, J. (1993) *The Rise and Fall of Liberal Government in Victorian Britain*, at pp.179, 180.

³⁶⁹ *Ibid.*, at p.180.

³⁷⁰ Northcote, S., et al. (1854) at p.3., cited by Marion, E. (1993) at p.480.

³⁷¹ Marion, E. (1993) at p.481; citing Kendrick, M. (1964) *The Reform of the British Civil Service*. Unpublished paper presented at the 1964 annual meeting of the American Political Science Association.

of Westminster public administration.³⁷² The deployment of character, then essentially an artefact of the social culture of the nineteenth-century, was considered to be the vital component in the realization of those features of the unified civil service as it was contemplated in the report. Character came as its own endorsement, certainly in respect of the public officials considered to possess it. But, more crucially, it was the key that promised the attainability of the obligations distilled in the newly-enshrined (Westminster) precepts that would become foundational in the institution of Westminster public administration by the end of the nineteenth-century.

Character, cast in these terms, draws some legitimacy at a more fundamental level from the Aristotelian conception of human *dispositions* to behave, which has attended most, if not all, philosophical constructions of virtue, not to mention myriad accounts of human agency attended still, as they are, by unresolved voluntarist-determinist tensions. The nineteenth-century culture of character would itself soon be eclipsed by the culture of personality – with its own transcendental imperatives cast as a ‘spiritual’ vision of the now-autonomous *self*, in which “self-development” came ultimately to be regarded as of more importance than were moral imperatives.³⁷³ In its modern configuration, the concept of the character-trait, as a function of human personality, continues to constitute a basis for the perceived efficacy of virtue as a way of understanding normative human behavior. As Nancy Snow states,

...[In many theoretical constructions of virtue]...virtues constitute important components of personality and, *a fortiori*, character. On these...[constructions]..., the virtues that

³⁷² Rhodes, R., Wanna, J., and Weller, P. (2009) *Comparing Westminster*, at p.159.

³⁷³ Susman, W. (1979) at p.216.

comprise character are conceived of as temporally stable and regularly manifested in behavior across a wide array of objectively different types of situations.³⁷⁴

The views which stand behind Snow's assertion will be interrogated in Chapter 5. But, as a concluding point for this chapter, it is worth noting the durability of the long-standing assumption of a notional *continuity* in the Northcote-Trevelyan conception of character in the form of the *permanent civil servant* – a persona singularly instantiated in the disinterested and impartial prudence of the notional public officer; a notion also to be interrogated in Chapter 5. In many ways, this continuity constitutes a central legitimating plank in the maintenance of the idealized edifice of Westminster public administration and its place within liberal-democratic systems of government. In the triumvirate formula of the social contract – *trust*, *legitimacy*, and *consent* - which sits at the foundation of Westminster liberal democracy, the propriety of governance relies upon the impartial and disinterested discharge of the duties of the public officer.

But Goodlad contends that the ideal of disinterested governance is a deliberately-constructed myth which operates to translate the upper classes' monopolization of administrative power.³⁷⁵

The fundamental structure of the civil service proposed in the Northcote-Trevelyan design was based on a simple hierarchy of rank according to type of work: "intellectual" and "mechanical" (i.e., document copying).³⁷⁶ She notes that the Prime Minister, Gladstone, gave quiet assurances that this structure would enable Britain's aristocrats to prove their "immense superiority."³⁷⁷ Trevelyan's own correspondence reveals his expectation that the imposition of examinations in

³⁷⁴ Snow, N. (2010) *Virtue as Social Intelligence: An Empirically Grounded Theory*, at p.1.

³⁷⁵ Goodlad, L. (2003) at p.142.

³⁷⁶ Northcote, S., et al. (1854) esp. at p.17.

³⁷⁷ Goodlad, L. (2003) at p.140.

order to qualify for entry to the civil service would ensure the “intellectual” ranks (which offered significantly superior remuneration, career prospects, and influence), would naturally be filled from that cohort of society who attended the two ancient universities: Oxford and Cambridge.³⁷⁸ For Trevelyan, these “intellectual” recruits were no less than philosopher-kings in the making; he said of them, “[t]he tendency of the measure will, I am confident, be decidedly *aristocratic*, but it will be so on a good sense by securing for the public service those who are, in a true sense *οι ἀριστοι* [i.e., *the best*].”³⁷⁹

Reliance on such a continuity is problematized by another factor – engaged in this chapter in piecemeal fashion, and more broadly throughout Part I of this thesis – being consideration of the historical contexts in which the concepts the subject of that continuity are situate. Alasdair MacIntyre argues that the notion that the concepts of morality can be studied without considering history and anthropology is a barren one.³⁸⁰ Through the course of this chapter, the accounts of concepts such as *virtue*, *politeness*, and *character*, have not comprised considerations of those concepts within their historiographic contexts; that would be an endeavor of far greater scope than is available here. They are, at best, glimpses of those concepts, set in times and places, and comprising discrete narratives which compete at each point with other narrative possibilities. In considering the suggestion of an administrative or governmental revolution in the United Kingdom in the nineteenth-century, MacDonagh observes that

³⁷⁸ *Id.*

³⁷⁹ Comments of Sir Charles Trevelyan extracted from Foreign Office Document 44580 §103 “Remarks by Capt. H. H. O’Brien, R.A., on Sir Stafford Northcote’s and Sir Charles Trevelyan’s Report upon the Reorganization of the Civil Service” cited in Hughes, E. (1949) at p.72.

³⁸⁰ MacIntyre, A. (1984) at p.ix.

without a clear recognition that a genuine historical process was at work, moulding men and ideas just as it was moulded by them, the causal function of the factors is bound to be misunderstood. We can easily see how this last is true in the sense in which all administration tends towards bureaucracy. 'The forms acquire an independent life of their own, and the original purpose of meaning is forgotten.'³⁸¹

The obvious resonance here is with MacIntyre's elaboration of the current state of moral philosophy, summarized here by Lutz:

MacIntyre's critique of modernity has two main points: The first is that modernity has lost its capacity to understand the real practical wisdom of traditional morality, and has formulated an approach to moral thinking that is unintelligible, unjustifiable, and ultimately arbitrary. The second is that morality, formulated in this modern fashion, can be used, and has been used, as a tool for social manipulation.³⁸²

To elaborate on the points made at the opening of Chapter 2, this socio-philosophical malaise described by MacIntyre gives rise to his hypothesis that

...in the actual world which we inhabit, the language of morality...[comprises]...the fragments of a conceptual scheme, parts which now lack those contexts from which their significance derived. We possess indeed simulacra of morality, we continue to use many

³⁸¹ MacDonagh, O. (1958) at p.53.

³⁸² Lutz, C. (2008) "From Voluntarist Nominalism to Rationalism to Chaos: Alasdair MacIntyre's Critique of Modern Ethics" in 30(1) *Analyse und Kritik* 91 at p.98.

of the key expressions. But we have – very largely, if not entirely – lost our comprehension, both theoretical and practical, of morality.³⁸³

In MacIntyre's words, "...we are the last inheritors – so far – of a process of historical transformation."³⁸⁴ The forgotten scheme, as was averred to in Chapter 1,³⁸⁵ is the Aristotelian tradition with its natural *telos*. The emotivism which is the resultant ensuing reality for modernity – in his argument - plays out in a society characterized by two poles-in-tension; one representing the *organizational* (i.e., bureaucracy) in which ends are taken to be given and not available for scrutiny, and the other representing the *personal*, in which judgment and debate about values are central factors, but in respect of which no resolution is possible.³⁸⁶ It is within this tension that the doctrinal schemes representing variant conceptions of the relationship of the individual to the state are articulated, fundamentally implicating that central precept of the so-called liberal-democratic project: the *social contract*. MacIntyre says of this,

...there are only two alternative modes of social life open to us, one in which the free and arbitrary choices of individuals are sovereign and one in which the bureaucracy is sovereign, precisely so that it may limit the free and arbitrary choices of individuals.³⁸⁷

This is significantly a point of agreement between the views representing each of the two poles.

He goes on,

³⁸³ MacIntyre, A. (1984) at p.2.

³⁸⁴ *Ibid.*, at p.35.

³⁸⁵ Chapter 1, Text associated with note 263.

³⁸⁶ MacIntyre, A. (1984) at p.34.

³⁸⁷ *Id.*

Given this deep cultural agreement, it is unsurprising that the politics of modern societies oscillate between a freedom which is nothing but a lack of regulation of individual behavior and forms of collectivist control designed to limit the anarchy of self-interest.³⁸⁸

The incoherence of emotivist reference points is arguably revealed in the observation of Barry et al, that in the (modernist) construction of liberalism, "...freedom was simultaneously the antonym, the limit and the objective of government."³⁸⁹ But in the modernist political community in which virtue is reduced to a singular perfection of the will, and in which shared conceptions of the common good are replaced with a morality that demands real personal sacrifice (i.e., a denial of the private self) for no higher reason than the law, intelligible connections between the virtues and the law disappear, says MacIntyre.³⁹⁰ The only goods, he says, would be the goods of individuals,³⁹¹ where "[m]orality as a rich understanding of living well is replaced by morality as a meeting of two wills" to the exclusion of all other factors.³⁹² In this world, obedience to the moral law, detached from any teleological foundation, is an end in itself. Lutz says that, taken together, the emphasis on law (i.e., the foundation to the social contract according to many, but foremost according to Locke), the rejection of teleology, and the denial of the private self, renders morality and moral action unintelligible because they cannot be accounted for as human action.³⁹³ Within the teleological conception constructed by Aristotle, how such action connected with human desires and needs was integral to the understanding of virtue. In such a world, moral

³⁸⁸ *Id.*

³⁸⁹ Barry, A., Osborne, T., and Rose, N. (Eds.) (1996) *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government*, at p.2.

³⁹⁰ MacIntyre, A. (1984) at p.170.

³⁹¹ *Id.*

³⁹² Lutz, at p.95.

³⁹³ *Id.*

agency is located not in social practices or roles, but in the self; and given this democratization, the self has no necessary social content and no necessary social identity, according to MacIntyre, and so, "...can be anything, can assume any role or take any point of view, because it *is* in and for itself nothing."³⁹⁴

The proposition of the disinterested, Impartial Public Officer of the Westminster tradition - and of modern-day liberal-democratic narratives of public administration - brings with it a question about what must be the moral anchor upon which the proposition necessarily must rely. That in the context of liberal-democratic systems of government public officials are expected to obey the law is uncontentious, indeed, it is axiomatic. But Dicey's contention is that the reason this is so is because the law is a *corpus juris*; in other words, a coherent and self-legitimizing whole, containing "...within itself a legal science, a meta-law, by which it can be both analysed and evaluated,"³⁹⁵ a system, indeed, which "transcends politics."³⁹⁶ Parkinson emphasizes this point in his contention that the law is transcendent, comprised of "foundational precepts" – "a core of legal rules and principles" grounded in tradition - on which its authority is based, and in respect of which it is afforded a "derivative legitimacy."³⁹⁷ But is Dicey's *corpus juris* a sufficient moral referent for character borne of personality cum Victorian character cum virtue? Or does the post-Enlightenment world, divested of Platonic transcendentalism; or calamitously compromised by "de-spiritualized humanism" - to recall Solzhenitsyn's characterization of it;³⁹⁸ or else reduced to

³⁹⁴ MacIntyre, A. (1984) at p.32.

³⁹⁵ Berman, H. (1983) *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Massachusetts, at pp.9, 8.

³⁹⁶ *Ibid.* at p.9.

³⁹⁷ Parkinson, P. (1994) *Tradition and Change in Australian Law*, at p.18.

³⁹⁸ See Chapter 1, text associated with note 208.

a state of unintelligible modernist emotivism in MacIntyre's analysis, reveal the proposition to be ontologically insupportable? This question constitutes a part of the analytical focus of Part III, tracing the evolution of science from the late nineteenth-century, and the rise of competing theories of virtue ethics, psychoanalysis, psychology (and the psychology of personality), situationist ethics, and sociological theories of interaction. The analytical foci of Part III follows consideration of the contextual example of the Australian Public Service in Part II (the comparative example of the British Civil Service is addressed in Chapter 5).

PART II – PROMISSORY OBLIGATION AND THE AUSTRALIAN PUBLIC SERVICE

Introduction

Part II introduces a critique of the primary statutory elements that make up the framework of ethics regulation operated by the APS. The so-called “*values-based*” system promulgated in the PS Act is evaluated against a background of mutually incompatible and conflicting narratives, as to the level of compliance exhibited by APS officers generally with their *mandatory* statutory ethical obligations. The analysis establishes a basis against which broader philosophical, psychological, and sociological, considerations can then be evaluated in Part III. These are considerations that may bear upon or otherwise explain human conduct, in respect of challenges and constraints that are constitutive of, or otherwise an incident of, the kind of *promissory obligation* to which APS officers are subject.

Chapter 4 commences with a critique of the philosophical bases for a governor’s notional reliance upon a public officer’s compliance with the promissory obligations the subject of that reliance. As discussed in the previous chapter, in ancient and medieval times, issues of allegiance were of primary concern to kings and governors who sought to ensure loyalty from their officers or subjects through the employment of a self-curse in the form of an oath. Assurances of loyalty have always been attended by the uncertainty of trust, particularly so, arguably, in those examples where oaths have been the subject of official compulsion. The transcendental underpinnings of ancient and medieval belief structures provided a means by which such uncertainty might have been assuaged to some extent. However, the advent of secular belief structures, which came to replace ideas of monotheistic retributive justice, has seen

transcendentalism displaced by the individual and his volitional capacity to make good his promise.

The assurances sought to be achieved by kings and governors through the ancient and medieval oaths that were taken by their officers remain imperative in modern systems of governance. The evolution of systems of social engagement, based upon ideas of contract, provided a conceptual template for the eventual development of liberal-democratic ideas of government. Whilst oaths – detached from their transcendental underpinnings – continue to hold an important place in the structure and operation of Westminster public institutions, a promissory obligation on the part of a public official may validly be assumed simply by virtue of that officer's contract of employment. So it is the case in the model of public administration which applies in the Commonwealth of Australia that, upon appointment, the public officer accedes (and is effectively subject) to the obligations of *honesty*, *integrity*, and *impartiality*. These obligations are promulgated in the PS Act because they are essential to the public officer's capacity to invariably serve the public good. And the success with which the public officer attends to those obligations underpins the government's legitimacy as governor, in terms of the overarching tripartite principles of the social contract, *viz*, *trust*, *legitimacy*, and *consent*. These arrangements are intended to underpin the principle of ministerial responsibility; the point of which is to render the public official 'anonymous' for the purposes of governance – *and*, the governor's legitimacy - within that social contract structure.

Chapter 4 goes on to evaluate the structure and operation of the principle framework of accountability enshrined within the PS Act, in the form of the APS Statement of *Values* and *Code* of Conduct. The statutory provisions which make up the *Values* and the *Code*, and which are the

centrepiece of the APS system of ethics regulation, comprise a range of principles that are constitutive of benchmarks for APS officers' day-to-day conduct, compliance with which is mandatory. The principles retain essential components of the Westminster predicates of an anonymous and impartial public administration, notwithstanding performance-orientated modifications that have been introduced in recent decades.

It is the *mandatory* nature of the provisions, however, that provides the basis for the focus of the thesis upon *virtue*, as the vehicle for the broader investigations and comparisons undertaken in Part III. Commentators who argue that virtue ethics constitutes – or, that virtue ethics should be seen as - the primary operating mechanism in questions of public sector compliance, provide the starting point for the consideration of alternative perspectives and challenges to virtue ethics that will be addressed in Part III. But Chapter 4 establishes a basis for these later investigations by evaluating official claims of exceptional levels of compliance of APS officers with their statutory obligations – in the form of *State of the Service Reports* - against myriad examples of apparent failures of compliance across the APS. Taken together, these examples make available the possibility of a significantly different interpretation of the actual state of compliance in the APS. This data is drawn from official inquiries and investigations, news reports, and academic and other literature dealing with specific events, with particular attention given to the infamous *Children Overboard* affair.

The alternative interpretation to that of the official reports of excellent compliance that is made available by these other sources, is that APS officers fall far short of the standards of excellence made mandatory by the operation of the PS Act. Public concern with the apparent levels of corruption and misconduct in Australia's public institutions have driven mounting calls for the

establishment of an independent body capable of properly investigating and prosecuting misconduct and corruption in the Commonwealth. These matters, therefore, stand as a challenge to the official reports of near perfect compliance by APS officers with the *Values* and the *Code*.

The purpose of the analysis in Chapter 4 is to facilitate an inquiry into the efficacy of the *Values* and the *Code*, both in terms of the real state of compliance, and, also, the claims that virtue ethics is a sufficient basis by which to evaluate the possibility of compliance. But, more broadly, the thesis seeks to consider these factors by evaluating competing theoretical constructs which have become available to modernity as a result of the Enlightenment.

CHAPTER 4 – CONFLICTING NARRATIVES OF VICE AND VIRTUE IN THE APS

"In reality, Howard is good at not hearing news that he doesn't want to hear, or he is surrounded with sycophantic courtiers who are terrified about bringing him bad news...."

"The public servants who advised Howard on the boat people were his people. If they failed, Howard failed. His pathetic attempts to deny that he has misled the Australian people is a high-profile example of how a debauched public service can operate against the narrow political interests of the government as well as the public interest."

Kenneth Davidson, "Playing the three-monkey defence", *The Age*, 21 February 2002.

Trust and the problem of allegiance, and the rise of the self-curse as oath

A recurring feature implicit and explicit in the historical and analytical narratives throughout Part I of this thesis is the question of how political authority becomes legitimized, that is, how a ruler inspires voluntary compliance with his or her rule. Both, theoretical accounts that seek to legitimize the rule of a class, of which Plato's philosopher king is an example, and practical attempts at operationalizing legitimate rule, such as the historical examples of appeals to divine right, have relied heavily upon transcendentalist rationales. But, on its face, the facility of such transcendentalism appears to be distinguishable from the practical machinery required to effect day-to-day compliance. Armchair philosophy postulates the dimensional poles of *reward* and *punishment* as a continuum along which compliance may be - at some point, and somehow - effected. But, in its application, the mechanisms deployed to encourage compliance since before antiquity variously constitute an attempt, generally on the part of the putative governor, to secure some practical kind of assurance of loyalty in circumstances where trust is necessarily in question.

Since pre-literate times, the insecurity of trust has attended the most fundamental human connections. And since the earliest social arrangements, human relations have been mediated through promissory entreaties of intrinsically uncertain *bona fides*. This sense of uncertainty is immediately apparent in definitions of trust. For example, one definition states that trust is “a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behaviour of another.”¹ And it is by no means certain that expressions of loyalty, compulsorily extracted as a function of one’s station, increases the possibility that the grounds for trust are thereby enhanced. Sunstein argues that “...compulsory declarations of attachment are an attempt to provide a statement of unity when there is in fact heterogeneity, and become necessary only when the statement is in an important sense false.”² And yet, Schlesinger observes, the invocation of a promise – in some sense - implies a kind of absolute value.³ Schlesinger contends that promises are essential to the orderly functioning of society and that profound implications attach to promises “...that touch on core issues of culture, the nature of the social contract, and the very substance of higher morality.”⁴ Since antiquity and before, in pre-literate Greece and the Far East, the reliance upon oaths to establish some basis for trust, in many social arrangements, but also in questions of political responsibility and allegiance, has offered a means of stabilizing expectations that are argued to be indispensable to the social bond.⁵ But these forms of promise provide no guarantee to the party who receives the oath. As Schlesinger observes, “...whether or not one fulfils a promise is highly conditioned by

¹ Harrington, B. (Ed.)(2009) *Deception: From Ancient Empires to Internet Dating*, at p.139.

² Sunstein, C. (1990) “Unity and Plurality: The Case of Compulsory Oaths” in 2(1) *Yale Journal of Law and the Humanities* 101 at p.105.

³ Schlesinger, H. (2008) *Promises, Oaths and Vows: On the Psychology of Promising*, at p.2.

⁴ *Ibid.*, at pp.2, 4.

⁵ Karavites, P., and Wren, T. (1992) *Promise-Giving and Treaty-Making: Homer and the Near East*, at p.2.

circumstance,”⁶ and, in the circumstances that prevailed in the years between the Reformation and the Glorious Revolution, for example, ambivalence often attended expressions of allegiance, given that common people knew it was “...safest to be in favour with the strongest side.”⁷

The anticipation of this kind of indeterminacy explains, no doubt, the invocation of “...powers greater than oneself to uphold the truth of a declaration, by putting a curse upon oneself if it is false.”⁸ In pre-religious and pre-animistic times, supernatural beings were unknown, and man believed that he possessed magical powers that could produce any desired result, this often being effected by way of a curse.⁹ But with man’s discovery of gods, oaths came to follow a consistent pattern, and they came to be sworn in witness of supernatural entities. In this form, states Lateiner:

An oath asserts something past as fact or promises something for the future with an invocation to the gods to punish the swearer if the assertion proves false or the promise is not kept...[t]he oath thus stabilizes and seals an uneasy relation between two, or more, parties.¹⁰

It was a function of the design of oaths, therefore, that false oaths were punishable; yet oaths sworn falsely were nonetheless commonplace. Thucydides, for example, after describing the frequent resort to oaths in the Peloponnesian Wars, describes their fragility and frequent

⁶ *Ibid.*, at p.2.

⁷ Underdown, D. (1981) “the Problem of Popular Allegiance in the English Civil War” in 31 *Transactions of the Royal Historical Society* 69, at p.69.

⁸ Sommerstein, A., and Bayliss, A. (2013) *Oath and State in Ancient Greece*, at p.3.

⁹ Silving, H. (1959) “The Oath: I” in 68(7) *The Yale Law Journal* 1329, at p.1330.

¹⁰ Lateiner, D. “Oaths: Theory and Practice in the Histories of Herodotus and Thucydides” in Foster, E., & Lateiner, D. (Eds.) (2012) *Thucydides & Herodotus*, at p.155.

susceptibility to fraud and betrayal.¹¹ Lysander, the Spartan Peloponnesian war commander, reportedly bade his men ‘cheat children with dice and cheat men with oaths,’ evoking dismay from the priest, Plutarch, for his blasphemy.¹² Lateiner observes that Herodotus recorded approximately forty oaths, including “non-deceptive and deceptive oaths,” some of which were designed for the purposes of deception and trickery.¹³ Indeed, from ancient times until the years leading to the Glorious Revolution, men devised methods of avoiding oath obligations and the possible consequences of divine retribution, such as, for example, the Jesuit’s development and practice of the mental reservation.¹⁴ In a vein suggestive of this contention, Leites notes the argument that casuistry itself came into being because people wanted to go as far as they could in gratifying their appetites without actually transgressing divine law.¹⁵

Oaths in public sector as a tool of legitimacy in the social contract

In ancient times, the oath was valued more than forensic evidence.¹⁶ The decline in the perception of the oath as a guarantee of truth – evidenced in the historical record as far back as 600BC – saw oaths eventually replaced by contracts as a means to secure promises, as certainty that the security of economic promises could be guaranteed by legal institutions increased.¹⁷ Jones argues that in an increasingly secular, capitalist society, the oath and the notion of

¹¹ Thucydides (1958) *History of the Peloponnesian War Books III and IV*, at p.147.

¹² Lateiner, D. (2012) at p.168, n.43.

¹³ *Ibid.*, at pp.158, 161.

¹⁴ Jones, D. (1999) at p.261.

¹⁵ Leites, E. (1988) at p.127.

¹⁶ Schlesinger, H. (2008)

¹⁷ Rutger, M. (2013) “Will the Phoenix Fly Again: Reflections on the Efficacy of Oaths as a Means to Secure Honesty” in 71(2) *Review of Social Economy* 249, at p.250.

allegiance it helped to secure were no longer necessary because in a world that had discovered that it paid a man to make his bond his word, self-interest filled the gap.¹⁸

That, in contemporary times, oaths retain some residual application in public institutions, underlines the need for self-interest to be transcended when it comes to obligations founded upon the public good. Oaths were always an important device for establishing trust in public officials. In ancient Athens, oaths were used to compel honest conduct by public officials where temptations to defraud the government or to take bribes existed.¹⁹ Sommerstein and Bayliss observe that, in ancient Greece, oaths were “clearly thought to be a means of ensuring that officials governed according to established practices.”²⁰ Even minor officials swore oaths, examples of which are preserved on stone.²¹ The *ekklēsia* curse stands as an ancient example of a public sector code of conduct, condemning, for example, anyone who plotted against the people; or who made diplomatic overtures to the Persians to the detriment of the city; or who attempted to subvert democracy; or who betrayed the city.²² Obviously, oaths taken in respect of public obligations are no less susceptible to the shifting social sensibilities that have seen the use of oaths decline generally. Rutger argues that oaths have become increasingly instrumental with the general decline of religion in society – a decline that saw the courts rule in 1916 that atheists could not be compelled to take an oath based on religious belief, forcing a statutory solution making religious and secular oaths legally equivalent.²³ However, within the context of

¹⁸ Jones, D. (1999) at p.166.

¹⁹ Faraone, C. (2005) “Curses and Blessings in Ancient Greek Oaths” in 5(1) *Journal of Ancient Near Eastern Religions* 139, at pp. 147, 155.

²⁰ Sommerstein, A., and Bayliss, A. (2013) at p.33-4.

²¹ *Ibid.*, at p.43.

²² *Ibid.*, at p.49.

²³ Rutger, M. (2013) in p.258.

the social contract, the oath performs an important role in grounding the legitimacy of the invitation to reliance that is offered by the public official in swearing the oath. A notable feature of the act of taking the oath is that the legitimacy of the act stands irrespective of the intention of the person giving the oath. Though deceit may attend the performance of an oath, the oath is not void, or rendered a lie or a misstatement, in consequence of the deceit of the person who performs the oath. The promise embedded in the oath remains a promise.²⁴ The expectations raised by the performing of the oath render the oath socially and formally binding, despite the deceit of the person swearing the oath. Ostensibly, therefore, the oath serves a dual function: as a means of securing loyalty, and as a reference point for accountability.

These transactions, be they in the form of a sworn oath or a contractual agreement, are recognized, from a philosophical standpoint, as promissory obligations. The transcendental aspect of the oath, sworn in fear of divine retribution where it is breached, is obvious. But, as has been seen in various contexts, the supernatural aspect which traditionally grounded a promissory obligation is often augmented – or, in any event, has come to be supervened - in the case of public officials, by reliance upon some component of the promisor's essence, invariably coincident with some conception of virtue. Medieval oaths of fealty, for example, constituted a commitment of honour and faith in a society characterized in its upper echelons by a chivalric code that linked honour to virtue.²⁵ Similarly, in the tradition of Roman *exempla*, a noteworthy example of *fides* might be pointed to as constitutive of a *specimen virtutis*, as is noted by Ogilvie.²⁶ And in the case of the so-called 'Impartial Public Officer' in the Westminster tradition, the

²⁴ Austin, J. (1975) *How To Do Things With Words*, at p.11.

²⁵ Jones, D. (1999) at p.21.

²⁶ See Ogilvie, R. *A Commentary on Livy, Books 1-5*, at p.686.

dedication solely to the public interest in the discharge of one's duty – necessarily a function of one's *character* in the nineteenth-century formulation of the tradition – has, as has already been seen, been drawn as an incident of *dispositional* qualities constitutive of, or otherwise functionally equivalent to, virtue.

But in the Westminster context, the imperatives of the Impartial Public Officer are not confined to questions of the officer's legitimacy alone. Seen within the broader parameters of the social contract, the Impartial Public Officer's legitimacy serves a bigger purpose, as the mechanism that, by necessity, enables the practical operation of ministerial responsibility. For it is an imperative of the governor's legitimacy under the social contract that his (or her) entreaty to govern according to those principles that crystallize the trust of those who might thereupon consent-or-not, is an entreaty he or she must be seen to operationalize without any fear that it might be undermined by a recalcitrant public administration.

From a theoretical standpoint, the successful operationalization of the social contract can be argued to be an essential condition-precedent necessary to ground the legitimacy of the institution of liberal democracy. But, in another important sense, these institutions must be recognized as being *mutually*-legitimizing in their effect. For the institution of liberal democracy, and its institutions in their turn, are critical to the legitimation and validation of the social contract and each of its functioning components. So, the institution of the rule of law, taken together with that of the architecture of the constituted Commonwealth of Australia, *viz: The Parliament, The Executive Government, and The Judiciary*,²⁷ provide tangibly for the structure and machinery of

²⁷ See *The Australian Constitution, Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s9 at Chapters I-III.

government, through which the *consent* of each enrolled Australian citizen might be operationalized by, *inter alia*, his or her pencilled mark on a ballot at a polling station, and its deposit in the authorised receptacle. The crystallization of *trust* is itself, through this mechanism, a product of the aspirant governor's perceived *legitimacy* in the eyes of the putative citizen.

The organ by which the executive transacts the business of government, the Australian Public Service (APS), must necessarily figure in the equation of perceived legitimacy of - and trust in - the state. The elected government relies in large part upon the public service – the machinery of state – to put into effect its policies and programs and to provide it advice. And this explains why the Westminster system of public administration - a long-accepted feature of the Australian version of liberal democratic government²⁸- conceives of the position of a public official as one “duly subordinate to that of the Ministers who are directly responsible to the Crown and to the Parliament.”²⁹ The sedimentation of archetype-like symbols such as *honesty*, *integrity*, and *impartiality*, which are constitutive of the *Values* and the *Code*, as well as the ideal of the Impartial Public Officer, in the discourses and narratives of the APS, ensure their place as markers of APS performance in respect of Westminster institutions. For example, in the annually-produced *State of the Service Report*, the recently-departed³⁰ Australian Public Service Commissioner (APS Commissioner), John Lloyd, writes:

²⁸ Rhodes, R., Wanna, J., and Weller, P. (2009) *Comparing Westminster*, at p.161.

²⁹ Northcote, S., and Trevelyan, C. (1854) *Report on the Organisation of the Permanent Civil Service*, at p.3. (addressing the example of the U.K. civil service).

³⁰ John Lloyd resigned from his position as Australian Public Service Commissioner in June 2018 (effective 8 August 2018). He was found by the Merit Protection Commissioner to have breached the Code of Conduct. See Conclusion.

The legitimacy and effectiveness of the APS relies on a values-based culture that encourages trust and accountability. It requires employees to consider underlying principles when they make decisions and perform tasks. A robust culture of integrity and accountability requires that agencies have in place the processes, procedures and systems necessary to support ethical behaviour.³¹

APS virtue enshrined in statute

The mechanism which establishes the technical basis for compliance with the requirement that Australian public servants conduct themselves always in a manner duly subordinate to their Minister is enshrined in the *Public Service Act* 1999 (Cth) (PS Act). Various provisions of the PS Act give expression to the statutory obligations according to which public servants must conduct themselves as a contractual condition of their employment by the Commonwealth of Australia. Under the various provisions which make up this scheme of accountability, public servants are technically accountable, through the hierarchical structure of their respective departments, to their minister, who is in turn accountable to the Cabinet, and ultimately to the people.³² This hierarchy of accountability comports – as it is intended to - with the Westminster concept. In the English context, it has been said to be, “at its simplest, where the executive is responsible to the

³¹ Lloyd, J. (2015) *State of the Service Report – 2014-5*, Australian Government, Canberra ACT, at p.43.

³² Emy, H., and Hughes, O. (1988) *Australian Politics: Realities in Conflict*, at p.344.

legislature -...[it]...emanates from the Westminster system of government and is *reflected* in the *Constitution* in 'practical constitutional understandings not reducible to written law.'"³³

Whilst the concept that underlies the Westminster principles allows for a myriad of democratic models under which their various components might be instituted, in the case of the Australian Commonwealth, the conduct of APS officers is the subject of express statutorily-imposed obligations, principally governed by the PS Act. The APS *Code of Conduct*³⁴ (*Code*) is the primary instrument giving specific, legally-enforceable structure to what is expected of APS officers in terms of conduct in respect of certain enunciated areas.³⁵ Among its prescriptions and proscriptions, the *Code* states expressly that APS employees must, in the course of their employment: behave honestly and with integrity;³⁶ comply with all applicable laws;³⁷ disclose and take reasonable steps to avoid conflicts of interest (real or apparent);³⁸ not provide false or misleading information in response to a request for information;³⁹ and not make improper use of the employee's duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.⁴⁰

The APS *Values*⁴¹ (*Values*), as are referred to in s. 13(11) of the PS Act, are set out in section 10, and have been described as a declaration "reflecting the public expectation that public servants

³³ Lawson, C. (2011) "The Legal Structures of Responsible Government and Ministerial Responsibility" 35 *MULR* 1005 at p.1008., citing Isaacs J, *Williams v A-G* (1913) 16 CLR 404, at p.457.

³⁴ Section 13, *Public Service Act 1999* (PS Act).

³⁵ See Appendix 1.

³⁶ s.13(1), PS Act.

³⁷ s.13(4), PS Act.

³⁸ s.13(7), PS Act.

³⁹ s.13(9), PS Act.

⁴⁰ s.13(10)(b), PS Act.

⁴¹ See Appendix 2.

will exercise appropriate conduct."⁴² The *Values* are designed to underscore the application and operation of the *Code* through the promulgation of Westminster-style principles, "...within the framework of Ministerial responsibility."⁴³ Section 13(11) imposes a legal obligation upon APS employees to "at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS."⁴⁴ Section 15 of the PS Act provides for a range of sanctions which may be imposed, including reprimand; fine; demotion; and termination of employment. Unlike their American counterparts, APS officers do not swear an oath upon their appointment. However, the statutory obligations which attach as a condition of their employment make obvious the promissory nature of the obligation thereupon arising as a consequence of the officers' acceptance of employment.

The place of these Westminster-style principles in the promulgated framework of expectations as to the conduct of public officers is particularly noteworthy, given the significant changes that have attended the overall public service ethos through the course of the twentieth- and twenty-first centuries. The introduction of the PS Act in 1999, incorporating the *Values* and the *Code*, constituted one component of a suite of progressively rolled-out changes which effectively restructured the relationship between government and the APS. In the 1970s, the Royal Commission on Australian Government Administration had been particularly concerned by the inadequate responsiveness of the APS to the elected government; and improving responsiveness was a central objective of subsequent changes introduced through the 1980s and 1990s.⁴⁵ The

⁴² Lawson, C. (2011) at p. 1028.

⁴³ s.10(4), PS Act.

⁴⁴ s.13(11), PS Act.

⁴⁵ Podger, A. S. "Beyond Westminster: Defining an Australian approach to the roles and values of the public service in the 21st Century", address to IPAA Seminar, 2 May 2002.

point of these changes was to transform departments into "results-oriented" business-like agencies that would operate according to "market-based" management systems, in which secretaries would no longer be 'permanent' heads of their departments, but would manage in terms similar to that of corporate CEOs.⁴⁶

MacDermott, following Hood,⁴⁷ has referred to these developments as the New Public Management ("NPM"). According to Wanna, "[t]he new [A]ct transformed the Australian Public Service from a rule-driven, centralized bureaucracy with standardized grades and pay rates, to a values-based, decentralized administration with devolved management flexibilities."⁴⁸ MacDermott observes that these developments were part of a world-wide paradigm-shift, "embraced to varying degrees across a number of public sectors, particularly those in English-speaking countries."⁴⁹ This approach has been coined 'corporate managerialism' as it uses the concepts of the commercial world and applies principles of a particular approach to business management to inform the conduct of public sector management.⁵⁰ As Haynes and Melville Jones note, "[t]his market-oriented management culture transforms both the machinery of government and the nature of the public service....[t]he very change of nomenclature ...from

⁴⁶ See MacDermott, K. (2008) *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service*, at pp.12-13.

⁴⁷ Hood, C. (1990) *Beyond the Public Bureaucracy State? Public Administration in the 1990s*, Inaugural Lecture, London School of Economics and Political Science.

⁴⁸ Wanna, J. (2005) "Public Service, Public Values: the Implementation of a Charter of Values in the Australian Public Service", paper presented at the Australian Political Studies Association Conference, Otago University, Dunedin, New Zealand.

⁴⁹ MacDermott, K. at p.14.

⁵⁰ Haynes, B., and Melville Jones, H. (1999) "Ethics and Public Sector Management: the Western Australian Experience" in 58(2) *Australian Journal of Public Administration* 70, at p.71.

public servant to public sector employee signals and helps legitimate a change in the type of bureaucracy and its associated ethical values."⁵¹

In terms of the statutory mechanisms designed to regulate the ethical conduct of public servants, these changes heralded a somewhat dramatic shift from the "old prescriptive [A]ct of 1922⁵²...[which]...ran to 280 pages by the early 1990s and was laced with 97 major sections many of which were subdivided into parts A, B, C, D, E, etc - including one section 76 that ran through to Z."⁵³ The new 1999 PS Act, on the other hand, Wanna notes, comprised 11 parts, with 79 relatively brief sections, running to a total of 47 pages.⁵⁴ Since their introduction in 1999, a "refined and distilled" reiteration of the *Values* became effective in July 2013. The then APS Commissioner, Stephen Sedgwick, stated that the new *Values* "...retained the essential character of traditional public service values – namely, accountable and professional, impartial service to the government and community, to the highest standards of integrity."⁵⁵

Of the *Values* that were introduced under the PS Act in 1999, Wanna argued that "[a]... 'core of statutory Values' now *defines* the new public service at the Commonwealth level, and under the [A]ct the Australian Public Service Commissioner is required to ensure that the APS 'incorporates and upholds the APS Values...'"⁵⁶ MacDermott noted that "[b]ecause the APS Values are

⁵¹ *Id.*

⁵² Wanna, J. (2005) at p.2.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Sedgwick, S. (2013) *State of the Service Report 2012-3*, Australian Government, Canberra ACT, at p.50.

⁵⁶ Wanna, J. (2005) at p.1.

principles-based, their application in particular circumstances is broadly up to the public servant applying them; but there are sanctions for failing to conform to them."⁵⁷

Lawson concludes that the 1999 PS Act, along with associated enactments, "raise...policies to the level of legislated rules and make clear that Agency Heads/Chief Executives/Directors (and their employees) are required to comply."⁵⁸ He contends that "[t]his is a nuanced understanding of responsible government and ministerial responsibility, which separates out the distinct responsibilities of Ministers from those of Agency Heads/Chief Executives/Directors (and their employees)."⁵⁹

As principles of conduct, the *Values* and the *Code* promulgate a range of positive norms, each of which is recognisable as a necessary incident of the public good. Any express or otherwise overt departure from the norms promulgated in the *Values*, and particularly as regards the universal nature of their operation, would operate to diminish the trust of those upon whose consent the institution notionally relies, and so to diminish in turn the legitimacy of the institution of liberal democracy itself. That this is so is directly derived from the universality which attends the ambit of the rule of law. The intrinsic connection between the operationalization and universal realization of the *Values*, and the conduct of the officers of the APS, whether individually or collectively, is elucidated in the promulgation of the statutory obligation that APS employees must *at all times* behave in a way that upholds the APS *Values*. However, the more powerful point to be made is that all obligations comprising the *Values* and the *Code* have the force of law

⁵⁷ MacDermott, K. (2008) *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service*, at p.11.

⁵⁸ Lawson, C. (2011) at p. 1038.

⁵⁹ *Id.*

and operate in respect of *all* official conduct of APS officers, without mitigation. *Any* breach of the *Code* constitutes misconduct for the purposes of the sanctions which apply by operation of s.15 of the PS Act.⁶⁰ The claims of the aspirant governor as to his or her suitability to govern within a Westminster-style structure is, at base, a claim to propriety, and the governor's propriety is measured by the *lawful* compliance of his or her administrators (among other things). On this point, the recognition of the potential dangers of an unelected bureaucracy is long standing; Weber, for example, cautioned that a bureaucracy ineffectively controlled or scrutinized might usurp a political leadership role.⁶¹ The real danger of the unaccountable and unsanctioned exercise of state power by unelected officials is echoed in observations made in the Australian (historical) context in more recent times, in respect of complaints that bureaucracies "have overpowered all the political institutions that are meant to control them."⁶² The narrative that attends these promulgated mandatory rules, of course, is that the APS is held to a very high standard, and it is the *mandatory* nature of the rules which makes available, *notionally*-speaking, such a narrative; one that aligns closely with the ethical substrate that makes up the foundation principles of the social contract: *trust*, *legitimacy*, and *consent*.

According to Weber, it is within the legitimizing framework of the rational-legal authority enjoyed by the state, through its commitment to a 'code of legal authority' and the bounded constraint effected by the rule of law,⁶³ that the appropriate subordination of public officials to the duly elected government might be achieved. Legislative enactment, which involves the deliberate

⁶⁰ See Australian Public Service Commission (2015) *Handling Misconduct: A Human Resource Manager's Guide*, Australian Government, Canberra ACT.

⁶¹ DuGay, P. (2000) *In Praise of Bureaucracy: Weber, Organisation, Ethics.*, at p.46.

⁶² Woodward, D., Parkin, A., and Summers, J. (1985) at p.43.

⁶³ Held, D. (1987) *Models of Democracy*, at p.150-1.

creation of legal duties and obligations,⁶⁴ is only the most prominent means by which the conformity of state officials is sought to be achieved. What ensues from this is a legal obligation on the part of the public official to obey the laws so-enacted.⁶⁵ And whilst it is highly arguable that a citizen incurs a *moral* obligation to obey any particular law enacted by the state,⁶⁶ in the case of public officials in modern liberal democracies, a moral duty to comply arguably attaches⁶⁷ by force of the promissory obligation which arises from the official's tacit or express acceptance of the obligations which flow from his or her position as a representative of the state. However, the resort to the principle of "*Values*" announces the possibility of a further moral strata which might be invoked as a basis for the willing compliance of the public officer in his or commitment to those obligations solely addressed – as they are - to the public good.

The virtuous public servant and the narrative of propriety

It is a notably persistent feature of public service culture, and ethics generally, that resort is made to Aristotelian or else "public service" conceptions of virtue as the primary constitutive foundation of public service ethics. For example, Heintzman, in a direct retort⁶⁸ to Langford's criticisms of regulatory statutes for public service ethics that are *values*-based, argues that Aristotle taught that moral virtue is formed by "habit", and that

⁶⁴ Hart, H. L. A., "Legal and Moral Obligation" in Melden, A. (Ed.) (1958) *Essays in Moral Philosophy*, University of Washington Press, Seattle U.S.A., at p.85.

⁶⁵ See Klosko, G., (1990) "The Moral Force of Political Obligations" in 84(4) *American Political Science Review* 1235 at p.1236.

⁶⁶ See Greenawalt, K. (1987) *Conflicts of Law and Morality*, at p.62-3.

⁶⁷ Hart, H. L. A., (1958), at pp. 101,

⁶⁸ Heintzman, R., "Public-Service Values and Ethics: Dead End or Strong Foundation?" in 50-4 *Canadian Public Administration* 573

we learn the virtues (including public-service virtues) 'by first exercising them...we learn by doing them.'...[f]or this reason public servants will learn how to reconcile values conflicts primarily by doing it,...by cultivating the habit of doing it;...if public servants learn to practice the public service virtues that are the outward expression of public service values 'by doing the acts that we do in our transactions with other[s],' this means that the most important forum for learning and strengthening public service values and ethics is...the workplace itself.⁶⁹

Macaulay and Lawton underline this point in their contention that "virtue in public management...is one of its essential characteristics."⁷⁰ Pusey develops this notion even further, in his assertion that the senior (Australian Commonwealth) public service may be defined...

very much as a moral establishment with its ethical norms condensed in an ethic of vocation....it is built on a *defacto* acknowledgement that public service is impossible without virtues that are by their nature inherent in character, and biography; that is to say without virtues that are defined and shared in social practices that do not reduce either to skills or to the imperatives of prudence.⁷¹

In theoretical terms, it is not surprising that notions of virtue are invoked in discussions of ethics regulation as it relates to public administration. To be sure, Chapter 2 of this thesis is devoted in its entirety to the fact that virtue ethics, or the Virtues, howsoever conceived, have been conceptually foundational - or have at least provided a point of conceptual leverage - in the long

⁶⁹ *Id.* at pp. 592-3.

⁷⁰ Macaulay, M., and Lawton, A. (2006) "From Virtue to Competence: Changing the Principles of Public Service" in September|October *Public Administration Review* 702, at p.709.

⁷¹ Pusey, M. (1991) *Economic Rationalism in Canberra: A nation Building State Changes its Mind*, at pp. 168-9.

development of political thought of various persuasions. In his treatise *The Social Contract* for example, Rousseau developed a republican conception of virtue as regards citizenship - or *civic virtue* - through his concept of the 'general will.'⁷² Insofar as liberal democratic thought is concerned, Locke laid particular stress on the pre-eminence of virtue and advocated the inculcation of the habit of virtue.⁷³ In the context of public administration, Weber, to whom Pusey's statement – in modified form – may be attributed, recognized a close affinity between bureaucracy and democracy, although he considered bureaucrats to occupy a unique and separate "sphere of ethical life" and that bureaucrats were thereby subject to different ethical protocols to those of their political masters.⁷⁴ To that end, Weber rejected the Aristotelian notion of a unified moral personality which underpinned and unified human conduct.⁷⁵

Read broadly, the language of the *Values* and the *Code* resonates with Aristotelian ideas of the virtues and what they are. Russell states that the virtues comprise a kind of human *excellence*, realized through the successful results of an agent's reasoned deliberative actions and choices.⁷⁶ Moreover, the Australian Government routinely uses language and imagery which resonate with the virtues. A 2010 report on overall reform in the APS, produced by the most senior Australian public servant at the time, Terry Moran AO, entitled *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*,⁷⁷ articulates an image of superlative performance and

⁷² Daggar, R. (1997) *Civic Virtues: Rights, Citizenship and Republican Liberalism*, at pp.83-86.

⁷³ Anderson, C. (1992) "'Safe Enough in His Honesty and Prudence' The Ordinary Conduct of Government in the Thought of John Locke" in XIII(4) *History of Political Thought* 605 at p.617.

⁷⁴ DuGay, P. (2000), at p.46

⁷⁵ *Ibid.* at p.74.

⁷⁶ Russell, D. (2009) *Practical Intelligence and the Virtues*, at p.343.

⁷⁷ Advisory Group on Reform of Australian Government Administration ("AGRAGA") (2010) *Ahead of the Game: Blueprint For The Reform of Australian Government Administration*.

conduct on the part of APS officers. The objective of the *Blueprint* is expressed in the following terms:

...the Blueprint puts people at the centre of public service reform. Ultimately it is people, not systems, who produce excellence and produce change. And it is our own people who will make the Australian Public Service what it legitimately aspires to be: the best public service in the world.⁷⁸

The *Blueprint* identifies the *Values* and the *Code* as integral to the achievement of "excellence". It proposes recommendations to revise the *Values* and *Code* with the intention that this should "[p]romote APS collegiality and unity; [e]ncourage excellence in public service; [c]larify expectations of public service behaviour to foster public trust..."⁷⁹ The recommendations from the *Blueprint* were accepted in their entirety by the government in May 2010.⁸⁰

This kind of superlative imagery is commonplace in references to the APS. And it is imagery routinely deployed in marketing and communications literature for all kinds of industries. As public trust in government is sensitive to the degree to which the APS approximates its obligations of "honesty," or "integrity," or "trustworthiness," it is not surprising that such exhortations should be expressed in government documents such as the *Blueprint*. However, the promulgation of archetypal aspirational motifs, such as honesty and integrity, typically considered to be objects of *aspiration* but applied mandatorily in the case of the conduct to be

⁷⁸ AGRAGA (2010), at p.v.

⁷⁹ *Ibid.* at p.46.

⁸⁰ Department of Prime Minister and Cabinet. (2011) *Department of the Prime Minister and Cabinet Annual Report 2010-11*, at p.64.

expected of the Impartial Public Officer is rendered problematic in one important respect. The imposition of the statutory obligation that a public servant should conduct himself or herself honestly (for example), *without mitigation*, in his or her performance of government business, is arguably emblematic of the kind of “unattainable standard”⁸¹ that realist theorists across a number of disciplines attribute to utopian conceptions of Westminster liberal-democracy. This is because, as the APS Commissioner – who has executive responsibility for the regulation of ethical conduct in the APS⁸² – is at pains to make clear to all incumbent officers, this and all provisions constitutive of the public service scheme⁸³ for ethics regulation “are not simply aspirational statements of intent. They are mandatory.”⁸⁴ As such, the superlatives comprising the *Values* and the *Code* that might otherwise exemplify symbols of the Kantian *archetype*, through their mandatory operation, actually expunge any hope of a meaningful role for aspiration or, for that matter, habituation. William Galston refers to such a standard as a “polestar” – i.e., unattainable in the sense that it represents principles which cannot account for human conduct in all domains of life.⁸⁵

Galston’s evaluation, however, does not coincide with the APS Commissioner’s appraisals of APS officers’ purported *actual* compliance with the *Values* and the *Code*. Each year, the APS Commissioner⁸⁶ is required under section 44 of the PS Act to produce a report to be tabled in the Parliament, which sets out, *inter alia*, the “state” of the APS during that year. Since its inception

⁸¹ Galston, W. (2010) “Realism in Political Theory” in 9(4) *European Journal of Political Theory* 385, at p.395.

⁸² Section 41, *Public Service Act 1999* (Cth).

⁸³ Sections 10, 13, *Public Service Act 1999* (Cth).

⁸⁴ See: Australian Public Service Commission, (No date) *Enhancing Ethical Awareness in the APS*.

⁸⁵ Galston, W. (2010) at pp.391-2.

⁸⁶ The statutory office of *Public Service Commissioner* is established by s.40(1) of the *Public Service Act 1999*.

in 2001, the *State of the Service Report*⁸⁷- the annual performance 'report card' for the Commonwealth bureaucracy - has invariably (or, at least, until quite recently) characterised the incidence of misconduct or corruption in the APS as virtually negligible. The *State of the Service Report* for 2010-11, prepared by a former APS Commissioner, Stephen Sedgwick, announced:

The APS is generally regarded as having one of the highest reputations for integrity of comparable public services around the world. For several years, the State of the Service Report has noted that levels of misconduct in the APS are relatively low and that, of the small level of misconduct, the incidence of corrupt or criminal activity is reflected in only a handful of cases each year. The data across years overwhelmingly shows that misconduct in the APS is dominated by individual acts of poor judgment rather than systemic issues.⁸⁸

Indeed, a review of each consecutive *State of the Service Report* from 2001 until the present reveals that each of those reports corroborates the Commissioner's assessments in the 2011 report. For example, the *State of the Service Report 2008-9*, prepared by then acting-Commissioner Carmel McGregor, reports:

Only about three in a thousand APS employees were determined to have breached the Code last year. Misconduct is overwhelmingly characterised by acts of individual poor judgment rather than systemic misbehaviour, maladministration or corruption.⁸⁹

⁸⁷ The Public Service Commissioner is obliged to prepare a *State of the Service Report* annually, pursuant to s.44. of the *Public Service Act 1999*.

⁸⁸ Public Service Commissioner, *State of the Service Report, State of the Service Series 2010-11*, at p.67.

⁸⁹ Public Service Commissioner, *State of the Service Report, State of the Service Series 2008-09*, at p.177.

The 2016 *State of the Service Report* confirms that the number of officers who breached the *Values* or the *Code* in that year remains low, as in previous years.⁹⁰

As the custodian of APS standards of accountability,⁹¹ the APS Commissioner makes clear what is expected as regards the ethical conduct of APS officers, according to the APS' adopted model of "values-based management," in the following terms:⁹²

... Australian Public Service (APS)...employees are required to be highly responsive to government, but in a way that maintains the trust placed by the public in the service. APS employees must achieve results promptly and to a high standard, while remaining impartial and apolitical, and without compromising other principles of good government administration.

At the same time, there are continuing demands – from the public and political commentators – for the APS to improve governance and continue to commit to integrity and associated institutional reform. Expectations have, arguably, never been higher.⁹³

Peter Shergold, writing in 2004,⁹⁴ pre-empted this view in observing:

Scrutiny of the conduct of public servants, and of their secretaries, has increased enormously. The behaviour and role of secretaries is today far more open to examination - and, paradoxically, to criticism - than in the past.⁹⁵

⁹⁰ Public Service Commissioner, *State of the Service Report, State of the Service Series 2015-16*, at p.27.

⁹¹ see ss.41(1)(a), (b), (e) and (f), *Public Service Act 1999*.

⁹² Public Service Commissioner, "Leading and Shaping a Unified, High Performing APS" (online).

⁹³ Public Service Commissioner (2010-11) at p.58.

⁹⁴ then Secretary of the Department of Prime Minister and Cabinet

⁹⁵ Shergold, P. (2004) "Lackies, careerists, political stooges"? Personal Reflections on the Current State of the Public Service Leadership" 63(4) *Australian Journal of Public Administration* 3, at p.5.

Lynelle Briggs, who was the APS Commissioner from 2004 to 2009, argues that the legally enforceable sanctions comprising the *Values* and the *Code*, coupled with "the robust Australian system of parliamentary scrutiny through the Senate Estimates process and other committees...has provided the Australian Public Service with a high degree of assurance around its ethical approach."⁹⁶

The conflicting narrative of prevalent misconduct

However, these routine affirmations of the exemplary conduct of APS officers stand in stark contrast to equally routine, myriad reports, both to Parliament and in the media, of extensive partial⁹⁷ or corrupt conduct, bullying, and other misconduct throughout the APS. Since the *Values* and the *Code* were instituted, numerous parliamentary enquiries evidencing claims of significant and widespread misconduct in the APS have occurred. Arguably, the most notorious examples include instances from the period constituting the government of John Howard, including, but not limited to, the "Children Overboard" affair,⁹⁸ and the "Australian Wheat Board Scandal."⁹⁹ MacDermott notes several instances from the period, including:

...the 'Children Overboard' affair (known to the Senate as 'A Certain Maritime Incident')

involving the Departments of Defence, Immigration and Prime Minister and Cabinet; the

⁹⁶ Briggs, L (2009) "Testing APS Ethics: Where's the Integrity", in 68(2) *Australian Journal of Public Administration* 119, at p.121.

⁹⁷ For example: Gourley, P. "Remember When Public Servants Were Impartial?", *The Canberra Times*, 5 August 2014.

⁹⁸ See: Senate Select Committee. (2002) "Select Committee on a Certain Maritime Incident Report", Commonwealth of Australia.

⁹⁹ See: Cole, T. Commissioner (2006) "Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Program", Commonwealth of Australia.

cases of the detention of Cornelia Rau and the deportation of Vivian Solon, involving the then Department of Immigration and Multicultural and Indigenous Affairs (DIMIA); the payments made by the Australian Wheat Board (AWB) to the regime of Saddam Hussein in order to obtain contracts for the sale of Australian wheat to Iraq, involving the Department of Foreign Affairs and Trade (DFAT); the detention of Dr Mohamed Haneef, involving the Australian Federal Police; and the role of a senior public servant in the Employment and Workplace Relations portfolio as the face of the Howard Government's *Work Choices* media campaign.¹⁰⁰

As regards incidents occurring after the 'Howard era', in 2012, separate parliamentary inquiries were initiated, respectively, into workplace bullying¹⁰¹ (with a considerable focus upon the incidence of bullying in the APS), and into the performance of the Department of Parliamentary Services¹⁰² (to address issues reported as constituting a 'toxic' workplace culture in which staff are regularly bullied and cronyism is common).¹⁰³ In addition, senior public servants appeared before Senate estimates proceedings and were questioned in relation to excessive staff turnover and bullying issues at the Attorney-General's Department ("AGD"),¹⁰⁴ and also at the CSIRO.¹⁰⁵ In relation to the latter, further controversy was revealed when media later reported that the

¹⁰⁰ MacDermott, K., (2008) *Whatever Happened to Frank and Fearless? The Impact of New Public Management on the Australian Public Service*. at p.1.

¹⁰¹ Parliament of Australia, House of Representatives, House Standing Committee on Education and Employment Inquiry into Workplace Bullying.

¹⁰² Senate Finance and Public Administration Legislation Committee Inquiry into the Performance of the Department of Parliamentary Services.

¹⁰³ Cranston, B. "Parliament House Staff Suffer Bullying", *The Sydney Morning Herald*, 2 May 2012.

¹⁰⁴ see Australian Senate, Senate Standing Committee on Legal and Constitutional Affairs, *Committee Transcript (Hansard)*, 24 May 2012 [20:07] at pp. 89 - 94.

¹⁰⁵ see Australian Senate, Senate Estimates Education, Employment and Workplace Relations Legislation Committee, *Committee Transcript (Hansard)*, 28 May 2012 pp.122 - 126.

federal workplace safety watchdog, Comcare, censured senior CSIRO management for misleading the estimates committee in testifying that a draft report into bullying claims "found no evidence of systemic deficiencies or a culture that promoted bullying."¹⁰⁶ It is also notable that the aforementioned consideration of staff turnover and bullying at AGD by the estimates committee is not an isolated occurrence; AGD officials are regularly interrogated by the estimates committee about high staff turnover. In 2003, the *Sydney Morning Herald* reported that AGD officials were required to explain concerns in relation to the AGD Human Rights Branch, after nearly 100% (i.e., 19 of 20) of the staff resigned within a 12-month period.¹⁰⁷

During the same period, several controversies erupted in the media alleging misconduct on the part of Commonwealth officers. In one matter, the former head of the Australian Federal Police Australian Wheat Board ("AWB") food-for-oil taskforce, Ross Fusca, alleged (in pleadings in Federal Court proceedings) he was offered a promotion if he would "make the oil-for-food taskforce go away."¹⁰⁸

In another matter, *The Canberra Times* reported that the Department of Immigration and Citizenship kept details of internal offences from the previous year secret; these relating to 55 confirmed breaches of the *Code*; "some...in the most serious categories of misbehaviour."¹⁰⁹

And in another example, *The Sydney Morning Herald* newspaper reported that senior Reserve Bank of Australia ("RBA") officials including RBA assistant governor, Frank Campbell, had been aware of bribery allegations in relation to the conduct of staff in a number of its subsidiary

¹⁰⁶ Berkovic, N. "CSIRO management caned over handling of bullying claims", *The Australian*, 24 July 2012.

¹⁰⁷ Hornery, A., and Moses, A. "Human Rights Write-Off", *Sydney Morning Herald*, 27 May 2003.

¹⁰⁸ McKenzie, N., and Baker, R. "Top Job 'Offered to End Probe'", *The Age*, 7 June 2012.

¹⁰⁹ Thompson, Phillip. "Dept's Staff Fail APS Code", *The Sydney Morning Herald*, 11 March 2012.

organizations, but had not reported the matter to the AFP until two years later, and only then consequent upon an exposé of the matter published by *The Age*.¹¹⁰ The RBA was subsequently scandalized by claims of a "cover-up."¹¹¹

Notable also in 2012, calls for a royal commission were made to investigate abuse in the Australian Defence Force, following the results of an investigation by law firm DLA Piper.¹¹² The final report of the Defence Abuse Response Taskforce identified 1751 instances of abuse within the scope of the Taskforce terms of reference, with a total of \$66.63 Million paid in reparations to the victims.¹¹³

More recent examples indicate no meaningful abatement in terms, not only, of the incidence of misconduct within the ranks of the APS, but also in terms of the systemic character of misconduct.

In 2016, the former Sex Discrimination Commissioner, Elizabeth Broderick, reported her findings that 62% of men and 66% of women in the AFP disclosed they had been bullied in their workplaces. Nearly 50% of women disclosed they had been sexually harassed.¹¹⁴ In addition, the AFP reported in April 2017 that AFP officers had on several occasions inappropriately accessed journalists' metadata without first obtaining a journalist information warrant.¹¹⁵

¹¹⁰ Baker, R., and McKenzie, N. "Reserve 'Cover-Up' Widens" *Sydney Morning Herald*, 25 August 2012.

¹¹¹ *Id.*

¹¹² Nicholson, B. "Push for Top-Level Probe on Defence Sex Abuse, Bullying" *The Australian* 16 June 2012.

¹¹³ Defence Abuse Response Taskforce (2016) *Final Report*, Australian Government, Canberra ACT, at pp.12, 15.

¹¹⁴ Broderick, E. (2016) *Culture Change: Gender Diversity and Inclusion in the Australian Federal Police*, Elizabeth Broderick & Co., Sydney Australia, at p.9.

¹¹⁵ See Farrell, P. "AFP Data Breach: Six Cases of Alleged Police Misconduct Investigate" in *The Guardian*, 29 April 2017.

A significant public backlash occurred in early 2017 when the Department of Human Services (DHS) provided private information to the DHS Minister, Alan Tudge, about a Centrelink customer, Ms Andie Fox, who made public comments about a falsely-rendered debt – part of the widely-reported “Robo-debt” fiasco. Ms Fox’ private information was then released to *The Canberra Times*, which published an article that included the private information. At Senate Estimates in February 2017, the Secretary of DHS, Kathryn Campbell, contended that releasing the information was necessary to ensure public confidence in the automated debt recovery system.¹¹⁶ However, Robert Richter QC provided written legal advice stating that Minister Tudge or one of his officers had committed a criminal offence.¹¹⁷ The matter was subsequently referred for investigation to the AFP by the opposition member of parliament, Linda Burney, and was determined not to have involved the commission of a criminal offence.¹¹⁸ Veteran Canberra political correspondent, Jack Waterford, pre-empted this finding in March 2017, when he stated:

It is probably unlikely the federal police will take any action against Human Services’ self-serving notion that the Social Security Administration Act entitles it to breach a person’s privacy if public complaints are made which the department believes to be unfounded...The AFP...has never demonstrated any zeal whatever in any matter where the actions of the government of the day might be criticized.¹¹⁹

¹¹⁶ See Belot, H. “Department of Human Services Defends Release of Personal Information of Blogger Critical of Centrelink” in *ABC News* 2 March 2017.

¹¹⁷ Gartrell, A. “Minister Alan Tudge’s Office May Have Committed Offence with Centrelink Lead: QC,” in *Sydney Morning Herald*, 3 April 2017.

¹¹⁸ McIlroy, T. “Human Services Minister Alan Tudge Cleared Over Release of Robo-debt Information” in *The Canberra Times*, 8 May 2017.

¹¹⁹ Waterford, J. “Centrelink’s Doomed Brigadier, Kathryn Campbell, Stares Down the Hordes” in *The Canberra Times*, 10 March 2017.

Frequently, APS standards of conduct and obligations requiring APS officers to discharge their duties with propriety are claimed to be deflected by ulterior priorities. An example may be seen in the experience of Dr Lynn Simpson, who worked as a veterinary officer monitoring the health of export livestock during their on-sea transportation. After a decade of submitting complaints about livestock being transported in conditions which comprehensively failed to meet Australian Standards - to no avail - Dr Simpson was employed as a technical advisor by the Department of Agriculture, Fisheries and Water in 2012, to work on the review of the Australian Standard for Export of Livestock (ASEL). Dr Simpson states that she had previously worked for the department in 2007 and that the information in her reports about on-board treatment of livestock was literally ignored; so much so, that, occasionally, she deliberately reported the cause of on-board livestock deaths as being “snakebite,” or “assassination,” or “bad attitude;” causes in respect of which she never received a query from the department. She states that shipboard standards are entirely within the department’s control, and that the government makes “hollow” promises of reform. But, she states, the government, in reality, has “repeatedly and vehemently” resisted shipboard reform and is unwilling to sanction offending exporters.¹²⁰

On her return to the department to work on the ASEL review in 2012, Dr Simpson prepared a report in 2013, which included highly graphic photos showing livestock, including injured and dying livestock, being kept in appalling conditions on ships. Notably, clause 1.3(f) of the *Australian Public Service Commissioner’s Directions 2013*, at the time, required all APS employees,

¹²⁰ Simpson, L. (2016) “Australia Knowingly Trades in Animal Cruelty: Former Live Export Ship Vet” in *Crikey*, 29 June 2016.

...to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way. Failure to report suspected misconduct may itself warrant consideration as a potential breach of the *Code*.¹²¹

Dr Simpson's report did not address her concerns regarding wilful blindness on the part of departmental officers as to the plight of exported livestock. Her report did, however, frankly identify significant instances of non-compliance with the Australian Standard, long ignored in the department. An internal departmental minute obtained by the Australian Broadcasting Corporation stated Dr Simpson's report was not to be made publicly available, as would otherwise normally be the case. Subsequently, the report was inadvertently uploaded to the department's website by a departmental officer, following which, Dr Simpson was removed from her job. She was informed in writing by a departmental senior executive that, in spite of her ethical conduct and technical expertise, which the executive directly acknowledged, she had been removed from her job because the "Industry" would not work with her following her revelations.¹²² Dr Simpson refers to this as an example of "regulatory capture."¹²³

A dramatic example of the use of strategic secrecy is evident in the strict secrecy requirements placed upon staff who are contracted to provide services at the Nauru and Manus Island detention centers. Notwithstanding the threat of legal sanction, numerous staff have gone public to expose what they say is a culture of cover-up in respect of horrific reports of abuse, including

¹²¹ Now repealed, replaced by *Australian Public Service Commissioner's Directions 2016*, clause 14(f).

¹²² Thomas, J. (2016) "A Government Vet Has Been Removed After Exposing the Appalling Conditions on Live Cattle Export Ships" in *ABC 7.30 with Leigh Sales*.

¹²³ Simpson, L. (2016).

child abuse, and psychological trauma, at those places.¹²⁴ One traumatologist and psychologist, Paul Stevenson, whose career working with the victims of terrorism and natural disasters spans 43 years, said he had never witnessed more atrocity than that which he saw at Manus Island and Nauru.¹²⁵

In relation to widely-reported government IT failures, including the 2016 Census failure, and the Centrelink “Robo-debt” debt recovery debacle, the former government Chief Digital Officer, Paul Shetler, stated publicly that there exists a “blame aversion” culture within Australia’s public administration. He stated that a culture of ‘good news’ meant that “...bad news is not welcomed, and when bad news comes, they try to shift the blame.”¹²⁶ The former judge who presided over The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry) which investigated government corruption in Queensland in 1987 to 1989, Tony Fitzgerald, provides a variation on that description. He contends that the major political parties are controlled by professional, “whatever-it-takes” politicians who are driven by self-interest and ideology and are addicted to vested-interest funding.¹²⁷ There are obvious implications for this in a reimagined APS, in which the appraisal of senior executive performance is corporatized and where the achievement of product-based outcomes is incentivized by way of bonuses. Columnist Kenneth Davidson argues that the Westminster system of government, founded on ministerial responsibility and buttressed by a professional career public service had

¹²⁴ Aubusson, K. “‘It’s Child Abuse’: Australian Doctor Brought to Tears by Treatment of Nauru Detainees” in the *Sydney Morning Herald*, 14 August 2015.

¹²⁵ Doherty, B., and Marr, D. “The Worst I’ve Seen – Trauma Expert Lifts Lid on ‘Atrocity’ of Australia’s Detention Regime” in *The Guardian*, 19 June 2016.

¹²⁶ Knaus, C. “Centrelink Crisis ‘Cataclysmic’ Says PM’s Former Head of Digital Transformation” in *The Guardian*, 5 January 2017.

¹²⁷ Gartrell, A. “Corruption Fighter Tony Fitzgerald Part of Plan to Clean Up Canberra” in the *Sydney Morning Herald* 12 June 2017.

been progressively trashed since the abolition of the Public Service Board in 1987.¹²⁸ He argues that the recalibration of the situation of department heads, from permanent officers to serving *at the government's pleasure* fundamentally re-framed – and politicized - the relationship between the government and the APS.¹²⁹ Perhaps the highest profile example of these implications *revealed* is that of the notorious *Children Overboard* affair and its subsequent investigation.

Children Overboard Affair

The Children Overboard affair was an Australian political controversy involving public allegations by Howard Government ministers in October 2001, in the lead-up to a federal election, that seafaring asylum seekers had thrown children overboard in a presumed ploy to secure passage to Australia (Wikipedia, "Children Overboard Affair," n.d.)

At issue in the Children Overboard affair was the question of whether certain details, which had been immediately available to a large number of persons in the ADF and the Department of Defence, had been communicated to the Prime Minister, the Minister for Defence, or certain of their ministerial staff or senior members of their respective departments, at any time prior to the election on 10 November 2001. Keating puts it this way:

[c]entral to the 'children overboard' affair...was the *apparent* failure of advisers to pass on to the minister official information that would have allowed the government to correct the public record in a timely manner.¹³⁰

¹²⁸ Kenneth Davidson, "Playing the three-monkey defence", *The Age*, 21 February 2002.

¹²⁹ *Id.*

¹³⁰ Keating, M. (2003) "In the Wake of a Certain Maritime Incident: Ministerial Advisers, Departments and Accountability" in 62(3)*Australian Journal of Public Administration*92 at p.93.

Those unrevealed details were such that, had they been so-conveyed, they could have clarified the true events so as to disabuse the Prime Minister and Minister of Defence of the erroneous nature of the claims they had made to the media.

The report of the Senate Select Committee ("Committee") on a Certain Maritime Incident¹³¹ ("report") subsequently recorded failures by several public officials to adequately advise either the ministers concerned, or key members of their ministerial or other staff, that claims that had been made by Prime Minister John Howard, Defence Minister Reith, and Immigration Minister Ruddock, to media between 8 October 2001 and the election on 10 November, that asylum seekers aboard SIEV 4¹³² had thrown their children overboard, were false. The report singled-out such failures particularly in relation to the actions of Dr Allan Hawke, Secretary of the Department of Defence,¹³³ Admiral Chris Barrie, Chief of Defence Force,¹³⁴ and Air Vice Marshall ("AMV") Titheridge, Head of Strategic Command and Defence representative on the Department of Prime Minister and Cabinet People Smuggling Taskforce.¹³⁵

The revelatory information had been the subject of frenetic communication between many key participants in the controversy, in the course of a handful of days immediately following the incident the subject of the allegation on 7 October 2001, and again in the days immediately preceding the election. Notwithstanding this, both the Prime Minister and the Minister for

¹³¹ Senate Select Committee. (2002) "Select Committee on a Certain Maritime Incident report", Commonwealth of Australia.

¹³² Suspected Illegal Entry Vessel No. 4.

¹³³ Senate Select Committee. (2002) at paragraphs 6.188 to 6.209.

¹³⁴ *Ibid.* at paras 6.104 to 6.162.

¹³⁵ *Ibid.* at paras 6.163 to 6.187.

Defence denied they had been conclusively advised by any of their staff that the claims they had made through various media outlets were in fact untrue.

One example, of the myriad examples of apparent failure in the information chain, is revealed in the report's consideration of the steps taken by Commander ("Cmdr") Stefan King who, at the time of the incident, worked in the International Branch of the Department of Prime Minister & Cabinet as the ADF Liaison Officer. Whilst attending a daily strategic command briefing, Cdr King was briefed by Commander Chatterton, Director of Operations, Navy, that photos relied on by government ministers as proof that asylum seekers aboard SIEV 4 had thrown children overboard, were in fact photos of a different event, taken on a different day. The photos did not depict children who had been thrown into the water as had been claimed. On the basis that he had been briefed "by a relevant person for a relevant purpose,"¹³⁶ Cdr King informed his immediate supervisor, Senior Defence Adviser, Harinder Sidhu, who agreed the branch head, Dr Brendan Hammer, should be briefed immediately. Doctor Hammer took no further steps in relation to Cdr King's briefing, on the strength that, in his opinion, it was "tearoom gossip."¹³⁷ Commander King strenuously denied before the Inquiry that the information provided to Dr Hammer was gossip or that he had represented it as such. He also stated that he believed Dr Hammer would consult the ADF representative on the people smuggling taskforce, AVM Titheridge, regarding the matter, but Dr Hammer took no further action regarding the information. Dr Hammer informed the Inquiry that he was not minded to speak with anybody else regarding the information, given its gravity if true, as it was not a matter within his area of

¹³⁶ Senate Select Committee on a Certain Maritime Incident, Transcript of Interview with Commander Stefan King, *Committee Hansard* at CMI 1491.

¹³⁷ *Ibid.* at CMI 1503.

responsibility.¹³⁸ Commander King stated to the Inquiry that he did not understand how the information provided by him had been recast as "gossip". That it had, however, provided a basis for people in a position to correct misconceptions relied upon by government ministers to ignore the information. In another incident, the senior officer in Defence public relations, Brigadier Gary Bornholt, made several attempts to persuade Minister Reith's media adviser, Ross Hampton, of the true nature of the photos. Hampton deflected Brigadier Bornholt's approaches in an "irate" manner and insisted the Minister would be standing by the claims he intended to make to the media. A second message left by Brigadier Bornholt on Hampton's voicemail, prior to the Minister's interview with Virginia Trioli, to the effect that he had proof that the Minister's claims were not correct, Hampton claimed never to have received.¹³⁹

In considering the events of the Children Overboard affair, Keating^{140,141} notes that Weller, in his review of evidence put before the Committee, "found an attitude of mind, not a conspiracy, so determined to find evidence to corroborate the story...[i.e., that asylum seekers on SIEV 4 had thrown their children overboard]...¹⁴² that they glossed over the evidence pointing the other way. In effect, as public service careers begin to rely more and more on the good favours of ministers, departmental secretaries can become too responsive, too concerned to show that they are on board, too concerned with political protection."¹⁴³

¹³⁸ Senate Select Committee. (2002) at paragraphs 5.129.

¹³⁹ Marr, D., and Wilkinson, M. (2003) *Dark Victory*, at pp. 202-204.

¹⁴⁰ former Secretary of the Department of Prime Minister and Cabinet and Head of the Australian Public Service 1991 - 1996.

¹⁴¹ Keating, M. (2003).

¹⁴² *Ibid.* at p.95.

¹⁴³ *Id.*

Senator Collins, one of the members of the Committee, makes the point in the report that "many trails lead directly to the Prime Minister's Department, his Office and to the Prime Minister himself," but notes the report stops short of claiming that "the Prime Minister knew the truth and lied."¹⁴⁴ In their book¹⁴⁵ on the Children Overboard saga, Marr and Wilkinson note "Howard, Moore-Wilton, Reith, Barrie, Halton, Scafton, Hendy and Hampton remained absolutely adamant that the military had never corrected its original advice about children being thrown into the sea."¹⁴⁶

Significantly, the Committee expressed its concern that the inquiry was hampered by the Cabinet decision which blocked key participants in the events of the Children Overboard affair from giving evidence at the inquiry.¹⁴⁷ The importance of the observation made by the Inquiry's Independent Assessor, the eminent barrister Stephen Odgers SC, cannot be overstated. Mr Odgers noted that as the Minister for Defence, Peter Reith, Peter Hendy,¹⁴⁸ Mike Scafton,¹⁴⁹ Ross Hampton,¹⁵⁰ and Miles Jordana¹⁵¹ had declined to appear before the Inquiry, "no firm conclusions should be drawn on factual issues relating to them where any possibility of controversy exists."¹⁵²

Senator Jacinta Collins made concluding remarks in the report in the following terms:

¹⁴⁴ Senate Select Committee. (2002) at p.469.

¹⁴⁵ Marr, D., and Wilkinson, M. (2003).

¹⁴⁶ *Ibid.* at p.290.

¹⁴⁷ Senate Select Committee. (2002) "Select Committee on a Certain Maritime Incident Report on the Scafton Evidence", Commonwealth of Australia, at para. 4.19.

¹⁴⁸ Chief of Staff to Minister for Defence.

¹⁴⁹ Senior Advisor to Minister for Defence.

¹⁵⁰ Media Advisor to Minister for Defence.

¹⁵¹ Adviser to Prime Minister on International Affairs.

¹⁵² Odgers SC, S. (2002) *Report of Independent Assessor to Senate Select Committee on a Certain Maritime Incident* at paragraph 3.4.

The reality of the inquiry into the children overboard affair is that at best there are inconsistencies and contradictions in the evidence given before the Senate Inquiry by some key Defence and Public Officials. At worst there are fundamental omissions, half-truths, untruths and cover-ups.¹⁵³

Intriguingly, it is the case that subsequent to their respective departures from the APS, Mike Scafton and Max Moore-Wilton both disclosed, independently of each other, that they *had* personally informed the Prime Minister prior to the election that Defence had provided evidence that the claims of asylum seekers throwing children in the water from SIEV 4 were not true.

Scafton's claim, in a letter to *The Australian* newspaper, resulted in the inquiry being re-opened to take his testimony. The Prime Minister dismissed Scafton's claim. Moore-Wilton made his disclosure to Paul Kelly in 2009 during Kelly's research for the book *The March of the Patriots*, and repeated his claims during three subsequent interviews with Kelly, only to recant during a fifth discussion with him, after enduring intense pressure from Howard.¹⁵⁴

Whatever the contradictions in the various claims made, it is certainly the case that the Committee's report, and the transcripts of witness testimony, reveal a level of detail as to what had been said to whom by whom, which is excruciating in its revelations of the sheer *number* of public officials who knew the claims made by the Prime Minister and the Ministers for Defence and Immigration and Multicultural and Indigenous Affairs were false - *even* as soon as one day

¹⁵³ *Ibid.* at p.469.

¹⁵⁴ Kelly, P. (2009) *March of the Patriots*, at pp.604-5.

after the alleged event - and yet purportedly this revelatory information was never made the subject of a brief of *any kind* to any of the Cabinet Ministers or key officials concerned.

The Children Overboard affair has become a notorious chapter in Australian political history. But in the wake of its central outrage, i.e., the claim that the Howard government deliberately misused information to better its chances of re-election and was assisted in doing so by a "debauched" public service, that episode's conclusions, as were left to the theoretical beneficiaries of democracy – i.e., the governed, are, in moral terms, confusing at best. Despite widespread condemnation and alarm at the revelations of the Children Overboard affair, many of the public servants considered to be central to the successful execution of the affair's (claimed) objective were quickly promoted after the election in 2001. Jane Halton, head of the people smuggling taskforce in the Department of PM & C, was awarded the Public Service Medal, and she was appointed to the position of head of the Department of Health and Human Services just prior to the commencement of the senate inquiry.

De Westminster quis custodiet ipsos custodes?

Taken together, these and many additional incidents have driven escalating alarm about diminishing integrity in Australia's public institutions, precipitating calls for the establishment of a Federal ethics body mandated to investigate and make findings in relation to corruption and misconduct in Australia's government and public administration. In 2009 Senator Bob Brown put a motion in the Senate asking that the Labor government of Kevin Rudd establish an Anti-Corruption and Integrity Commission, which motion was defeated by a large majority including the combined unanimous votes of both Labor and Liberal & National parties. In 2013, Greens

Senator Christine Milne introduced the *National Integrity Commission Bill 2013* to the parliament. The Labor Party supported a motion by the Palmer United Party to establish a Senate Select Committee for the purposes of investigating and reporting upon the proposed establishment of a National Integrity Commission (Select Committee). The Select Committee reported on 13 September 2017, drawing criticism that it had watered-down its recommendations, *to wit*, that it had recommended that the Senate give “careful consideration” to the establishment of a National Integrity Commission.

Notably, at each stage of the bill’s passage in the Senate, government Senators opposed the bill, on the basis that the existing anti-corruption arrangements are sufficient or require minimal modification, and that corruption in public institutions in Australia is minimal or non-existent.¹⁵⁵ At the tabling of the report of the Senate Select Committee, Liberal Party member of the Committee, Senator Dean Smith, said in the Senate:

There have been calls for a revolutionary approach rather than an evolutionary one – a new agency with investigative powers that duplicates the work of the existing system. On the evidence presented to this inquiry, such an approach is far from warranted. Many are quick to point to one instance or another of corruption or malpractice at a federal level and to draw the conclusion that a new body with the jurisdiction of an anti-corruption commission is necessary.¹⁵⁶

The submission of the Attorney-General’s Department (AGD) to the Select Committee asserts that

¹⁵⁵ See: Senate Select Committee for a National Integrity Commission (2016) *Interim Report*, Australian Government, Canberra ACT, at chapter 3.

¹⁵⁶ Commonwealth of Australia, Senate (2017), *Debates (Hansard)*, No. 14, p.7227.

The Government takes a robust, multi-faceted approach to combatting corruption, in which a range of agencies play a role in preventing, detecting, and responding to corruption. This approach is preferable to creating an entirely new anti-corruption agency. Dispersing responsibility for anti-corruption between a range of agencies promotes accountability and transparency and protects against abuse of power within Australia's anti-corruption framework.¹⁵⁷

The AGD, notably, states that the Australian system of government, along with the separation of powers, the rule of law and a free press, are other important features of Australia's safeguards against corrupt behavior.¹⁵⁸ In his submission to the Select Committee, Constitutional Lawyer George Williams contended that the diffusion of responsibilities across multiple agencies risks underreporting of corrupt conduct, while gaps in the regime mean that the system fails to hold people accountable.¹⁵⁹ This position was broadly supported by numerous other organizations which made submissions, including Transparency International – Australia, and The Australia Institute, among others.

Notably, ReachTEL polling in early 2017 was reported to show that 85% of all voters believe there to be corruption in the federal arena.¹⁶⁰ In relation to the ability to discern with any accuracy what level of misconduct occurs in public institutions, given current arrangements, the former Deputy Secretary of the Department of Finance and Administration (1998-2003), Stephen Bartos, states:

¹⁵⁷ Attorney-General's Department (2017) *Submission No. 11 – Senate Select Committee on a National Integrity Commission*, at p.2.

¹⁵⁸ *Id.*

¹⁵⁹ Williams, G. and Hobbs, H. (2017) *Submission No. 8 – Senate Select Committee on a National Integrity Commission*.

¹⁶⁰ Farr, J. "Overwhelming Majority Believes Pollies Are Corrupt" in *News Limited*, 17 January 2017.

I have written occasionally over 10 years about the dangerous, complacent belief that the APS is free of corruption. Each time, I received ever-more emails from public servants who have observed corruption in their agency but have no safe way to bring it to light. Without a body with broad anti-corruption investigative powers, we have no way of knowing the extent of corruption in the APS and among federal politics.¹⁶¹

Up to this point it is evident that the standards of conduct demanded of APS officers are demarcated by two significantly divergent views as to the extent to which, in practice, those obligations are complied with in the workplaces of the APS – i.e., that which has historically been presented by senior representatives of the APS and the Australian government, on the one hand, and that arising from myriad reports of misconduct through the media and other means, on the other. In the Westminster context, the distance which separates, respectively, the claims of generalized propriety, and those of arguably systemic impropriety, is not a phenomenon unique to the APS. Nor should it be regarded as a matter having relevance to nothing more than issues of practical organizational management. It will be argued that assumptions fundamental to the liberal-democratic project fall short of taking proper account of what might loosely be referred to as the *human condition*. Modern scholarship across a number of disciplines – and particularly since the end of the nineteenth-century – has slowly illuminated some of these disjunctions, some of which will be considered in Part III, comprising the following two chapters.

¹⁶¹ Bartos, S. “Make Our Good Bureaucracy Great: Embrace Risk, Welcome Criticism, Forgive Mistakes” in *The Sydney Morning Herald*, 5 June 2016.

PART III – VIRTUE AND THE CHALLENGES OF THE ENLIGHTENMENT

Introduction

Part III evaluates the efficacy of the fundamental Westminster precepts - upon which the legitimacy of modern liberal-democratic public administration must rest - in the context of significant theoretical developments in psychology and sociology through the late-nineteenth- and twentieth-centuries. In broad terms, Chapter 5 critiques these issues through the rise of the fields of psychotherapy, psychology, and, more particularly, the specialization of personality psychology. Chapter 6 similarly critiques these matters in the context of social theory, and particularly the theoretical constructs of so-called ‘interactionist’ theorists. Taken together, these constructs represent a continuity in the science-based - and, secular - social developments that gained momentum in the nineteenth-century; sometimes to scandalizing effect.¹ Each of the theoretical fields addressed respectively in Chapters 5 and 6 bring their own challenges to the claim that public officers’ compliance with their promissory obligations is down to virtue. Both this claim, and the theoretical examples considered, are evaluated according to the benchmark of the so-called Impartial Public Officer.

Chapter 3 introduced the *Impartial Public Officer* as the idealized embodiment of the standards of conduct expected of Westminster public officials in the discharge of their duties. In the context of the Australian Commonwealth, those standards comprise the principles promulgated in the *Values* and the *Code*, including *honesty*, *integrity*, and *impartiality* (among others). In the context of the British Civil Service, similar principles are identified in the form of *The Seven Principles of*

¹ See, for example, text associated with note 281, Chapter 3.

Public Life, comprising: *Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty, and Leadership*. In each case, public officers are required to discharge their duties “...solely in terms of the public interest.” And, so, the Impartial Public Officer is not simply an abstract ideal; it is presented in its operational contexts as an operating – and *operationalized* – expectation of performance in the discharge of a public officer’s day-to-day duties. In each case, also, the claim is made on behalf of those who populate the British Civil Service and the Australian Public Service that those expectations are met to an exceptional degree. Such an outcome, itself, stands as an imperative, given that failure in this regard could have direct implications for the triumvirate principles of *trust, legitimacy, and consent*, under the social contract. But, as was addressed in Part II, such claims of exceptional compliance, in the case of the APS, are challenged by an incompatible and conflicting narrative, that suggests the possibility of widespread and systemic misconduct and corruption in the APS.

Chapter 5 evaluates the implications for the promissory obligations in respect of which the Impartial Public Officer is bound, that arise out of socio-political expectations brought to bear upon the abstract notion of the social contract. Notwithstanding the abstractedness of the social contract as a theoretical construct, tangible and significant socio-political expectations arguably operate in the broad subjective experience of those who are subject to Westminster systems of governance. As such, the social contract remains a continuing defining feature of operating Westminster. And the legitimacy of the Westminster model, even in highly modified form, continues to rely upon the traditional precepts of *honesty, integrity, and impartiality*. These and like-traditional values are identified by commentators as ‘continuities,’ upon which the legitimacy of Westminster relies. In the British context, they have recently been described as the

“bedrock” of the Civil Service. Whatever the reality of the behavior of politicians in the modern political world, ministerial responsibility remains a central legitimating concept in Westminster liberal-democracy, and the impartiality of public administrators is necessarily an essential ingredient in that design.

Chapter 5 considers the comparative example of the British Civil Service, in respect of its own experiences with its management of so-called *standards of conduct*, in terms of the historical incidence of misconduct and impropriety in the organization. The critical reliance of the British Civil Service upon convention, in engendering standards of conduct in its officers, is critiqued from the perspective of the inception of the exemplar Impartial Public Officer as a natural progression from the so-conceived Victorian *man-of-dutiful-character*. The reliance of the British upon this contrivance was central to the avoidance of a codified system of ethics regulation in the United Kingdom, until quite recently. Nonetheless, an observable dissonance between claims of remarkable propriety on the one hand, and a culture of secrecy and departures from conventional standards of conduct on the other, has been identified by several commentators.

Notably, the distillation and instantiation of the Westminster formulation coincided with the rising momentum of psychology as an evolving ‘scientific’ discipline. This development brought some promise that the possibility of agentic volition, in the form of so-called free-will, could be substantiated scientifically. But psychology also brought concomitant challenges, not only to the possibility of unproblematic rational conduct and decision making, but also to existing ideas regarding the moral basis of human motivation as a legitimating basis for ideas of virtue. These are issues that directly implicate the very possibility of the Impartial Public Officer. The chapter charts the development of these issues along three principal routes: the development of

psychotherapy (or 'depth-psychology'), the rise of the discipline of psychology, and that also of personality psychology (and related situationist ethics).

The advent of the discipline of psychology represented a culmination in the normalization of conceptions of self in society, for it purported to be the science of the interiority of the self. Certainly, later constructions of psychology came to focus upon the self as an operating entity in its own right. Earlier schools of thought had construed psychology in terms of faculties of *moral reasoning*, with the structures of personality expressed in terms of moral exemplars. But the advent of personality psychology saw a move to cleave morality as an operating element from its theoretical construct. Rather than being a medium through which an individual might develop towards an external standard, personality – and, individuality – became an end-in-itself; an expression of the uniqueness of the individual. Those qualities of the human condition that had once been recognized as dispositional features of virtue and vice, or of so-called character, were now distilled down to measurable and verifiable 'traits,' i.e., "...temporally stable and cross-situationally-consistent features" of human personality. Nonetheless, the efficacy of the construct of dispositional traits has been challenged by competing constructions of human personality based on so-called situationist ethics. From that standpoint, human conduct is said to be a function not only of dispositions to behave but, crucially, situational factors bearing significantly upon an individual's conduct, also.

Chapter 5 critiques these to-date unresolved contentions, between trait theory and situationist ethics, in terms of the implications of that result for the claim that compliance with a promissory obligation, such as that to which Westminster public officers are subject, should properly be understood as simply a function of the internalization of promulgated values. The assumption

which underlies any such view, where high levels of compliance is a necessary imperative, relies upon an unlikely conception of public officers who enjoy an exceptional mastery over their power to rationally engage – as a matter of practice – in objectively-determined, volitional and selfless decision-making.

The Chapter also considers a further problematizing dimension in the development of this scientific trajectory, in the conundrums of the human condition brought to the table by theorists such as Sigmund Freud, and the field of psychotherapy (or, depth-psychology). Recognized enduring disjunctions in the stability of the human psyche, made famous in Freud's observation that *the ego is not master in its own house*, could not be accounted for in early developing constructions of personality psychology. Eventually, the field of personality psychology enveloped the ground covered by psychotherapy, and then pathologized those areas, constituted by irrationality or instability, which were seen by Freud as foundational to the human psyche. None of these developments succeed in establishing a sound theoretical basis for the view that a process of 'internalization' could successfully operate to achieve the levels of compliance necessary for robust legitimacy under the social contract.

As was discussed in Part I, pre-Enlightenment systems of social order and conceptions of virtue were characterized by transcendental and mythological justifications, generally argued to have been displaced with the rise of Enlightenment secularism and the instantiation of the rights-bearing, autonomous individual. Chapter 6 addresses the claim that mythology was left behind with the advent of the Enlightenment, through its consideration of arguments that modernist political life retains a reliance upon myths, which operate ultimately to justify claims to political legitimacy. The development of Chiara Bottici's argument in support of the place of modern

political myth places significant reliance upon the work of Baruch Spinoza. Spinoza reconceived conceptions of conventionally binarized conditions of social and moral relations as gradations of perfection, in respect of which a reasoning individual stood as only a possibility, in the form of the *free man*. In ontological terms, Spinoza conceived of individuals as fundamentally relational, who 'strive to persevere in their own being' in a web of affective relations. Spinoza's characterization of human identity in these terms, of course, anticipates modernist critiques of identity, and the autonomous, reasoned, individual, by Friedrich Nietzsche, and by social theorists who followed. It is from this perspective that the conception of the Impartial Public Officer is critiqued as myth, in its reliance upon archetypal so-called *standards of conduct*, as representations of the actual performance of Westminster public officers. The problematic nature of such archetypal principles as standards of conduct, particularly given they are mandatory, is illustrated by a brief analysis of the statutory obligation of *honesty* by which APS officers are bound, and the place of deceit as a normative aspect of everyday human life.

Chapter 6 goes on to evaluate these claims from the standpoint of interactionist perspectives, against the background of a counter proposition to the claim that a public officer's compliance with promissory obligations is down to virtue. It is alternatively proposed that deceitful conduct, in a range of configurations, constitutes normative practice in APS work environments, in a manner that is not consistent with the *Values* and the *Code*. The chapter problematizes modernist conceptions of social and moral order, which rely for their ontological centre upon an autonomous rational agent; and also the place of human reason as the transcendental quality of consciousness, upon which modernist social order and the construct of the Impartial Public Officer relies. This 'interactionist' lens draws upon the works of Harold Garfinkel, Erving Goffman,

and Anthony Giddens, and presents alternative interpretations of modernist conceptions of the reasoning individual, in terms of contingencies argued to arise in situated and associated relational contexts. Generally speaking, interactionist theories reject structuralist conceptions of human conduct as a function of external rule-based and moral constraints, and, in doing so, decentre modernist conceptions of the volitional agent. Meaning, in these terms, is a function of social engagement, and is the object of interaction. Identity, and *situated* orders, are mere contingencies. The meaningful rules, therefore, are a function of the organization of social practice – in Garfinkel’s account – and not a function of conventional social structures.

There are significant contingencies that arise from the adoption of these perspectives, not the least of which involves a challenge to conventional views of how an agent functions within bureaucratized, rule-based structures. Taken together, for example, Goffman’s conception of the *presentation of self*, and his so-called *Underlife of the Organization* (a product of extensive ethnographic research), proposes an interpretation of organizational life that could have no legitimate place in the mandated structures of the APS. And Garfinkel’s account of identity as a function itself of interaction, to be achieved moment-to-moment, is fundamentally out of step with modernist conceptions of the human individual, and certainly with that of the Impartial Public Officer.

CHAPTER 5 – SACRED VALUES, STANDARDS & CONVENTIONS, AND THE INTERIORITY OF THE IMPARTIAL PUBLIC OFFICER

The narrative of the Social Contract and the legitimate expectations of the governed

The tension between narratives reviewed in Chapter 4 regarding the prevalence of misconduct in the APS provides one point of analytical focus in this thesis. On the one hand, what is claimed is no less than the impressive realization of an almost ideal degree of compliance by APS officers with their duty to conduct themselves in accordance with the *Values* and the *Code*; that is, to conduct themselves selflessly - *no less* - and solely according to the public good. On the other hand, an apparent – and arguably systemic - failure of compliance is suggested. The question of whether virtue can be said to account for the impressive compliance described in the first account – or, indeed, to be determinative of any level of compliance in any account, is itself an appropriate inquiry-in-its-own-right.

The analytical point of reference used for the sake of this particular inquiry is to consider the mutual incompatibility of the conflicting narratives from the standpoint of the social contract. The consideration of whether the principles of *trust*, *legitimacy*, and *consent* stand as functionally coherent, operationalized parts, meaningfully related within the conceptual paradigm of the social contract, becomes necessary in the face of the claims variously referred to as a “crisis of authority” (as articulated by Hanna Arendt),¹ or Voegelin’s “social disorder,” which he refers to as a “Western apocalypse,”² or MacIntyre’s modernist “emotivism,” of which virtue’s decline (he argues) is a symptom.³ This is so because the social contract – or at least this formulation of it -

¹ See text associated with note 188, Chapter 1.

² See text associated with note 220, Chapter 1.

³ See text associated with notes 209-211, Chapter 1.

is itself a centrepiece of the so-called liberal-democratic project. These critiques, which opine the loss of a transcendental or teleological underpinning to social arrangements in the modernist world, generally do not figure liberalism to be compatible with *any* solution to the so-called crisis. In his dissatisfaction with liberalism's atomized individualism, MacIntyre, for example, is criticized for being antiliberal and for relying upon "picture-window nostalgia"⁴ for a lost *telos*. And Voegelin sees the liberal political tradition and the tradition of constitutionalism as effectively no more than "deformations of Christian philosophy."⁵ On this point, Voegelin is criticized by David Walsh for failing to recognize Christianity as a foundation that could restore Western social and political order.⁶ Walsh himself considers the crisis of order to be a crisis of the liberal tradition itself; but the Christian foundation of his argument means that this formulation still is coextensive with a crisis borne of a lost *telos*. His view that the crisis reveals a loss of confidence in the idea that a community of free and equal individuals is a sufficient condition for the emergence of a good political order⁷ is, in large part, coincident with MacIntyre's view. Like MacIntyre, Walsh contends that with the disappearance of "...the great overarching virtues of the Western moral tradition..." the very foundations of morality had collapsed.⁸

The crisis that purportedly attends contemporary liberal-democracy is said to be illuminated by many apparent aberrations in the functional architecture of modernist political life. From realist accounts of "deep state" machinations which decry the theatre that saturates the political life of Washington DC – argued to be a performative exercise that has nothing to do with actual

⁴ Holmes, S. (1993) *The Anatomy of Antiliberalism*, at p.121.

⁵ Federici, M. (2002) at p.145.

⁶ *Ibid.*, at p.144.

⁷ Walsh, D. (1997) *The Growth of the Liberal Soul*, at p.16.

⁸ *Ibid.*, at p.27.

decision-making⁹ - to Jacques Rancière's theoretical analysis in *Hatred of Democracy*,¹⁰ which contends that the interests of elites are always incompatible with the universal suffrage of a social contract model of democracy, the fundamental viability of democratic institutions has come to be increasingly in question. But what is not in question is the extent to which those who are so-governed continue to be subjectively invested in the *idea* of democratic government – *and in their place in it* - whatever it is they perceive it to be; and, seemingly, despite the style of political system they happen to live under. In the most recent (i.e., 2010-2014) tranche of data from the World Values Survey,¹¹ respondents (categorized according to country, of a sample of 60 countries) were asked to rate the *importance of democracy* on a ten-point Likert scale (10 = “absolutely important”). In every participating country, except for Rwanda and Singapore, “absolutely important” represented the most commonly-selected response. The mean response did not fall below 7.5 for any country, except for Russia (*mean* = 7.42), Belarus (*mean* = 7.48), and Haiti (*mean* = 6.37). Notably, in China, 81.6% of respondents gave a response of 7 or higher. Similarly, the idea that the right of the people in the respondents' country to choose their leaders in free elections constitutes an *essential characteristic of democracy* (i.e., 10, on a ten-point Likert scale) represented the most frequent response in every country. Notably, the proportion of respondents who selected this response in Australia (64.8%) was exceeded only in the cases of Germany (70.9%), Sweden (75.0%) and Yemen (69.1%).

⁹ See for example, Lofgren, M. (2016) *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government*, at flyleaf.

¹⁰ Rancière, J. (2006) *Hatred of Democracy*.

¹¹ See World Values Survey.

Certainly, in liberal-democracies, such a robust commitment to the idea of institutional democracy by those who are governed under a system of liberal-democracy is familiar; it would be unusual to encounter large numbers of citizens in a liberal-democracy arguing *against* the institution. And that is so despite that people in liberal-democracies characteristically (or, at least, very often) describe low levels of satisfaction with public administration and the performance of government. Again, in the latest World Values Survey results, 54% of Australians reported not-very-much confidence in the civil service, or none-at-all. And 68.3% of Australians expressed not-very-much confidence in the government, or none-at-all; and 69.4% of Australians expressed not-very-much confidence in the parliament, or-none-at-all.¹² These figures, notably, are very similar to those of the United States. In his book *The Myth of the Rational Voter*,¹³ Brian Caplan describes a phenomenon he refers to as *democratic fundamentalism*, which he reports is widespread; “[i]ts purest expression is the cliché, attributed to failed 1928 presidential candidate Al Smith, that ‘All the ills of democracy can be cured by more democracy.’”¹⁴ Citing the research of psychologist Philip Tetlock, he argues¹⁵ that democracy is one of the best examples of what Tetlock calls *sacred values*: values of a such a quality they are considered to be absolute and inviolable.¹⁶ Caplan’s thesis is that (from an economic standpoint) democracy fails because democratic governments do what voters want, where the voters necessarily operate from a basis of popular misconceptions, irrational beliefs and personal biases. Of course, the capacity for rationality on

¹² World Values Survey Wave 6: 2010-2014.

¹³ Caplan, B. (2007) *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*, Princeton University Press, Princeton U.S.A.

¹⁴ *Ibid.*, at p.186.

¹⁵ *Ibid.*, at p.189.

¹⁶ Tetlock, P. (2003) “Thinking the Unthinkable: Sacred Values and Taboo Cognitions” in 7(7) *Trends in Cognitive Sciences* 320 at p.320.

the part of those who are governed under the institution of liberal-democracy and who are armed with their passions and rights of suffrage has long been a point of concern for students of liberal-democracy. Hirschman speculates that Machiavelli's celebrated distinction between "the effective truth of things' and the 'imaginary republics and monarchies that have never been seen nor have been known to exist'"¹⁷ probably indicated his appreciation of the need for the Prince to account for human nature.¹⁸ In the American context, writers such as John Adams had few illusions:

Plato and his disciples, from the fourth Century Christians, to Rousseau and Tom Paine, have been fully sensible of this Weakness in Mankind, and have too successfully grounded it in their Pretensions to Fame. I might indeed, have mentioned Bolingbroke, Hume, Gibbon, Voltaire, Turgot, Helvetius, Diderot, Condorcet, Buffon, De La Lande and fifty others; all a little cracked! Be to their faults a little blind; to their virtues ever kind.¹⁹

But whilst the vagaries of the human condition will be a point of focus in the remainder of this thesis, the present point to be made is that the legitimacy of the right to consent-or-not is routinely established performatively through the practical crystallization of liberal-democratic government, consequent upon the notional formation of contractual relations under the social contract. Whatever the effect of the arrangement in reality – and whether-or-not the idea of an operating *social contract* is in fact illusory – the narrative which continues to dominate the place and role – and the *establishment* - of government in liberal democracies is one of *service*, and

¹⁷ Hirschman, A. (1977) at p.13.

¹⁸ *Id.*

¹⁹ Letter from John Adams to Thomas Jefferson, 16 July 1814, cited in: Diggins, J. (1984) at p.69.

governance bounded by the rule of law; some variation of: *Of the people, by the people, for the people*. It is from the mutual articulation and acceptance of that narrative that the legitimate expectations of those who hold the right to consent-or-not are afforded normative traction. Consent is a powerful symbolic element, meaningfully accounted for within the negotiated order of democratic societies and is normatively crucial to the perception of legitimacy. As David Beetham so cogently points out, in the contractual paradigm, governments are legitimated through the *act* of consent; and that legitimacy is *not* contingent upon those qualities of the individual who so-consents (or not), such as his motives or self-interest;²⁰ nor, indeed, is it contingent upon the question of whether he exhibits a suitable rationality. An irrational voter remains a legitimate voter (whatever reliance democratic theory places upon Enlightenment rationality), and a representative elected by an irrational constituency is, nonetheless, legitimately elected and morally bound by the promises by which the trust that anchors that social contract was secured.

Westminster ideals as a continuing basis of legitimacy under the Social Contract

It is this account of legitimacy that concentrates the narrative of government under Westminster; and it is within this narrative that the place of Westminster public administration is carefully accounted for. A fascinating aspect of the experience in Western liberal democracies – to revisit the discussion of Westminster *continuity* from Chapter 3²¹ - is that the narratives regarding the

²⁰ Beetham, D. (2013) at p.95.

²¹ See text immediately following that associated with note 364, and text immediately following that associated with note 373, Chapter 3.

fundamental precepts of Westminster public administration – and how they define the public administration’s relationship with government - have remained an inviolable component of the narratives of modern governments; essentially unchanged since the nineteenth-century. This is so despite that the place and role of public administration in Western liberal democracies and its relationship with government has in fact changed dramatically through the course of the twentieth- and twenty-first-centuries. As Cabinet Secretary in the Blair government, Sir Gus O’Donnell, stated in a speech entitled ‘Our 21st Century Civil Service – Creating a Culture of Excellence,’ which was given at the launch of the *Civil Service Code* (U.K.) in 2006,

Our traditional values of integrity, objectivity, impartiality and honesty are our bedrock.

They are just as important today as when they were first developed and are essential to everything we do, whether it’s policy, delivery or corporate services.²²

Notably, these claims stand as points of legitimacy insofar as the instantiation of the so-called ‘Impartial Public Officer’ is concerned. Richards and Smith argue that the qualities described by O’Donnell reflect a “public service ethos” - a rhetorical device which protects a particular conception of the Civil Service.²³ The discursive maintenance of the public service ethos is crucial to understanding the distribution of power within the Westminster paradigm, on their account. In that sense, and bearing upon questions of continuity, Richards rejects contentions from various commentators that the place of the Westminster paradigm itself has been undermined by the progressive changes initiated by Margaret Thatcher, known colloquially – and herein

²² Sir Gus O’Donnell, ‘Our 21st Century Civil Service – Creating a Culture of Excellence,’ speech to Public Service Reform conference, 6 June 2006, extracted in: Richards, D. (2008) *New Labour and the Civil Service: Reconstituting the Westminster Model*, Palgrave Macmillan, Houndmills U.K, at p.3.

²³ Richards, D., and Smith, M. (2000) “The Public Service Ethos and the Role of the British Civil Service” in 23(3) *West European Politics* 45 at p.51.

earlier referred to²⁴ - as New Public Management (NPM). He argues that a *reconstituted* Westminster model accounts for the changed nature of governance, including as regards the relationship between public servants and ministers, by continuing to draw directly upon the traditional Westminster precepts.²⁵ This point is underscored in the observation of Rhodes et al, that

Northcote-Trevelyan is employed as a myth set up as an ideal and used as a defence of the civil service, less to resist change and more to select the parts that fit with existing administrative philosophies.²⁶

Richards' reconstituted model therefore operates as a 'legitimising mythology' which, he argues, is in the strategic interests of both ministers and civil servants to sustain.²⁷ The dominant narrative of civil servants "...is conditioned by the need to provide an account that continually emphasizes how they have acted with 'constitutional propriety.'"²⁸ This is imperative because "...one of the greatest indictments an official can face is to be accused of acting unconstitutionally by breaking the civil service 'Code of Practice.'"²⁹ Richards and Smith state,

The Whitehall narrative of the civil service is that its members are neutral, permanent and apolitical. They are acting in the public interest and they have a dual loyalty – to the government as a whole and to the minister. The minister is elected and so is answerable

²⁴ See text associated with note 47, Chapter 4.

²⁵ Richards, D. (2008) *New Labour and the Civil Service: Reconstituting the Westminster Model*, at p.6.

²⁶ Rhodes et. al. (2009) at p.161.

²⁷ *Id.*

²⁸ Richards, D., and Smith, M. (2004) "Interpreting the World of Political Elites" in 82(4) *Public Administration* 777, at p.778.

²⁹ *Ibid.*, at p.785.

to the public and therefore officials have a duty of loyalty to the minister. However, officials are neutral and act out of a sense of public service.³⁰

But, at a more fundamental level, ‘constitutional propriety,’ *qua* the impartiality of public officers, is imperative because it is requisite to the proper operation – and *legitimacy* - of the social contract. Here, the entire edifice of Westminster constitutional democracy in all its forms is at stake. The narrative is, in effect, an articulation of constitutional theory, in which civil servants are “simply the bearers of structures;”³¹ put differently, civil servants at once represent - and also operate wholly within - the structure represented by the social contract, articulated for present purposes by the principles of *trust*, *legitimacy*, and *consent*.

Ministers, on the other hand, are actors who are capable of making decisions; their narrative (and imperative) is to demonstrate control in the department and parliament.³² While the respective narratives of ministers and civil servants are contrasting (i.e., as Weber would have it), they nonetheless are aggregates of the Westminster tradition.³³ The respective narratives, taken together, conform to the overarching principle of public administration neutrality as a necessary incident of ministerial responsibility; this arrangement itself simply reflecting - as was mentioned in Chapter 3 – a functional extension of the rule of law; evidencing its application to both ministers and public servants equally.³⁴ But as “*a priori* guiding principles,” the Westminster precepts are confronted by an ineradicable tension between the problems of devising a system

³⁰ *Id.*

³¹ *Ibid.*, at p.787.

³² *Ibid.*, at p.784.

³³ *Ibid.*, at p.798.

³⁴ See text associated with note 358, Chapter 3; See Dicey, A. V. (1897) *Introduction to the Study of the Law of the Constitution*, 5th Ed., at p.307.

“...flexible enough to cope with alternating periods of calm and conflict...” and the reconciling of its practice to real-world imperatives³⁵- and particularly those of the human condition.

Regulation of ethics by tradition – the British experience

The task of reconciling these issues is further complicated by the politico-philosophical imperatives which sit at the base of competing interpretations of “the good” and other universals. This becomes particularly evident when one considers the formulation of the “ethical” framework according to which the Impartial Public Officer came to be expected to conduct himself. This component of the Westminster doctrine, as was averred to in Chapter 3, was not a part of the original Northcote-Trevelyan formulation, but has been credited by various commentators to the work of the Victorian Idealist T. H. Green.³⁶ Green’s idealism might be argued to constitute a perfect modernist confection of the autonomous self, cast in the role of Impartial Public Officer. For him, “self-realization” realizes, itself, a virtuous connection to society which enables the common good. The virtuous embodiment of the Westminster public official is found in his statement:

³⁵ Massey, A. (1993) *Managing the Public Sector: A Comparative Analysis of the United Kingdom and the United States*, at p.1-2.

³⁶ *Ibid.*, at p.36. See also, for example: Richter, M. (1964) *The Politics of Conscience: T. H. Green and His Age*; O’Toole, B. (1990) “T. H. Green and the Ethics of Senior Officials in British Central Government” in 68(3) *Public Administration* 337.

The real function of government...[is]...to maintain conditions of life in which morality shall be possible, and morality consisting in the disinterested performance of self-imposed duties...³⁷

In Green's positively Aristotelian formulation, the *agentic* Impartial Public Officer is possible because, as O'Toole observes, "...for him, personal good, properly understood, is *part of* the 'common good,' and does not take into account personal considerations."³⁸ On considering Green's formulation in respect of the place of government, O'Toole notably states:

Although all people are called upon to lead a moral life, there is one group of people upon which it is particularly incumbent to act with these moral principles in mind: the governors, both politicians and officials. Government is, after all, called upon to create the conditions in which morality shall be possible.³⁹

On this reading of Green, Massey observes that "[t]he role of senior public officials is almost the Platonic one of the Guardian class."⁴⁰ In similar fashion to the *Values* and the *Code* in the Australian context, the Platonic flavor of those principles of conduct demanded of officers of the British Civil Service is evident in *The Seven Principles of Public Life*. These are promulgated in the *First Report of the Committee on Standards of Public Life* (the Nolan Report).⁴¹ The articulated principles include: *Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty*, and

³⁷ Green, T. (1895) *Lectures on the Principles of Political Obligation*, at pp.39-40.

³⁸ O'Toole, B. (1990) at p.340; citing Milne, A. (1962) *The Social Philosophy of English Idealism*, at pp.100-106.

³⁹ *Id.*

⁴⁰ Massey, A. (1993) at p.36.

⁴¹ Nolan, Lord B., and Breña, G. (1995) *Standards in Public Life: The First Report of the Committee on Standards in Public Life*, HM Stationary Office, London U.K.

Leadership.⁴² In accordance with the principles, holders of public office are to take decisions “...solely in terms of the public interest.”⁴³ In truly archetypal fashion, a 1928 inquiry into Civil Service corruption declared:

...the State is entitled to demand that its servants shall not only be honest in fact, but beyond the reach of suspicion of dishonesty.⁴⁴

If, indeed, it is correct to say that T. H. Green’s idealism provided the template for the personage of the Impartial Public Officer as *exemplar* of the selfless constitutional propriety demanded of the incumbent civil servant, then his creation must be seen as nothing short of an ideal: the *archetype* man of dutiful character. The attendant characteristics of this Victorian construction constitute an incident of his membership of that cohort. For that reason, the conventions which attended the Westminster edifice were not seen to require codification, if, indeed, that were at all possible. Victorian *men of character* brought propriety with them as a nominal function of their persona. And the logic of this narrative comports with those narratives that have regarded the operations of Westminster institutions as largely uncorrupted in practice. A persistent claim regarding periodic suggestions that a code of ethics might be required in the British context has run along the following lines:

It has never been thought necessary to lay down a precise code of conduct because civil servants jealously maintain their professional standards. In practice the distinctive

⁴² *Ibid.*, at p.14.

⁴³ *Id.*

⁴⁴ Fisher, W. *et al.* (1928) *Report of the Board of Enquiry Appointed by the Prime Minister to Investigate Certain Statements Affecting Civil Servants*, Cmd. 3037, London, HMSO; cited in Doig, A. (1996) “From Lynskey to Nolan: The Corruption of British Politics and Public Service” in 23(1) *The Corruption of Politics and the Politics of Corruption* 36 at p.39.

character of the British Civil Service depends largely on the existence of a general code of conduct which, although to some extent intangible and unwritten, is of very real importance.⁴⁵

Questions about the prevalence of breaches of ethics in the British context – more often tending to be thought of as acts of (non-petty) corruption in practice – intersect with the theoretical paradigms through which official conduct is perceived and understood. So, some commentators argue that Thatcher's program of policies, generally interpreted as NPM, start from a public choice theoretical perspective which sees public officials as individuals who are utility maximizers, motivated by self-interest.⁴⁶ David Miller notes that, in at least some versions of public choice theory, the whole idea of public service itself is corrupt.⁴⁷ Alternatively, from the perspective of constitutional theory, the ethical conduct of public officials is understood in structuralist terms, with departures from ethical conduct understood as individual failings⁴⁸ by perpetrators distinguishable as *bad apples*.

From this perspective, for the individual constructed as the Impartial Public Officer, official deportment in the context of *standards of conduct* is both the guarantee of the individual's character and an elemental component of the British political tradition. As Alan Doig discusses, the propensity of the British Civil Service – and that of various British government parliamentary committees and inquiries through the twentieth-century – to persistently invoke the essential

⁴⁵ *Civil Service Pay and Conditions of Service Code: Establishment Officers' Guide*, cited in Chapman, R. (Ed.) (1992) *Ethics in Public Service*, at p. 104.

⁴⁶ See, for example, Richards, D., and Smith, M. (2000) at p.60.

⁴⁷ Miller, D. "Neoliberalism, Politics and Institutional Corruption: Against the 'Institutional Malaise' Hypothesis" in Whyte, D. (Ed.) (2015) *How Corrupt is Britain?*, at p.60.

⁴⁸ *Id.*

place of *standards of conduct* in British public life, is a direct reference to the same historical formulation constitutive of that equivalent and necessary incident of the Victorian gentleman of character.⁴⁹ As was discussed in Chapter 3, entry to the intellectual ranks of the Civil Service brought expectations of character and the refinements understood as the qualities of manliness, duty and honour: “...almost total reliance was placed on the sense of honour and perceptions of propriety that were supposed to be the mark of a gentleman.”⁵⁰ Quibbles with proposals for codes of ethics arose, Doig notes, because “[f]ormal rules...were *supplementary*⁵¹ to the sense of duty and rectitude that existed before recruitment, and bound politicians and officials in a shared culture (albeit male, public-school, and Oxford- or Cambridge-dominated).⁵² Those who populated this strata of British society saw themselves as the exemplars of moral standards, and their regard for their contemporaries brought with it “...the assumption of and faith in the high levels of personal conduct of those in public life.”⁵³ Not only did this rhetoric constitute the internal narrative of this Civil Service and government cohort, but its attendant practice and ideology also shaped public attitudes towards and expectations of the Civil Service and its moral standards.⁵⁴ Those expectations, indeed, are coextensive with the expectations that arise out of the crystallization of trust and the establishment of legitimacy in the social contract.

This commonplace view of the institutions of the British political tradition has, in more recent times, been widely criticized. Richards, Smith and Hay state of it, for example,

⁴⁹ Doig, A. (1996) at p.37.

⁵⁰ *Ibid.*, at p.38.

⁵¹ My emphasis.

⁵² Doig, A. (1996) at p.38.

⁵³ *Ibid.*, at p.40.

⁵⁴ *Ibid.*, at p.38.

...for those with long memories, a popular refrain, not exclusive to the political class, was that 'Britain had the best armed forces, police force, judiciary, civil service [or any of the above] in the world.' Supporting evidence substantiating such claims was mainly conspicuous by its absence and was more often than not the product of a still lingering imperial superiority.⁵⁵

As the title of their book suggests, they note a striking contrast with historical appraisals of propriety within British public institutions, and the current perceptions which paint a dramatically different picture:

...a continual flow of stories of misjudgment, mismanagement and at times illegality. There are also other institutional pathologies that the constraint of a single volume has not afforded the opportunity to explore: child protection; failures of hospitals within the NHS; reoccurring crises in education...⁵⁶

The authors cast these developments in terms of "institutional crises" and contend that they now pervade "...what were once seen as venerable and trusted institutions in both a contiguous and recurrent fashion."⁵⁷ They say "[t]he new zeitgeist is framed by a climate of public distrust and suspicion forged on a view that institutions prioritize self-interest over the public good."⁵⁸ The trajectory of this evolution of public trust is particularly evident in the long-standing battle to control information and communications in British public institutions. David Vincent argues that the revelations of government-sanctioned espionage in 1844, expedited through its postal

⁵⁵ Richards, D., Smith, M., and Hay, C. (Eds) (2014) *Institutional Crisis in 21st Century Britain*, at p.256.

⁵⁶ *Ibid.*, at p.257.

⁵⁷ *Ibid.*, at p.2.

⁵⁸ *Id.*

services in relation to an Italian exile, Joseph Mazzini, heralded the beginning of a tradition of public secrecy⁵⁹ which would extend to contemporary times. He notes that when the revelation surfaced, the radical MP Thomas Duncombe presented a petition to the House of Commons protesting the introduction of “the spy system of foreign states,’ which was ‘repugnant to every principle of the British constitution, and subversive of the public confidence, which was so essential to a commercial country.”⁶⁰ The subsequent revelation that the letters of MPs were also being opened led, he says, to a more extensive interrogation in the Commons and the Lords of official secrecy “...than was to be permitted again for well over a century.”⁶¹ There had pervaded a fear that government and its ministers were overturning established safeguards and undermining public accountability for official secrecy. But once MPs became aware that their own privacy might have been violated,

...their indignation at the prospect of lowly Post Office clerks feasting their eyes on the domestic communications of honourable gentlemen could scarcely be contained.⁶²

For his part, the Home Secretary, Sir James Graham, declared his respect for public opinion and the respect due to his office, but otherwise declared “I absolutely demure to entering into any explanation on the subject. I demur even to a Committee of the House as a tribunal before which to prosecute such an inquiry.”⁶³

⁵⁹ Vincent, D. (1998) *The Culture of Secrecy: Britain 1832-1998*, at p.2.

⁶⁰ *Ibid.*, at p.1. See also Smith, F. (1970) “British Post Office Espionage, 1844” in 14(54) *Historical Studies* 189 at p.194.

⁶¹ *Ibid.*, at p.2.

⁶² *Ibid.*, at p.19.

⁶³ Smith, F. (1970) at p.195.

Vincent contends that it is a “core element” of the executive mentality that governments may conceal the truth from citizens “in the citizen’s own best interests.”⁶⁴ In the context of the British public administration’s tradition of “honourable secrecy,” commentators have more recently cast “...the well-known secrecy and unaccountability”⁶⁵ of the British state as “the British disease”⁶⁶ with an established history.⁶⁷ Miller says of this phenomenon,

There is something particularly secretive and closed about the UK system of governance, compared with other systems such as that of the United States, Canada and Australia. To understand this it is important to understand the sinews of secrecy and the elitist history of the British system of government – a system which made very significant efforts to protect elite power in the face of the democratic reforms which gave all adults the vote, a reform only finally won in 1927.⁶⁸

The close control of information by British public institutions was not simply a necessary incident of governance, says Vincent; the distribution of power and its control was a central factor in the resort to it. He argues that the control exercised over the distribution of information was symptomatic of the efforts of the British establishment elite to deny the extension of democracy to the lower orders.⁶⁹ Vincent argues that it reflected confidence and insecurity in equal measure, and represented the institution of artificial barriers “[a]s formal marks of rank and privilege faded and as the lower orders were admitted to the outer reaches of the political nation and the lower

⁶⁴ Vincent, D. (1998) at p.271.

⁶⁵ Whyte, D. (Ed.) (2015) at p.59.

⁶⁶ Vincent, D. (1998) at p.315.

⁶⁷ Whyte, D. (Ed.) (2015) at p.62.

⁶⁸ *Ibid.*, at p.66.

⁶⁹ See Whyte, D. (Ed.) (2015) at p.62.

rungs of the meritocratic ladder.”⁷⁰ In an observation reminiscent of Plato’s formulation of the Guardian class’ monopoly over reason and knowledge (and, therefore, the right to rule) as characterized by Ellen Meiksins Wood,⁷¹ Vincent states:

The more open the competition for authority and status, the more resolute was the attempt to police the boundaries of character and knowledge.⁷²

But what this brought, also, he contends, was an erosion of the very trust required from those in respect of whom that knowledge was withheld; knowledge that was required, according to the liberal model, in order for them to function effectively as citizens.⁷³ Vincent argues that it is only the authentic compliance of civil servants with those principles referred to herein as ‘constitutional propriety’ that could ensure abuses of official secrecy did not occur. Many commentators contend that British public institutions observed a remarkable standard of propriety in the discharge of their official work. Other commentators suggest otherwise. Miller, for example, states “[t]here has always been corruption in government, public institutions and indeed business in the United Kingdom.”⁷⁴ To the extent corruption in contemporary times appears to be more extensive and more intense than in times past, Anthony Giddens argues that this is simply a function of ‘visibility;’ that is, the dramatic escalation in access to information now enjoyed by the general public.⁷⁵

⁷⁰ Vincent, D. (1998) at p.315.

⁷¹ See text associated with note 93ff, Chapter 1.

⁷² Vincent, D. (1998) at p.315.

⁷³ *Ibid.*, at p.320.

⁷⁴ Whyte, D. (Ed.) (2015) at p.64.

⁷⁵ *Ibid.*, at p.67.

The redoubtable British commitment to constitutional propriety so often remarked upon has itself been the subject of claims of dissonance, as has been the case in the Australian example addressed in Chapter 4. Richards and Smith argue that there exists an observable dissonance between claims to this effect, and the rhetoric of government ministers and public servants, and reality.⁷⁶ An example is to be seen in contrasting accounts of British efforts to ensure the proper operation of the civil service. Richard Chapman, for example, states:

Until recently, the British civil service was generally thought, by those who served in it, to be the best in the world... The service was, for many years, politically neutral in a partisan sense: officials did not change with governments. Over a considerable period of time, they developed a professional pride with ethical standards that were generally learned not from formal training sessions or from codes or statements that had the status of law, but from socialization and learning from experience.

Many of these good qualities were achieved piecemeal, over long periods of time... The piecemeal development of the high standards achieved by the British civil service was largely the result of pressures for efficiency in the nineteenth century and early years of this century. This is well illustrated in the reports of commissions and committees of inquiry, including the Northcote/Trevelyan Report of 1854, the Playfair Report of 1875, the Riddle Report of 1888, the MacDonnell Report of 1914. Together, the implemented recommendations from these and other internal Treasury reports resulted in effective Treasury control over civil establishments and high standards of management within

⁷⁶ Richards, D., and Smith, M. (2000) at p.47.

government departments. These were thought to be necessary but not sufficient features of a good civil service. The service also developed in other, less tangible, ways... Perhaps the most important characteristic of the British civil service developed in this century was its sense of unity.⁷⁷

Alan Doig, on the other hand, observes that political aspirants (i.e., members of the political élite) of the late-nineteenth- and twentieth-centuries recognized the importance of public appearance, and the need that it be seen to coincide with the requisite standards of conduct. To that end, he observes, they exercised a “discretion against discovery” and adhered to a code of “complicitious tolerance,” abetted by other political élites.⁷⁸ In this, what was at stake, was “...the moral indignation of the lower middle class.”⁷⁹ He notes various examples of scandals and instances of impropriety resulting in formal investigations and inquiries to which decision-makers in the Commons and civil service responded with resistance to recommendations for reform, and inertia and uninterest regarding both the implementation of inquiry recommendations and the wider implications of the conduct complained of. Doig reviews a litany of inquiries, including: a parliamentary select committee inquiry into the “Marconi scandal” (1912) involving ministers of the Crown engaging in insider-trading; both quasi-judicial and internal inquiries (1921; 1928) regarding alleged bribery and currency speculation on the part of senior civil servants; an internal inquiry regarding a senior civil servant negotiating an employed position in an industry he regulated (1936); the Lynskey Tribunal inquiry and a subsequent parliamentary committee inquiry investigating corruption in government in relation to lobbying and intermediaries (1948;

⁷⁷ Chapman, R. (1992) “The End of the Civil Service?” in 12(2) *Teaching Public Administration* 1 at pp.1, 2.

⁷⁸ Doig, A. (1996) at p.37.

⁷⁹ *Id.*

1950); a 1969 select committee investigation into government members accepting benefits from industry; and two inquiries – one a Royal Commission - resulting from the “Poulson scandal” (the Redcliffe-Maud inquiry and the Salmon inquiry) investigating “entrenched and extensive networks of local government corruption and influence-peddling” encompassing also Parliament and several higher-order public-sector organizations.⁸⁰ Many other inquiries and investigations into misconduct perpetrated at lower echelons of the public administration infrastructure also took place during this period.⁸¹ Many of the inquiry findings affirmed that there was nothing fundamentally wrong with the political or administrative culture; this, notwithstanding warnings from within the Commons of the growing dangers of corruption.⁸² Various of the inquiries exposed a plethora of systemic, cultural and procedural information showing the potential for corruption.⁸³ The findings of later inquiries revealed failures to take seriously and implement recommendations of earlier inquiries.⁸⁴ On the tail-end of this line of inquiries, the Nolan Committee was established, says Doig, in the face of an array of concerns, including:

Changes in organization and structure of the public sector...attitudes to public office, the culture of the public service, and the delivery of public services that...[had]...fragmented the ethical environment, exposed the weaknesses of uncoordinated, static, weakly-applied, and even more weakly-policed standards of conduct, and allowed those who wish to do so to exploit their public position for personal or party advantage.⁸⁵

⁸⁰ *Ibid.*, at pp.38-46.

⁸¹ *Ibid.*, at p.39.

⁸² *Ibid.*, at pp.40, 41.

⁸³ *Ibid.*, at pp.45-6, 47.

⁸⁴ *Ibid.*, at p.47.

⁸⁵ *Ibid.*, at p.52.

He states:

The establishment of the Nolan Committee...would appear to be at the end of a long slide in the failure by inquiries and governments to address the question of standards in public life.⁸⁶

But the Committee, he says, attempted to deny the generality of the concerns it was charged to address by arguing that public perception was based on perceptions and beliefs rather than ‘supported by the facts.’⁸⁷ Meanwhile, senior civil servants, Doig says, continued to insist that the core public service values remained intact.⁸⁸ Tim Slessor argues that “[c]ollective allegiance to an ‘agreed line’ is a Whitehall necessity,”⁸⁹ this reflecting one mode of “unity” perhaps not intended in Chapman’s use of the term.⁹⁰ He argues that in relation to numerous scandalous events in British government and civil service history, an “Infallibility Syndrome” characterizes the management of official public responses to outcries about misconduct.⁹¹ Slessor says this syndrome should be understood in the same terms as Papal Infallibility.⁹² As a strategy to maintain a perception of legitimacy regarding one’s control over public institutions, this makes sense. In strategic terms, conceding fallibility – where, say, the relevant circumstances cannot reasonably be denied – so that a bad apple is acknowledged and ‘appropriately’ dealt with, may be possible without risking the overall veil of inherent propriety. However, to concede fallibility as necessarily an inherent feature or potentiality of all those who comprise the “keepers of the

⁸⁶ *Ibid.*, at p.51.

⁸⁷ *Ibid.*, at p.52.

⁸⁸ *Ibid.*, at p.48.

⁸⁹ Slessor, T. (2002) *Ministries of Deception: Cover-ups in Whitehall*, Aurum Press, London U.K., at p.289.

⁹⁰ See text associated with note 77, this chapter.

⁹¹ Slessor, T. (2002) at p.293.

⁹² *Id.*

public interest” – as a cohort - where membership of that cohort is itself taken to evidence a requisite minimum *personal standard of conduct*, would be to risk the legitimacy of the very edifice upon which trust in the social contract is invested.

Many of the afore-described examples suggestive of improper conduct in the Westminster contexts of both the APS and the British Civil Service appear to stand – in a generalized sense - well within that “reach of suspicion of dishonesty” warned of by Sir Warren Fisher in 1928.⁹³ As with the equitable principle: *Not only must justice be done; it must be seen to be done*, the importance – from a political realist standpoint - of *perception*; in this case, that of those who are governed and who carry the right to consent-or-not, stands large. The persistence of dissatisfaction in relation to perceived failures of compliance on the part of public officials is attended – at an analytical level – by questions about whether the promulgated *standards of conduct* - be they traditional or codified - are within the reach of the mortal public officer in any realistic sense. Insights from a range of disciplines offer a way into these issues that can provide depth to the traditional politico-philosophical viewpoint.

That the satisfaction of promissory obligations under a public-sector code of conduct – seen for our purposes as an incident of the social contract - might be perceived by some to be a function of virtue⁹⁴ coincides with a substantial body of philosophical thought and political theory in the liberal-democratic tradition, as the foregoing chapters make evident. The post-Enlightenment conceptions of dispositions of character, maintained since the nineteenth-century and given

⁹³ See text associated with note 44, this chapter.

⁹⁴ i.e., Heintzman, R.; Macaulay, M., & Lawton, A.; and Pusey, M.; See, text associated with notes 68-71ff, Chapter 4.

scientific credence – if only indirectly - through the evolving discipline of psychology and the psychological construct of personality, has afforded virtue, and *virtue ethics*, an impressive contemporary longevity, whatever its travails in the face of rising secularism and virtue's contemporaneous nineteenth-century decline. As was discussed in Chapter 3, the concept of virtue was seen to endure progressively diminishing leverage as a basis for moral appraisal, evidenced in its declining usage through the course of the nineteenth-century. The rise of Enlightenment rationality is broadly credited with playing a major role in precipitating virtue's decline. The rise of 'manners' in the wake of the Glorious Revolution – a product of the declining fortunes of the ranks of lower-class landed interests - has been argued to have filled this gap for a time. But manners eventually gave way to 'character' as the dramatic social changes of the nineteenth-century, which stressed the Protestant Ethic emphasizing work and producer values,⁹⁵ brought a common acceptance of the notion of a morally autonomous, agentic self. This, along with a concomitant and escalating emphasis upon objectivity and measurability, saw the individual come to be conceived in terms of 'personality,' and character re-construed as scientifically-established 'traits.' Nonetheless, the rise of the discipline of psychology and counterpart analytical disciplines of sociology and anthropology have also brought significant challenges to the idea that compliance with a promissory obligation might be, at the end of the day, down to virtue.

⁹⁵ Higham, J., and Conkin, P. (Eds.) (1979) at p.214.

Moral Psychology: Cognition, Virtue, Moral Reasoning, and the Rise of the *Moral Self*

The establishment of the *self* as a psychological construct within the discipline of psychology, and as an interpretative basis for ethnographic life, has not been the subject of a uniform trajectory. As Monin and Jordan observe, for decades, in relation to the question of a moral self, moral psychology did not include the self within its analytical paradigm. For the most part, it focused instead “...on *moral reasoning* and on the cognitive underpinnings of decisions about right and wrong.”⁹⁶ The preoccupation of this developing strand of psychology was with the ongoing question of when and why people act in the service of human welfare,⁹⁷ or, as Hardy and Carlo describe it, the question of “[w]hat is at the root of heroism and lifelong moral commitment?”⁹⁸ These questions must surely bear directly upon any claim that virtue is what animates compliance with obligations directed at the public good; from an Aristotelian standpoint – or, at least, a rationalist modern-day interpretation of one – practical rationality informs voluntarist choice in the implementation of the *Values* and the *Code* for the sake of the *Values* and the *Code*. And the dispositions of the actor who makes the choice determine whether the choice is made according to virtue.

The rising discipline of psychology brought with it the promise that the ambiguity which had historically attended philosophical accounts both of voluntarist conduct,⁹⁹ as well as the

⁹⁶ Monin, B., and Jordan, A. “The Dynamic Moral Self: A Social Psychological Perspective” in Narvaez, D., and Lapsley, D. (Eds.) (2009) *Personality, Identity and Character: Explorations in Moral Psychology*, at p.340.

⁹⁷ Aquino, K., and Reed, A. (2002) “The Self-Importance of Moral Identity” in 83(6) *Journal of Personality and Social Psychology* 1423 at p.1423.

⁹⁸ Hardy, S., and Carlo, G. (2011) “Moral Identity: What is It, How Does It Develop, and is It Linked to Moral Action” in 5(3) *Child Development Perspectives* 212 at p.212.

⁹⁹ See, for example, text immediately following note 304, Chapter 3.

invocation of will as the animating mechanism of the social contract,¹⁰⁰ might be obviated through the scientization of the concept of disposition. Empirically-established human traits could now vindicate and afford efficacy both to rationalist accounts of consent and to the idea that representatives of the state were capable of complying impartially with their promissory obligations.

The social-cognitive perspective (for example), originally proposed as a cognitive-behavioral perspective by Piaget, and later extended by Kohlberg, takes as its central tenet the view that the sophistication of a person's moral reasoning predicts his or her moral behavior.¹⁰¹ Kohlberg's Stage Theory is a universalistic attempt to construct human moral reasoning in terms of predictable stages of maturation in cognition-based reasoning. He proposed six developmental stages of cognitive maturation. His methodology involved the presentation to subjects of hypothetical moral dilemmas as a basis by which to assess the subject's reasoning about his or her proposed course of action in response.¹⁰² Kohlberg's theory emphasized a very specific relationship between cognitive processes, moral thought, and action, hypothesizing that, at higher stages of cognitive development, moral thought and behavior coincide more fully.¹⁰³ In relation to the agent who has a highly-developed level of reasoning, Kohlberg argues, "...he who knows the good chooses the good,"¹⁰⁴ so-emphasizing a direct relationship between cognition and will in the context of moral reasoning (or at least at its higher stages in his model).

¹⁰⁰ See text associated with note 165, Chapter 2.

¹⁰¹ *Id.*

¹⁰² Berk, L. (1991) *Child Development – 2nd Edition*, at pp.486-7.

¹⁰³ *Ibid.*, at p.500.

¹⁰⁴ Kohlberg, L. (1981) *The Philosophy of Moral Development: Moral Stages and the Idea of Justice*, at p.189.

Among a range of aspects of Kohlberg's theory that have drawn significant criticism,¹⁰⁵ his arguments supporting the idea of a direct link between cognitive process and action – a mechanism that could potentially vindicate rationalist voluntarist conceptions of human action – have been criticized as misconceived. Whilst he acknowledges Kohlberg's basic theoretical point that higher-stage subjects are more likely to act in accordance with their judgments than lower-stage subjects (such as children),¹⁰⁶ Roger Straughan considers that Kohlberg's hypothetical "moral dilemmas" constitute an unreliable guide insofar as real-life morality is concerned.¹⁰⁷ Straughan identifies subjects' self-reported reasons for action – which Kohlberg takes to represent choices defined by the subjects' stage of moral reasoning – as being justificatory statements of moral judgment that say nothing about the subjects' motivations to act;¹⁰⁸ which motivation, he contends, must include the essential ingredients of real-life moral decisions, including motives, feelings, wants and emotions (all of which may run counter to hypothetical reasoning and judgments).¹⁰⁹

The socio-cognitive perspective is a development on this, coming out of Albert Bandura's research on moral disengagement.¹¹⁰ Hardy and Carlo observe that several factors explain the development of this psychological perspective, beyond the construct of moral reasoning, to one more focused upon the self as an operating entity.¹¹¹ Augusto Blasi, for example, established that

¹⁰⁵ See Flanagan, O. (1991) *Varieties of Moral Personality: Ethical and Psychological Realism*, at pp.185-191.

¹⁰⁶ Straughan, R. "Why Act on Kohlberg's Moral Judgments? (Or How to Reach Stage 6 and Remain a Bastard)" in Modgil, S., and Modgil, C. (2012) *Lawrence Kohlberg: Consensus and Controversy*, at p.156.

¹⁰⁷ *Ibid.*, at p.150.

¹⁰⁸ See *Ibid.*, at p.152ff

¹⁰⁹ *Ibid.*, at pp.150-1.

¹¹⁰ See Bandura, A. (1999) "Moral Disengagement in the Perpetration of Inhumanities" in 3 *Personality and Social Psychology Review* 193.

¹¹¹ Hardy, S., and Carlo, G. (2011) at p.212.

moral action is predicted only to a modest extent by moral reasoning.¹¹² On this point, Walker and Frimer note the accumulated evidence indicating that typically only about ten percent of the variability in moral action is explained by cognitive function processes;¹¹³ a result that problematizes the theoretical reliance by cognition-based perspectives - such as Kohlberg's - upon the idea of a generally-linear relationship between cognition and action as the primary index of moral functioning. In addition, several researchers including Colby and Damon have established that even highly-moral people often do not exhibit sophisticated moral reasoning capacities.¹¹⁴

These findings, and the models proposed in light of them, move away from the concept of moral reasoning in that they are represented by a *self*-related construct now known as *moral identity*. This research addresses the question of moral *motivation*, mapping-out two distinct approaches. One perspective seeks to describe a general personality structure shared by widely recognized moral exemplars, or else it looks to describe individual differences in the extent to which morality is central to one's personal goals.¹¹⁵ Monin and Jordan refer to the former as a "personological approach." The second approach they describe as a "social-psychological approach," which they say complements the personological approach by accounting for the situational malleability of moral self-regard, or one's self-perceived moral standing at any given moment.¹¹⁶ Shao and

¹¹² See Blasi, (1980) "Bridging Moral Cognition and Moral Action: A Critical Review of the Literature" in 88(1) *Psychological Bulletin* 1.

¹¹³ Walker, L., and Frimer, J. (2007) "Moral Personality of Brave and Caring Exemplars" in 93(5) *Journal of Personality and Social Psychology* 845 at p.845.

¹¹⁴ See Colby, A. and Damon, W. (1992) *Some Do Care: Contemporary Lives of Moral Commitment*.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Aquino, et al, refer to these respectively as “the character perspective” and the “social-cognitive perspective.”¹¹⁷

It is through a concept such as that of moral identity that theoretical moral psychology might afford (applied) philosophical accounts of virtue the possibility of a scientized, legitimating basis from which a disposition to act in the public good might be conceived, constructed and articulated. In terms of “virtues” that are coincident with such an objective within a public institutional context, institutional theory, as articulated by Hinings et al, conceives these objectives in terms of archetypal *values*, which serve a legitimating role and are, themselves, constitutive of organizational structure.¹¹⁸ This standpoint draws on the important relationship that is argued to exist between values and structure.¹¹⁹ In this sense, their approach represents a departure from Kohlberg’s model which emphasizes moral reasoning over moral content. Kohlberg criticized what he referred to as Aristotle’s “bag of virtues,”¹²⁰ which he saw as ‘content’ essentially *comprising* moral character; content which he believed did not exist.¹²¹ Jonas observes that Kohlberg’s theoretical approach was, alternatively, “Socratic” or “Platonic,” supervening all Aristotelian virtues (and the Aristotelian advice to *practice* them) with only one: *Justice*.¹²² Kohlberg, he notes, believed one did not habituate to virtue; rather, one developed

¹¹⁷ Shao, R., Aquino, K., and Freeman, D. (2008) “Beyond Moral Reasoning: A Review of Moral Identity Research and its Implications for Business Ethics” in 18(4) *Business Ethics Quarterly* 513 at p.513.

¹¹⁸ Hinings, C., Thibault, L., Slack, T., and Kikulis, L. (1996) “Values and Organizational Structure” in 49(7) *Human Relations* 885 at p.889, 890.

¹¹⁹ *Ibid.*, at p.890.

¹²⁰ Kohlberg, L. “Education for Justice: A Modern Statement of the Platonic Views” in Gustafson, J. (1970) *Moral Education: Five Lectures*, at p.59.

¹²¹ *Ibid.*, at p.63.

¹²² Jonas, M. (2016) “Plato’s Anti-Kohlbergian Program for Moral Education” in 50(2) *Journal of Philosophy of Education* 205 at p.205.

knowledge of it.¹²³ In constructing his theory of cognition and will-to-action, Straughan argues that Kohlberg never adequately dealt with the common disjunction between principle and inclination.¹²⁴ Kohlberg's insights regarding motivation, from that standpoint, are ultimately less nuanced, for example, than those exhibited by Saint Augustine in his despair for his recalcitrant will.¹²⁵

The socio-cognitive perspective's categorization of personality structure according to moral exemplars resonates with the basic logic of the "values-based" approach of modern public administration that provides the conceptual framework for the *Values* and the *Code*. Moral exemplars, such as *honesty*, *integrity*, and *impartiality*, stand as imperative *standards of conduct* enshrined within the Westminster motif. Seen intimately from Westminster's perspective, they are self-consciously elucidated paradigmatic conditions constitutive of the basis for consent, insofar as the place and conduct of public administration in the mould of liberal democracy is concerned. They are held-out by Westminster as make-or-break gauges of trust, and, so, of the success-or-failure of the social contract; and as claims to a promised *standard of conduct*, they are imperative.

Personality Psychology – *Scientific* Personality, Traits, & the Displacement of *Moral* Character

As was mentioned in Chapter 2, the modern-day revival in virtue ethics is widely-taken to have been inspired by Gertrude Anscombe's complaint in 1958 that modern moral philosophy has

¹²³ *Ibid.*, at p.206.

¹²⁴ Modgil, S., and Modgil, C. (2012) at p.150.

¹²⁵ See text associated with note 40, Chapter 3.

become incoherent.¹²⁶ For Anscombe, modern moral philosophy is the product of Enlightenment sensibilities divested of any conception of God as lawmaker. A “law-conception” of ethics arose out of the Enlightenment that stood outside the framework of Aristotelian virtue and Christian ethics, to which end the use of terms such as “ought” and “obligation” could make no sense.¹²⁷ By the twentieth-century, the aspiration to live according to God’s likeness had been displaced by the aspiration to *self*-realization. T. H. Green’s conception of those principles of conduct he believed to be emblematic of the Impartial Public Officer saw the convergence of the ideas of self and self-realization with that of moral propriety. For him, moral progress could only ever constitute progress where it succeeded in bringing about “...the harmony of will and reason, in the only form in which it can really exist, *viz. in the character of persons.*”¹²⁸

But the creation of the Impartial Public Officer had come at the dawn of a seismic shift in which the concept of moral *character* would come to be superseded by the new concept of scientific *personality*; a shift that spawned a separate branch of psychology to those of the schools of cognitive-development (discussed above) and behaviorism. As Nicholson describes it in the American context, “[t]he emergence of personality and the decline of character signaled the development of a new kind of American self.”¹²⁹ Character was very much a significant element of the Victorian age in America. In the nineteenth-century, Ralph Waldo Emerson said of it,

Character is...moral order seen through the medium of an individual nature...[t]ime and space, liberty and necessity, truth and thought, are left at large no longer...[a] healthy soul

¹²⁶ See Anscombe, G. (1958) at p.6.

¹²⁷ See text associated with note 7, Chapter 2.

¹²⁸ Green, T. (1895) at p.32. My emphasis.

¹²⁹ Nicholson, I. (1998) “Gordon Allport, Character, and the ‘Culture of Personality,’ 1897-1937” in 1(1) *History of Psychology* 52 at p.52.

stands united with the Just and the True...[t]hus men of character are the conscience of the society to which they belong.¹³⁰

But, in the twentieth-century, notes Nicholson, “Character” smacked of rectitude and prudery.¹³¹ Driven by the rise of the discipline of psychology, impulses that control human behavior and destiny were felt to arise more and more from *within* the individual¹³² rather than as a function of human conformity with some higher moral order. As Susman notes, “[o]ne of the things that makes the modern world ‘modern’ is the development of consciousness of self.”¹³³ He argues that this represented a new *modal type* of self, necessary to meet the needs of changed social conditions and a new cultural order. Susman’s thesis is that cultural development specifically depends for its forms on whatever is the existing vision of *self*.¹³⁴ He states that the nineteenth-century had been a “culture of character,” but the new century brought with it a developing need in public institutions for “objective” and “scientific” gathering of data and treatment of social ills, including the development of psychological and psychiatric studies.¹³⁵ Indeed, noting the publication of Théodule Ribot’s “...first authoritative text on ‘The Diseases of the Personality’” in 1885, Danziger argues that it was the medicalization of so-called ‘personality’ in France that provided the impetus for the later establishment of the *category* of ‘personality.’¹³⁶ Restructuring of industrial methods also played a crucial role. Henry Ford led the way in

¹³⁰ Atkinson, B. (Ed.) (1940) *The Complete Essays and Other Writings of Ralph Waldo Emerson*, at p.369.

¹³¹ Nicholson, I. (1998) at pp.56-7.

¹³² Higham, J., and Conkin, P. (Eds.) (1979) at p.212.

¹³³ *Id.*

¹³⁴ *Ibid.*, at p.224.

¹³⁵ *Ibid.*, at pp.214, 215.

¹³⁶ Danziger, K. (1997) *Naming the Mind: How Psychology Found its Language*, at p.124.

introducing a five-day week to his workforce whilst effectively remunerating it for six-day's work.

He stated in 1914:

The harder we crowd business for time, the more efficient it becomes. The more well-paid leisure workmen get, the greater become their wants. These wants soon become needs. Well-managed business pays high wages and sells at low prices. Its workmen have the leisure to enjoy life and the wherewithal with which to finance that enjoyment.¹³⁷

Indeed, the embryonic field of academic psychology had embraced 'applied psychology' as it applied to the area of advertising and the 'psychology of salesmanship.' Danziger notes that academic psychology adopted the language of the industry and, through its 'scientific' investigations, showed the most effective advertising was that aimed at the creation of new 'wants.'¹³⁸ It was these new ideas of production, consumption, and use, coupled with the ability of individuals to appreciate these changes "...with increasing 'objectivity'" that distinguished the human modality of *character* from the modern modality of *personality* with its "...individual idiosyncrasies, personal needs and interests."¹³⁹

So, Nicholson notes, with the rise of the science of psychology, the psychological category of *personality* referred to the *objective self*;¹⁴⁰ now an entity 'scientifically' determined. The pioneering personality psychologist, Gordon Allport, railed against the use of the term *character* in relation to personality, insisting that it needed to be expunged from the lexicon of scientific

¹³⁷ See Crowther, S. (1926) "Henry Ford: Why I Favor Five Days' Work with Six Days' Pay" in 52 *World's Work* 613 at p.613.

¹³⁸ Danziger, K. (1997) at p.112.

¹³⁹ Higham, J., and Conkin, P. (Eds.) (1979) at p.216, 217.

¹⁴⁰ Nicholson, I. (1998) at p.59.

psychology because it was a 'moral' term. The platform upon which Allport stood was the imperative that the discipline of psychology maintain "value neutrality."¹⁴¹ Allport, went to considerable lengths to distinguish personality and character; the former, in his view, belonging to scientifically-based personality psychology, the latter to morality-based social ethics.¹⁴² Freud had described the effect of this seismic shift in terms of science's impact upon "...the self-love of humanity"¹⁴³ which came, in the first instance, with Copernicus' revelation that the ancient cosmology which placed the earth at the centre of the universe was false.¹⁴⁴ The narcissistic attitude by which man severed the bond of community with the animal kingdom – unlike the creators of ancient myths who recognized no such division¹⁴⁵ – Freud identified as the source of what he saw as a false dichotomy.¹⁴⁶ In addition, he berated the human arrogance with which man equated "the mind" as coextensive with "consciousness."¹⁴⁷ He states,

...mental processes are in themselves unconscious and only reach the ego and come under its control through incomplete and untrustworthy perceptions – [this amounting to]...a statement that *the ego is not master in its own house*;¹⁴⁸

a perspective which brought with it obviously-problematized conceptions of voluntarism, and, therefore, of cognition as a driver of human action.

¹⁴¹ *Id.*

¹⁴² See Allport, G. (1921) "Personality and Character" in 18(9) *The Psychological Bulletin* 441, at p.443.

¹⁴³ Freud, S. "One of the Difficulties of Psycho-analysis" in (1925) *Collected Works Volume 4*, at p.350.

¹⁴⁴ *Ibid.*, at pp.350-1.

¹⁴⁵ See text associated with note 38, Chapter 1.

¹⁴⁶ Freud, S. (1925) at p.354.

¹⁴⁷ *Id.*

¹⁴⁸ *Ibid.*, at p.355.

Danziger notes that, as an embryonic school of thought in search of legitimacy, the discipline of psychology was confronted by a significant competitive tension with the field of psychoanalysis, or ‘depth psychology,’ which enjoyed a heightened popularity in the early decades of the twentieth-century. The psychological category of personality enjoyed a legitimating fillip in its medicalization, rendering it a scientific category by default that could “sail under the flag of science.”¹⁴⁹ However, initially, Danziger notes, it had no way of accounting for the basic disjunction – foundational in depth psychology – between appearance and reality in matters psychological.¹⁵⁰ The scientific methodology based upon questionnaires, rating scales, adjectival checklists, distilled into ‘measurable’ data - upon which the legitimacy of psychology relied - revealed itself as naïve empiricism from the standpoint of depth psychology.¹⁵¹ Where personality psychologists regarded a verbal self-description of an experienced event or a perceived circumstance as “...a trustworthy reflection of what is there to be known,” depth psychology saw a screen or camouflage whose function is to mislead.¹⁵²

But the expansive and ambiguous definitional scope of the psychological category of personality engineered a resolution of this problem by its eventual envelopment of the theoretical space populated by psychoanalysts. ‘Personality’ would come to extend its definitional boundaries to account for areas including organic and inorganic psychopathology, the psychology of de-contextualized human life, and, notably, personality as the aggregate of *traits* reflected in verbal

¹⁴⁹ Banicki, K. (2017) “The Character-Personality Distinction: An Historical, Conceptual, and Functional Investigation” in 27(1) *Theory and Psychology* 50 at p.54.

¹⁵⁰ Danziger, K. (1997) at p.130.

¹⁵¹ *Ibid.*, pp.129, 130.

¹⁵² *Ibid.*, at p.130.

descriptions.¹⁵³ The dimensions of personality that would come to provide a template for the operationalization of this new mode of constructing the self and structuring socio-cultural discourse was provided by the scientific constructs being developed in the discipline of psychology. The cultural shift enabling these developments left room for the retention, essentially, of an Aristotelian conception of human disposition within the evolving scientific structure of personality psychology, in the form of trait theory. As Banicki observes,

The conceptual and theoretical core of personality psychology, both in its scientific and folk versions (Gilbert & Malone, 1995¹⁵⁴; Ross, 1977¹⁵⁵), has usually been constructed around the notion of temporally stable and cross-situationally consistent features: so-called *global or robust* traits.¹⁵⁶

In its unreconstructed form, this description is recognizable in the conceptual formulation of the character *disposition* relied upon by Aristotle in his conception of human virtue in which, notionally, excellence might be achieved in the attainment of the *Golden Mean* – the perfection of a balance between bipolar dispositions. Typically – although not exclusively - trait theory, in its modern guise, also theorizes the distribution of human traits according to a handful of discrete “factors” representing an aggregation of bipolar dimensions. The Five-Factor Model, for example,

¹⁵³ See *Ibid.*, at p.131.

¹⁵⁴ Gilbert, D., and Malone, P. (1995) “The Correspondence Bias” in 117 *Psychological Bulletin* 21.

¹⁵⁵ Ross, L. “The Intuitive Psychologist and his Shortcomings: Distortions in the Attribution Process” in Berkowitz, L. (Ed.) (1977) *Advances in Experimental Social Psychology: Volume 10*.

¹⁵⁶ Banicki, K. (2017) at p.51.

comprises: 1) Neuroticism-Stability, 2) Extroversion-Introversion, 3) Openness,¹⁵⁷ 4) Agreeableness-Antagonism, and 5) Conscientiousness-Undirectedness.¹⁵⁸

In its early-twentieth-century construction, the higher-self - unencumbered by morality¹⁵⁹ and purged of anything resembling metaphysics¹⁶⁰ - was represented by the popular aspiration to constantly improve one's personality across these dimensions. But later, the individual self would come to be, as Philip Cushman describes it, "...the ultimate locus of salvation: the evolving, constantly changing self, on a never-ending search for self-actualization and 'growth.'"¹⁶¹ This, in effect, constituted a "psychology of human needs" that amounted to little more than historically-contingent conventions, according to Danziger, comprising categories in vogue in a particular society at a particular time.¹⁶² In the early decades, personality psychology operated from unchallenged assumptions *viz*: that human conduct is universally an expression of some essence *within* the individual, susceptible to objective observation, quantification and measurement, and essentially unchanged in spite of the conditions in which the conduct occurs; and, concomitantly, that 'personality' is a real, natural and discrete entity.¹⁶³ Danziger further notes the reliance in the belief in a "timeless human nature;" only possible, he observes, by ignoring relevant contemporary developments in philosophy and social science.¹⁶⁴

¹⁵⁷ Representing dimensions: Original-Conventional; Creative-Uncreative; Independent-Conforming; Untraditional-Traditional; Daring-Unadventurous.

¹⁵⁸ See Liebert, R., and Spiegler, M. (1990) *Personality: Strategies and Issues – 6th Edition*, at p.219.

¹⁵⁹ Nicholson, I. (1998) at p.52.

¹⁶⁰ *Ibid.*, at p.59.

¹⁶¹ Cushman, P. (1990) "Why the Self is Empty: Toward a Historically Situated Psychology" in 45(5) *American Psychologist* 599 at p.603.

¹⁶² Danziger, K. (1997) at pp. 122, 123.

¹⁶³ *Ibid.*, at p.129.

¹⁶⁴ *Ibid.*, at pp.129-30.

Notwithstanding the rapid social developments which drove the ‘need’ for techniques such as intelligence-testing, non-intellectual trait testing, workforce management and consumer psychology, much of this social terrain was susceptible to the charge that it was itself value-laden. The legitimacy of scientific personality relied upon its ability to show itself divested of value-laden techniques. On its face, the notion of a disposition, cast in terms of objectively observable and measured criteria, offered up a de-moralized predictive technique directed at human conduct.¹⁶⁵ And, as Banicki observes, it was an *ethical dimension* that constituted the basis of the demarcation between what he terms the *character-viewpoint* and the *personality-viewpoint*.¹⁶⁶ On the ‘character’ side of this equation, human individuals are taken to be “more or less rational and internally consistent *moral agents* possessing stable dispositions (virtues and vices) and performing actions which are susceptible...[objectively]... to moral evaluation and responsibility ascription.”¹⁶⁷ As to the ‘personality’ side of this equation, no normative framework applies, but criteria are amenable to simple observation and are construed according to psychological constructs to do with explanation, empathy and understanding, rather than moral evaluation.¹⁶⁸ Some versions of trait-theory saw traits as fulfilling a predictive role; certainly Gordon Allport, according to David Zuroff, considered that traits are real, causal, entities corresponding to as yet unknown neurophysiological structures.¹⁶⁹ But he notes that other theorists considered that traits are descriptive summaries of past behavior which have no real existence.¹⁷⁰ And, yet others

¹⁶⁵ See Zuroff, D. (1986) “Was Gordon Allport a Trait Theorist?” in 51(5) *Journal of Personality and Social Psychology* 993 at p.999.

¹⁶⁶ Banicki, K. (2017) at pp.57-58.

¹⁶⁷ *Ibid.*, at p.57.

¹⁶⁸ *Ibid.*, at p.58.

¹⁶⁹ Zuroff, D. (1986) at p.996.

¹⁷⁰ *Id.*

saw traits as dispositional – in the sense of implying nothing about the occurrence of actual behavior¹⁷¹ (i.e., they represent a potentiality [disposition] that proves nothing insofar as the cause of an actual behavioural event is concerned).

A watershed moment in the characterization of traits as cross-situationally consistent predictors of human conduct came with Walter Mischel's meta-analysis of trait research, in which he observed the following in relation to statistical findings of consistency:

[T]he phrase 'personality coefficient' might be coined to describe the correlation between .20 and .30 which is found persistently when virtually any personality dimension inferred from a questionnaire is related to almost any conceivable external criterion involving responses sampled in a *different* medium – that is, not by another questionnaire. Generally, such correlations are too low to have value for most individual assessment purposes beyond gross screening decisions. Moreover, the obtained networks of relationships often are too diffuse to be comprehensible theoretically. Finally, the correlations obtained among personality measures to some extent may simply reflect their common associations with intelligence and education.¹⁷²

With this statement, what came to be known as the *Person-Situationist Debate* erupted.¹⁷³ Personality trait research had developed according to the *lexical hypothesis* which posited that socially relevant and salient personality characteristics are encoded in the natural language.¹⁷⁴

¹⁷¹ *Id.*

¹⁷² Mischel, W. (1968) *Personality and Assessment*, at p.78.

¹⁷³ Funder, D., and Guillaume, E., et al (2012) "The Person-Situation Debate and the Assessment of Situations" in 21(1) *Japanese Journal of Personality* 1 at pp.1-2.

¹⁷⁴ John, O., and Srivastava, S. "The Big Five Trait Taxonomy: History, Measurement, and Theoretical Perspectives" in Pervin, L., and John, O. (Eds.) (1999) *Handbook of Personality, 2nd Edition*, Guilford, New York U.S.A., at p.103.

Gordon Allport and Henry Odbert compiled a taxonomy of all terms from the Webster's New International Dictionary "...descriptive of personality or personal behavior" for a total of 17,953 words.¹⁷⁵ These they distilled into four general categories comprising personality traits, temporary states and moods, evaluative judgments of human conduct, and physical characteristics, capacities and talents.¹⁷⁶ Following various refinements by a number of researchers, a five-factor structure was coined the *Big Five* by Lewis Goldberg in 1981.¹⁷⁷

Within this new context of *personality*, virtue ethics, as would be expected, relies generally upon a conception of psychology in which temporally stable virtues are regularly manifested in behavior across objectively different situation-types.¹⁷⁸ This is the basic Aristotelian conception: i.e., that *character traits* inhere in agents as relatively long-term stable dispositions to act in distinctive ways.¹⁷⁹ In her description of it, Nancy Snow draws no material distinction between personality traits and character.¹⁸⁰ To be fair, for all Gordon Allport's remonstrations about the incompatibility of scientific personality and moral character, the discipline of psychology came to regard itself as providing an objective basis which could serve as a foundation for a new moral code, according to Nicholson.¹⁸¹ Indeed, Allport's own approach was paradoxical, he says. Allport

¹⁷⁵ Allport, G., and Odbert, H. (1936) "Trait-Names: A Psycho-Lexical Study" in 47(1) *Psychological Monographs* 1 at p.24.

¹⁷⁶ See *Ibid.*, at p.25ff.

¹⁷⁷ Pervin, L., and John, O. (Eds.) (1999) at p.105.

¹⁷⁸ See, for example, Snow, N. (2010) *Virtue as Social Intelligence: An Empirically Grounded Theory*, Routledge, New York U.S.A., at p.2.

¹⁷⁹ Harman, G. (1999) "Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error". Paper presented at a meeting of the Aristotelian Society, 21 June, 1999, downloaded from 128.250.144.144 on 22 August 2013, at p. 317.

¹⁸⁰ Snow, N. (2010) at p.2.

¹⁸¹ Nicholson, I. (1998) at p.65.

wanted to use the psychological category of personality to scientifically affirm normative values such as honor, duty, humility, stability and self-sacrifice within the context of the human self.¹⁸²

But the proposition of temporally stable, cross-situationally consistent trait-based behavior is the central point of disputation for *situationist* ethicists. Harman describes the central proposition of the situationist critique in these terms:

In trying to characterise and explain a distinctive action, ordinary thinking tends to hypothesise a corresponding distinctive characteristic of the agent and tends to overlook the relevant details of the agent's perceived situation.¹⁸³

This proclivity is termed the *fundamental attribution error*. It is the tendency to overestimate the effect of disposition or personality and to underestimate the effect of the situation. Situationist ethicists argue that, notwithstanding the central role of character traits in virtue ethics, empirical studies have found no objective basis for the belief they can explain differences between agents.¹⁸⁴ Situationist theorists attack the fundamental assumptions of virtue ethics from the bases of three central theses:

- i. Behavioural variation across a population owes more to situational differences than dispositional differences among persons;
- ii. Empirical evidence problematizes the attribution of robust traits;
- iii. Personality structure is not typically evaluatively consistent. That is, for a given person, the dispositions operative in one situation may have a very different evaluative status

¹⁸² *Ibid.*, at p.64.

¹⁸³ Harman, G. (1999) at p.316.

¹⁸⁴ *Ibid.* at p.325.

than those manifested in another situation - evaluatively inconsistent dispositions may "cohabit" in a single personality.¹⁸⁵

Particularly as regards any nominal virtue of "honesty," or "integrity," the idea that an actor's conduct might, on balance, be governed predominantly by situational imperatives - as opposed to dispositions governed by the actor's character - potentially raises significant questions about the feasibility of a system for regulating ethical conduct that draws on theoretical precepts grounded in virtue ethics. The possibility that an actor's conduct might be susceptible to situational imperatives was illuminated in a series of classic studies in social psychology. In Milgram's obedience to authority study (1961), the situational factor at play was the authority of a supervisor who compelled the subjects to engage in unethical behavior.¹⁸⁶ In the Stanford Prison Experiment (1971), Zimbardo investigated the effects of external features of an institutional setting upon the internal dispositions of actors in terms of associated psychological effects.¹⁸⁷ And Darley and Batson's Princeton Theological Seminary Experiment (1973) examined the influence of situational and personality variables on helping behavior in a feigned emergency situation.

The challenge brought to virtue ethics by social psychology's focus on *situation* is, at base, empirical. A plethora of research findings supported by hundreds of social psychologists is presented in support of the situationist critique.¹⁸⁸ Doris contends that predictive and explanatory appeals to traits are very often empirically inadequate and are confounded by "...the

¹⁸⁵ Doris, J. (1998) "Persons, Situations, and Virtue Ethics" in 32(4) *Nous* 504 at p.507.

¹⁸⁶ See Milgram, S. (1974) *Obedience to Authority: An Experimental View*.

¹⁸⁷ See Zimbardo, P. (2007) *The Lucifer Effect: Understanding How Good People Turn Evil*, at p.195.

¹⁸⁸ Upton, C. (2009) "Virtue Ethics and Moral Psychology: The Situationism Debate" in 13(2/3) *The Journal of Ethics* 103 at p.104.

extraordinary situational sensitivity observed in human behavior.”¹⁸⁹ In a somewhat harsher tone, Harman states bluntly that there is no empirical basis for the existence of character traits.¹⁹⁰ But the so-called person-situationist debate has, to date, not been resolved in favour of either position. Virtue ethicists such as Upton and Snow concede, whether explicitly or implicitly, the need to establish an empirical basis to the claims of virtue ethics.¹⁹¹ Upton notes that there remains “...a multitude of unanswered questions and unexplored routes of argumentation”¹⁹² which implicates both sides of the debate. In countering the situationist critique, Upton makes the point that even Aristotle had an acute awareness of the importance of moral psychological observations to virtue ethics, and that his pre-theoretical moral psychology accounted for the tension between morality and the reality of the human condition.¹⁹³ Doris, probably, would not quibble with Upton’s characterization of Aristotle’s observations in terms of their “...subtlety, complexity and plausibility,”¹⁹⁴ although Harman, arguably, would categorize Aristotle’s observations as an example of folk morality, which he rejects as unreliable.¹⁹⁵ In rebuttal to both Doris and Harman, Kamtekar contends that character traits conceived of and debunked by situationist social psychology research have very little to do with character as it is conceived of in traditional virtue ethics which, she says, offers a conception of character far superior to the one attacked by situationist theorists.¹⁹⁶

¹⁸⁹ Doris, J. (2002) *Lack of Character: Personality & Moral Behaviour*, at p.15.

¹⁹⁰ Harman, G. (1999) at p.316.

¹⁹¹ See: Snow, N. (2010) at p.2; also Upton, C. (2009).

¹⁹² Upton, C. (2009) at p.112.

¹⁹³ *Ibid.*, at p.103, citing Aristotle’s discussion of bravery in *Nicomachean Ethics*.

¹⁹⁴ *Ibid.*, at p.104.

¹⁹⁵ See Harman, G. (1999) at pp.315-6.

¹⁹⁶ Kamtekar, R. (2004) “Situationism and Virtue Ethics on the Content of Our Character” in 114(3) *Ethics* 458 at p.460.

But insofar as the efficacy of the *Values* and the *Code* is concerned, any vindication of virtue ethics in this debate would offer little in terms of its authentication. For there is at once a conceptual and practical fracture which runs through the middle of the *Values* and the *Code* and attendant narratives regarding compliance in the APS. The fracture begins to become evident in the accounts of virtue ethics articulated by those commentators who reject the situationist critique. For example, Kamtekar criticizes the tendency of situationist research to assume that the manner in which the researchers construe the situation the subject of their research is how other actors construe it, proposing that subjective construal of the 'situation' may vary between actors, thus problematizing the proper identification of the *operative* 'situation' in situationist experiments.¹⁹⁷ Kamtekar reasons that subjective construal cannot in fact be an aspect of character.¹⁹⁸ But the question, for those who propose that compliance with the *Values* and the *Code* is down to virtue, is whether the mandatory compliance demanded by the PS Act can accommodate subjective variation in the construal of public service obligations as they apply in the workplace? The transcript of the proceedings of the Select Committee on a Certain Maritime Incident¹⁹⁹ reveals in compelling fashion how the ability of the Committee's investigation to determine whether mandatory standards of conduct under the PS Act had been breached was effectively neutered by the opacity of witness' subjective variability.

Especially given the expectation of Plato and Aristotle that most will never in their lifetimes achieve virtue, then a virtue-based explanation of compliance with the *Values* and the *Code* would presumably describe gradations of something increasingly-less than compliance as the

¹⁹⁷ *Ibid.*, at p.470.

¹⁹⁸ *Ibid.*, at p.471.

¹⁹⁹ See Chapter 4.

norm. But this is not an acceptable outcome under the PS Act, and nor does it reflect the accounts of ethical conduct as they are reported in the *State of the Service Reports*. And of course, from a virtue ethics viewpoint, the mandatory nature of the *Values* and the *Code* is itself problematic. Aristotle explicitly rejected the idea “...that deliberation can proceed from codified practical principles, much less from ranked and weighted ones.”²⁰⁰ Daniel Russell observes that, for Aristotle, the idea of a precise connection between ‘grand blueprint’ and particular decisions would have been an utterly mysterious one.²⁰¹ He states that it is naïve to expect ethical problems to be solved by the operationalization of virtue-based action-guiding theories.²⁰² In a not-too-removed vein, Kupperman criticizes the characterization of virtue by situationists such as Harman as extreme in their expectations that virtue more or less equates to near-perfection.²⁰³ He argues that it is unrealistic to expect that truly virtuous people will not err, and that a lesser standard of virtue than that expected by situationist theorists should be expected. Upton similarly contends that it is a fatal dilemma to assume that virtue applies universally to moral agents, who vary radically in their psychological, physiological, and personal situations.²⁰⁴ On Kupperman’s account, none of us is perfect. But, again, this introduces a problematic kind of opacity to the clear statutory pronouncements of the *Values* and the *Code*, and it also sits uncomfortably with the APS report card in the *State of the Service Reports*. If something less than perfect compliance is acceptable for APS officers, then what is that level, and who decides in relevant cases what lesser standard is OK? And how would a lesser standard wash with those

²⁰⁰ Russell, D. (2009) at p.28.

²⁰¹ *Id.*

²⁰² *Ibid.*, at p.2.

²⁰³ Kupperman, J. (2001) “The Indispensability of Character” in 76(2) *Philosophy* 239 at p.241

²⁰⁴ Upton, C. (2016) “The Empirical Argument Against Virtue” in 20(4) *The Journal of Ethics* 355 at p.356.

who hold the right to consent-or-not, say, if an aspirant governor were to ask that they accept deceit as a normative part of the state's day-to-day public administration?

The level to which APS officers are reported in the *State of the Service Reports* to comply with the ethical standards promulgated under the *Values* and the *Code* in every year since their inception is close to perfect. If approximately 3 in every thousand public servants (or thereabouts) – *in total* - are determined to have breached the *Values* or the *Code* in any given year (as is reported), then the implication – as is regularly drawn by the authors of the *State of the Service Reports* – is that the balance of individuals (i.e., greater than 99 in every 100 APS officers) *never commit a single breach* of the very stringent ethical requirements enshrined therein. Understood in *eudaimonistic* terms, the conduct of almost every APS officer is, in this story, an exemplar of superlative compliance against each value (or *virtue*) comprising the *Values* and the *Code*, such as to be tantamount to the effective realization of Aristotle's *Golden Mean*. The impartial civil servant is, indeed, the “keeper of the public interest” and champion of *The Good*. Sir Stafford Northcote, Sir Charles Trevelyan, and T. H. Green might be proud; but Aristotle would smell a rat.

For those who contend that compliance with the *Values* and the *Code* is down to virtue, practical rationality must inform voluntarist choice in the implementation of the *Values* and the *Code* for the sake of the *Values* and the *Code*. Indeed, some close approximation of this could be the only explanation for the level of compliance claimed for the APS by APS Commissioners each year. And in the case of the aforementioned claims in the *State of the Service Reports*, from a virtue standpoint, every exercise in *phronesis* must converge in each case with an outcome consistent with the particular values and other rules promulgated by the PS Act, as a matter of necessity –

and to the exclusion of the virtues (and, not to mention, vices) more readily recognized by *proper* virtue ethicists. Forgetting, for a moment, that such a scenario does not accord with how Aristotle saw things, in terms of modern personality theory, such an outcome would necessitate a level of statistical uniformity in the discrete distribution and structural profile of traits for each APS officer heretofore unknown to science. It would necessitate a truly mechanistic human psychology in which cognitive evaluation translates directly to objectively-determined volitional acts. And it would necessitate that the myriad, complex, and conflicting imperatives that arise in the real-world contexts of the *Values* and the *Code* are not deflected or otherwise compromised by unpromulgated albeit competing imperatives. It would require a level of perfectibility believed by Aristotle to be generally beyond mortal persons, but which was occasionally a feature of gods (or a consequence of their intervention) in the mythical fables that passed for truth in the time of Homer. Homer is long gone, but myths are still with us.

However – and as alluded to above - if this obvious problem is to be considered, say, from a ‘realist’ standpoint, it is not enough to say that expectations of superlative conduct are unrealistic and beyond the mortals who populate the APS. For example, the mandatory obligation that Commonwealth public servants conduct themselves honestly in the performance of their duties is logically coextensive with the normative expectations that ground the consent that *enables* legitimacy in the liberal conception of political life. The social contract held by liberals to be reflected in these arrangements may well constitute an idealization of political life, as is argued by many realist theorists. But whatever the merits of that criticism, it remains that these kinds of narrative inform the subjective experiences and perceptions – and expectations - of the governed. If realists say legitimacy remains an essential feature of political life, it is inconceivable

that such legitimacy could ever be grounded in any substantive expectation by the governed for the exercise by public officials of a level of honesty determined *by the situational imperatives* with which they are confronted, moment to moment, day to day. As Galston perceptively observes: “If one ought to do P if possible, but we have good reason to believe that most of all human beings cannot do P, then P loses its normative force *for us*.”²⁰⁵ The imperative for the state – that it must successfully persuade its citizens of its legitimacy - necessitates that citizens be persuaded, *inter alia*, that its claims of predominantly honest conduct – or, to recall the term suggested by Richards and Smith: “constitutional propriety”²⁰⁶ - on the part of state officials is fundamentally valid (notwithstanding peripheral ‘exceptions’ involving instances of malfeasance on the part of ‘bad apples’). This could never be achieved in a situationist world; but nor could it be achieved in any realistic reading of a world governed by virtue ethics. And if that is correct, a fundamental problem arises. And this problem directly implicates the ability of the governor to legitimize his or her rule by satisfying the requirement that the public administration of the state is truly impartial, anonymous, and committed solely to the discharge of its obligations according to the public good. It is contended here that what is at stake, is the social contract itself. And, if that is correct, it leaves open the proposition that the narratives about compliance in the *State of the Service* reports rely upon virtue-like exemplars in reporting conduct of APS officers, *not* for the sake of regulating ethical conduct in any realistic sense; but for the sake of the governor’s legitimacy under the social contract, in the eyes of those who notionally retain the right to consent-or-not.

²⁰⁵ Galston, W. (2010) at p.406.

²⁰⁶ See text associated with note 28, this Chapter.

In order to draw together some of these matters, the final chapter gives some consideration to the phenomenon of dishonesty, as a normative human reality that problematizes our conceptions of ethical conduct. The assumptions of 'internalized' norms which underlie the design of the '*values-based*' ethics regulation system in the APS are critiqued in the context of competing 'interactionist' theories, which have gained significant traction since the mid-twentieth-century. These inquiries are considered, also, against an examination of the extent to which modern society can truly be said to have left behind the myth-based building blocks of our fundamental conceptions of society and human conduct.

CHAPTER 6 – VIRTUE & VICE: THE IMPARTIAL PUBLIC OFFICER SITUATED

Challenging the conception of the Impartial Public Officer as a singularly rational volitional agent

In its traditional guise, the so-called Impartial Public Officer invariably exhibits a rational and morally competent capacity to deliberately and consistently engage in objectively determined volitional acts; each of which conforms to a set of promulgated values coincident with the public good. In the context of the APS, these take the form of *mandatory* statutory obligations that require APS officers to conduct themselves - at all times - honestly, with integrity and impartiality.¹ The standard of conduct which marks out that of the Impartial Public Officer, is effectively that also claimed for the vast majority of APS officers each year (excepting, approximately, 3 in every thousand), in the annual *State of the Service Reports*.

The realization of virtue as it is understood by Plato or Aristotle might look something like this kind of perfected achievement. But, as with most virtue ethicists, Plato and Aristotle believed this kind of perfection to be beyond most, if not all, mortals. It was Plato's achievement that the concept of virtue could be cast as a quality capable of inhering in an individual, rather than as something evidenced only in *action*,² thus enabling the so-called Impartial Public Officer as a conceptual possibility. At least until the Enlightenment, transcendental justifications played a considerable part in underscoring the meaning of virtue. However, after the Enlightenment, the teleological substance of virtue shifted; replaced, in large part, by the discrete phenomenon of the *self-as-autonomous-individual*. But whereas Plato's cosmological justifications for justice-as-

¹ See text associated with note 84, Chapter 4.

² See text associated with note 263ff, Chapter 1.

virtue were founded upon ancient mythical conceptions that allowed him to put the radical idea of morality as a human *quality* into the frame, in modern times, myth arguably plays at least as great a role in our understanding of moral conduct - and particularly in terms of ideals such as that of the Impartial Public Officer.

A crucial adjunct to both ancient and traditional elaborations of virtue is that its evolving conceptions, from at least the time of Plato, have been elemental in justifications used to found conceptions of organized social order. Plato's cosmological design³ constituted an imposition of order – *kosmos* – that placed the earth at the centre of the universe, with Hell at the centre of the earth and Heaven above the clouds;⁴ a 'philosophy of order,' to recall Voegelin.⁵ Sweeney notes that this logic of attribution, in the form later developed and refined by Aquinas, necessitated the separation of body and soul (and, that it couldn't have succeeded otherwise), and incorporated a divine orderliness that included categories of human kind: divinely ordained kings and queens, the rule of masters over servants and men over women, with class, rank, gender and wealth of every person divinely planned.⁶ It was this overarching scheme that would come to provide the philosophical plan for Aquinas' justificatory teleology.⁷ Teleology in this sense, according to Sweeney,

...meant that all of life is intricately organized and purposeful, beginning with what Aristotle had called the Unmoved Mover, and which Aquinas renamed God.⁸

³ See text associated with note 17, Chapter 1.

⁴ Sweeney, J. (2014) *Inventing Hell: Dante, The Bible, and Eternal Torment*, at p.157.

⁵ See text associated with note 229, Chapter 1.

⁶ Sweeney, J. (2014) at pp.92, 157-8.

⁷ *Ibid.*, at p.156.

⁸ *Id.*

And, as has been discussed, the dichotomies that were legitimized through these mythico-philosophical justifications brought with them a moral imperative to the *maintenance* of the articulated social 'balance' that comprised them; an imperative which was disseminated, as Launderville earlier noted,⁹ through an extant *hope* - in his description of it - the hope of salvation; or else it might be the levellers' hope for the rights constituted by their supposed 'birthright',¹⁰ or the hope of one's improvement through the careful husbanding of one's character,¹¹ or else the hope to satisfy one's wants through the exercise of one's right to consent-or-not. The legitimation of the balance to be maintained in respect of these dichotomies - at least in their pre-Enlightenment form - was the *telos*; itself imperilled by any threatened imbalance, as MacIntyre reminds us: the emotivist man-as-he-happens-to-be, in contrast to the human *telos* perfected: man-as-he-could-be-if-he-realized-his-essential-nature.¹² And so *disorder* in this mythico-cosmological system constituted the infiltration of evil, and all disorder, Sweeney says, was determined to arise from human fault or sin.¹³ Schall notes Satan's primary disorder: *non servian* - "I shall not serve" was one pole in a choice where *order* might be rejected for another order (i.e., necessarily, disorder), even one that originated within the self.¹⁴ Jameson argues that the conceptual opposition characterized by this dichotomy of good and evil is fundamental to the construction of 'Other'-ness and is the basis of all ethics.¹⁵ In his formulation, the Other is the stranger or the alien, and 'Other'-ness functions to delineate a given social order

⁹ See text associated with note 73, Chapter 1.

¹⁰ See text associated with note 158, Chapter 3.

¹¹ See text associated with note 257ff, Chapter 3.

¹² See text associated with note 5, Chapter 2.

¹³ *Ibid.*, at p.158.

¹⁴ Schall, J. (2007) *The Order of Things*, at p.11.

¹⁵ Jameson, F. (1975) "Magical Narratives: Romance as Genre" in 7(1) *New Literary History* 135 at p.140.

to provide a deterrent against deviance or subversion.¹⁶ Orr observes that the conceptual mechanism afforded by the binary opposition that makes separable mind and body – or, one’s soul from one’s terrestrial existence - has facilitated the structuring of discourse, both ideologically and institutionally, to operationalize social domination and discrimination.¹⁷

But in the comparatively terrestrial and modernist world of the Impartial Public Officer, the *inculcation of values* by an otherwise independent agent is the primary normative strategy that underlies the state’s regulatory methodology in respect of its public officials. More generally, the regulation of ethical conduct in public life relies for its legitimacy upon the ability to responsabilize actors, both normatively and according to the man-made statutory frameworks that stand as pillars of the social contract and as a bulwark against social and institutional disorder. The elevation of the artifice of the so-called Impartial Public Officer under Westminster has been instrumental in the narratives of responsabilization that have attended Westminster public administration since the nineteenth-century. Westminster accounts of the Impartial Public Officer rely upon a volitional conception of agency similar to that described by Wilcox:

...caused (and rationalized) by an agent’s desire for an outcome, and their belief that particular behaviours will lead to such outcomes...where agents are aware of their actions and their reasons, they identify with those reasons, and their action stems from their deliberations.¹⁸

¹⁶ *Id.*

¹⁷ Orr, D. (2002) “The Uses of Mindfulness in Anti-Oppressive Pedagogies: Philosophy and Praxis” in 27(4) *Canadian Journal of Education* 477 at p.479; see also, generally, Warren, K. (1988) “Critical Thinking and Feminism” in 10(1) *Informal Logic* 31.

¹⁸ Wilcox, T. “Agency at the Intersection of Philosophy and Social Theory” in Mir, R., Willmott, H., & Greenwood, M. (2015) *The Routledge Companion to Philosophy in Organization Studies*, at p.268.

These are assumptions that underpin the voluntarist conception of the Impartial Public Officer. And they are no-less central to the philosophical and broader academic inquiry, observes Wilcox, into the question of “...what is meant by *intent, causes, choice*, and being an agent *in the world*.”¹⁹ But, as is evidenced in the conundrum of St. Augustine’s recalcitrant will,²⁰ for example, and from the standpoint of other theoretical perspectives in particular, the philosophical moral basis for attributions of responsibility to individual actors - whether in public institutional frameworks or otherwise - is and has always been problematic.

The narrative of the Impartial Public Officer, characterized in Chapter 5 as requiring “...a truly mechanistic human psychology in which cognitive evaluation translates directly to objectively-determined volitional acts”²¹ is, from any reasonable standpoint, unreal. The object of the narrative could only ever be achieved by way of a realized *standard of conduct* constituted by a supercharged version of the kind of volitional agency described above by Wilcox. For the reasons discussed in Chapters 4 & 5, such an expectation is problematic enough. In the case of the APS, any suggestion that the reportedly negligible levels of misconduct (i.e., as is purported in consecutive *State of the Service Reports*) might somehow be down to virtue is doubly problematic. Such claims, as have been made or otherwise insinuated by various commentators, typically avoid those theoretical areas which stand as challenges to virtue ethics, such as situationist ethics and the *fundamental attribution error*, or psychoanalytical or ‘depth’ psychology and its ideas of internal conflict as a normative state. It is not suggested here that the contentions brought either by situationist ethicists or the likes of Sigmund Freud constitute a final

¹⁹ *Id.*

²⁰ See text associated with note 40, Chapter 3.

²¹ See paragraph preceding text associated with note 206, Chapter 5.

answer to any claim that any approximation of the narrative might be down to virtue; indeed, as noted in Chapter 5,²² no *bona fide* virtue ethicist would, in any event, ever seriously entertain such a claim. However, if we return to a reconsideration of the demarcation between pre-Enlightenment myth and post-Enlightenment reason that was assumed into existence with the advent of the Enlightenment, new lines of inquiry emerge. And if we inquire as to whether there is a place for myth in the modern conception of the Impartial Public Officer, a whole new basis for questioning the idea of the Impartial Public Officer as a singularly rational and volitional agent is brought to the fore. That basis is twentieth-century social theory, earlier resonances of which are usefully found in the work of Baruch Spinoza.

Social Order and the Rise of Social Theory: *action-redux*, *myth-redux*, and the contingency of identity, theorized.

Commentators have referred to ‘Northcote-Trevelyan’ or the so-called ‘Westminster’ precepts as instances of myth,²³ employed in one way or another to characterize some quality of public administration to which the myth gives its force. But unlike popular interpretations of the word ‘myth’, the aforementioned claim²⁴ - that the construct of the Impartial Public Officer relies in some sense upon myth - is not one which, in consequence, imputes anything approximating an anthropomorphized godliness to the Impartial Public Officer. To that end, it is notable that definitions that situate myth as simply a product of primitive religious thought have been rightly

²² See text associated with notes 206-7ff., Chapter 5.

²³ See text associated with note 26, Chapter 5.

²⁴ See text associated with note 2, this chapter.

criticized.²⁵ In Tudor's view, the fact that some myths, such as the English Myth of the Norman Yoke, or the American Myth of the Founding Fathers, purport to be factual accounts of actual events in history, implicates the *belief* of the myth-maker as an essential component in the definition of myth. He argues that "[m]yths are not esoteric philosophy but garbled history."²⁶ However, Roland Barthes' emphasis upon the *processes* involved in myth-making is, perhaps, a more sensitive account for the purposes of definition:

What the world supplies to myth is an historical reality, defined, even if this goes back quite a while, by the way in which men have produced or used it; and what myth gives in return is a *natural* image of this reality...myth is constituted by the loss of the historical quality of things: in it, things lose the memory that they once were made.²⁷

Bottici observes that Aristotle considered *mythoi* superior to history because it is a form of knowledge that deals in universals: "...the knowledge of different human characters..." – and, of *what could be* (i.e., emphasizing its teleological *and* aspirational possibilities), rather than in the specificities traversed by the historian.²⁸ *Political* myths are argued to be a category of general mythology.²⁹ Along with Tudor and Barthes, Bottici agrees that myths operate in contemporary societies and are an important element in modern politics.³⁰ However, she disagrees with Tudor's view that the definition of political myth must rely upon its perceived truth or content.³¹ For her,

²⁵ See, for example, Tudor, H. (1972) *Political Myth*, at p.17.

²⁶ *Ibid.*, at p.19.

²⁷ Barthes, R. (1972) *Mythologies*, Jonathan Cape, London U.K., at p.142.

²⁸ Bottici, C. (2007) *A Philosophy of Political Myth*, at pp.37, 170.

²⁹ Tudor, H. (1972) at p.17.

³⁰ Bottici, C. (2011) "Towards a Philosophy of Political Myth" in 3(5) *IRIS – European Journal of Philosophy and Public Debate* 31, at p.32.

³¹ *Ibid.*, at p.38.

the constitution of myth-as-narrative, and particularly the *process* of how myth is produced – received - and reproduced by actors - both consciously, and unconsciously – is essential to its definition.³² She refers to this process as the “work on myth.” Arguably, in that sense, the conception of the Impartial Public Officer as myth is sustained *inter alia* through long-standing and oft-repeated narratives such as, for example, the lauding of British civil servants’ “distinctive character” and capacity for jealous maintenance of their professional standards;³³ or the reiterated conclusions of consecutive *State of the Service Reports* alleging near-perfect compliance with the *Values* and the *Code* each year.³⁴ These examples are consistent with Bottici’s interactional account. According to her, the work on myth may be expedited in a vast array of settings and functions, whether as a part of discourse, ritual, or art,³⁵ whether in dimensions that are cognitive or aesthetic,³⁶ and whether in consolidated or fragmentary form.³⁷ She states:

A political myth is not only...the result of already defined social groups, but it also can be the means for their construction...[and]...can be both the result of an already existing identity as well as the means to create an identity yet to come.³⁸

In *A Philosophy of Political Myth*, Bottici acknowledges that the basis of her theory is provided in Spinoza’s analysis of the role of *imagination* in Jewish prophecy in the story of Moses and the

³² *Ibid.*, at p.40.

³³ See text associated with note 45, Chapter 5.

³⁴ See, for example, text associated with notes 88-90, Chapter 4.

³⁵ Bottici, C. (2011) at p.40.

³⁶ *Ibid.*, at p.44.

³⁷ *Ibid.*, at p.40.

³⁸ *Ibid.*, at p.39.

chosen people.³⁹ The banishing of the Hebrews to the desert, unregulated by law, constituted a veritable state of nature in Spinoza's conception of it. The uncertainty of any individual's connection with another, and his susceptibility to deceptive or otherwise iniquitous treatment, Spinoza contends, induced a wretchedness in which "...their hearts are ready to believe anything at all."⁴⁰ Rosenthal notes it was Spinoza's insight in his reflections upon Moses' chosen people and the Hebrew prophets' exhortations to *right* conduct that the dimensions of *hope* and *fear* (to recount Launderville's observations about the place of *hope* in such arrangements⁴¹) framed the social conditions that propel people from the state of nature into a social contract.⁴² Self-interested individuals motivated by desire and appetite rather than sound reason, according to Spinoza, could only be led to public good, and, thereby, social order, (if at all) through their own self-interest.⁴³ To this end, he argues,

...everyone can act with deceit by the right of nature and is not obliged to stand by promises [i.e., their contracts] except where there is hope of a greater good or fear of a greater evil.⁴⁴

Spinoza's philosophical and political conception of imagination, reality, freedom, and democracy - at least in more recent interpretations - brings a radical new lens by which to interrogate the

³⁹ Bottici, C. (2007) at p.170.

⁴⁰ Rosenthal, M. (1997) "Why Spinoza Chose the Hebrews: The Exemplary Function of Prophecy in the Theological-Political Treatise" in 18(2) *History of Political Thought* 207 at p.220; See also: Spinoza, B. (2007) *Theological-Political Treatise*, at p.5.

⁴¹ See text associated with note 73, Chapter 1.

⁴² Rosenthal, M. (1997) at pp.219, 220.

⁴³ *Ibid.*, at p.219.

⁴⁴ Spinoza, B. (2007) at p.199.

place of the individual within the liberal-democratic project.⁴⁵ His treatises have been said to displace the individual from the centre of political analysis⁴⁶ (and, it may be supposed, from that of the law-centred paradigm itself). His conscious departure from Hobbes⁴⁷ in his endorsement of collective opposition to the governor⁴⁸ represents a radical re-framing of conventional democratic theory in respect of the aforementioned *balance to be maintained*⁴⁹ evidenced, for example, in Plato's tripartite soul or the primacy placed by Locke upon rights of property. But his writings as regards the individual and the construction of reality also displace structuralist accounts of social order which – as will be seen - significantly anticipate social theorists of the twentieth century, such as Harold Garfinkel, Erving Goffman, and Anthony Giddens. And it is from the standpoints provided by those theorists that another challenge to the claim, that the purported excellent compliance of APS officers with the *Values* and the *Code* might be down to virtue, may be opened for analysis.

Spinoza anticipates these twentieth-century social theorists in seeing human beings not as "...given entities, but rather...[as]...processes, webs of affective and imaginary relations, which are never given once and for all."⁵⁰ Radically - for an Enlightenment thinker - Spinoza's theory does not emphasize the individual but, rather, emphasizes action - and, interaction. His ontology, explicated through his theory of *conatus*, emphasizes *affect* in constitutive rather than derivative

⁴⁵ See Williams, C. (2007) "Thinking the Political in the Wake of Spinoza: Power, Affect and Imagination in the *Ethics*" in 6 *Contemporary Political Theory* 349.

⁴⁶ Montag, W. (2005) "Who's Afraid of the Multitude? Between the Individual and the State" in 104(4) *South Atlantic Quarterly* 655 at p.659.

⁴⁷ *Ibid.*, at p.659.

⁴⁸ Spinoza, B. "A Political Treatise" Ch.3§2, in Elwes, R. (1891) *The Chief Works of Benedict De Spinoza*, Vol. 1., George Bell and Sons, London U.K., at p.301.

⁴⁹ See text associated with notes 3 – 12, this chapter.

⁵⁰ Bottici, C. (2012) at p.593.

terms,⁵¹ through which every individual “...endeavours to persevere in its own being.”⁵² He does not conceive of the state of nature in Hobbesian terms but regards humans as fundamentally *relational*. He looks to the *social* dimension of man as a necessary imperative and regards the public good and the *Golden Rule* as essential to it.⁵³ Spinoza defines ‘good’ and ‘evil’ for the purposes of the individual in subjective and utilitarian terms.⁵⁴

I shall understand by “good” what we know certainly is a means by which we may approach nearer and nearer to the model...[i.e., *exemplar*]...of human nature that we set before ourselves. By evil, what we certainly know prevents us from becoming like that model.⁵⁵

As Rosenthal notes, what is good (and what is an effective means to achieve it) varies between individuals.⁵⁶ The purpose of an exemplar - in Spinoza’s conception of it - is to bridge the gap between subjective and objective value.⁵⁷ Bottici notes, however, that despite that exemplars are based on what Spinoza refers to as universal ideas, such ideas are not adequately grounded upon foundations of reason, but constitute “...incomplete and confused images of the world.”⁵⁸ Bottici notes that Aristotle’s conception of imagination (*phantasia*) equates to Spinoza’s own, regarding “...the knowledge of the different ‘*exemplars* of human nature,” in his theoretical

⁵¹ *Id.*

⁵² Spinoza, B. (1883) *Ethic: Demonstrated in Geometrical Order and Divided into Five Parts*, Trübner & Co., London U.K., at p.114; Part III, Prop VI.

⁵³ See Ruddick, S. (2010) “The Politics of Affect: Spinoza in the Work of Negri and Deleuze” in 27(4) *Theory, Culture and Society* 21 at p.24.

⁵⁴ Rosenthal, M. (1997) at p.211.

⁵⁵ See Bottici, C. (2007) at p.169

⁵⁶ Rosenthal, M. (1997) at p.211.

⁵⁷ *Ibid.*, at p.212.

⁵⁸ Bottici, C. (2007) at p.169.

account of the place of imagination in prophecy.⁵⁹ Spinoza's account of the role of imagination illuminates his appreciation that effective political argument needed to go beyond mere rational discourse, according to Rosenthal.⁶⁰ Moreover, Bottici notes that both Spinoza and Aristotle consider imagination to be a powerful determinant in the creation of order as an incident of normal human life.⁶¹

Rosenthal observes that Moses recognised that the role of the subjective appearance of reality to the Hebrews was such that the *impression* of self-interest was as important to them as its reality.⁶² He notes that Spinoza contended that prophecy – the facility by which the prophet perceives God's revelations – “does not require a more perfect mind, but a more vivid imagination.”⁶³ And, so, Moses' strategy, in Rosenthal's account of it, was to “...manipulate the appearance of self-interest until it was identical with real public interest.”⁶⁴ In this way, the rich language and vivid imagination of the prophets was mistakenly seen by the masses as the word of God. By this approach, the prophets worked “...to transcend individual interests to create a common standard of judgment and behaviour.”⁶⁵ This common standard Spinoza named *exemplars of human behaviour*, and it was the role of rich prophetic language to create an imaginative narrative “...that claims universal authority in order to justify a particular set of institutions.”⁶⁶ For Spinoza, these ideas go directly to considerations of governance and the state, but bring with them a conundrum, according to Bottici, in that imagination constitutes at once

⁵⁹ Bottici, C. (2007) at p.170.

⁶⁰ Rosenthal, M. (1997) at p.209

⁶¹ *Id.*

⁶² *Ibid.*, at p.219.

⁶³ *Ibid.*, at p.220.

⁶⁴ *Ibid.*, at p.219.

⁶⁵ *Ibid.*, at p.211.

⁶⁶ *Ibid.*, at p.210.

the basis for the instability of politics and “...the only possible remedy to it.”⁶⁷ As Spinoza observes,

...it is easy for people to be captivated by a superstition, but difficult to ensure that they remain loyal to it. In fact, because the common people everywhere live in the same wretched state, they never adhere to the same superstition for very long. It is only a new form of credulity that really pleases them, one that has not yet let them down. Such instability of mind has been the cause of many riots and ferocious wars.⁶⁸

But Bottici points out that Spinoza’s conception of myth is not the Enlightenment conception which, she says, seeks to relegate myth as contrary to reality; Spinoza’s conception of reality is not “...an *a priori* of human understanding” but something which approximates the Scholastics’ conception of *realitas* as a variation or synonym of *perfection*, as in, for example, God as the most real of beings.⁶⁹ For Spinoza, immanent reality is not a function of the “material conditions of...[sensed]...experience”⁷⁰ as the Kantian postulate describes it; a point of view with which not only are social theorists comfortable, but also the major proponents of ‘depth’ psychology, such as Freud and Jung. As Williams states:

...not...[to]...suggest that Spinoza is simply a *precursor* of any particular strand of contemporary theory...[but]...one could trace a number of genealogies of shared ideas that bind Spinoza’s reflections to this or that perspective.⁷¹

⁶⁷ Bottici, C. (2012) “Another Enlightenment: Spinoza on Myth and Imagination” in 19(4) *Constellations* 588 at p.588.

⁶⁸ Spinoza, B. (2007) at p.5.

⁶⁹ Bottici, C. (2012) at p.590.

⁷⁰ Kemp-Smith, N. (Ed.) (1929) *Immanuel Kant’s Critique of Pure Reason*, at p.239.

⁷¹ Williams, C. (2007) at p.350.

But these revolutionary ideas of Spinoza's – described by Althusser as “terrifying to its own time”⁷² – do not simply provide a conceptual substrate by which Bottici is able to recognize myth as it is woven through modern political narrative. Spinoza's rejection of any fundamental distinction between mind and body brings with it profound implications for Enlightenment thinking. As Bottici contends:

...the trappings of Enlightenment ultimately rests on the separation of the knowing subject from the known object and the resulting dichotomy between imagination and reason. Since the body and the mind are nothing but two modes within two attributes of the unique substance, no radical separation between them exists. In fact, the very notion of a self-enclosed subject, of a Cartesian ego, does not make any sense within Spinoza's ontology.⁷³

It is in this way that Spinoza (and, subsequently, social theory) distinguishes a radically different basis by which to conceive of the place of the so-called individual within the structures of social order. His analysis problematizes the Enlightenment conception of the individual as a rational and autonomous decision-maker, and so, problematizes democratic theory. Spinoza's conception of the *good* in terms of gradations of perfection; and, as Ruddick observes, his refusal to recognize any meaningful separation between mind and body, “...completely...[undoes]...a framework that places God in his heaven, man over nature (and woman), humans over animals, reason over emotion”⁷⁴ – i.e., the same dichotomous ‘balance’ earlier averred to by Sweeney.

⁷² Quoted in Montag, W. (2005) at p.656.

⁷³ Bottici, C. (2012) at p.593.

⁷⁴ Ruddick, S. (2010) at p.27.

The binarized 'Other' as a fundamental mechanism of traditional systems of ethics is thereby obviated as a marker of deviance and a counterpoint to *right* conduct within a given social order. For Spinoza, "...thought and reason cannot be extricated from the life of the body and the passions,"⁷⁵ with the result that, "[f]rom a Spinozistic perspective neither liberalism nor communitarianism *alone* is capable of accounting for the complicated relations between individuals and the communities in which they dwell."⁷⁶

Ruddick argues that it is Spinoza's emphasis on affect as a quality that is *constitutive* rather than derivative, and what this says about his *relational* ontology, that has "...inspired a broad re-shaping of the contemporary political imaginary," re-framing the idea of the *subject* as unitary and fixed "...with 'man' at its centre."⁷⁷ As Williams observes, Spinoza has been described as "...the philosopher of incomplete reason" and it is his relational ontology which "...calls into question the existence of boundaries between individuals" that raises significant problems for existing theoretical paradigms.⁷⁸ For Spinoza, it is the *potentia* that is made available through human collaboration that can realize a power to act.⁷⁹ The power to act in Spinoza's formulation, moreover, effectively reconstitutes *action* as elemental to virtue, diminishing the Platonic *quality* which may inhere in an individual in favour of a kind of virtue that might have more readily been recognized in the time of Homer. And it is the power to act, within the milieu of social context, in Spinoza's conception of it, that radically demarcates him from Enlightenment conceptions of

⁷⁵ Williams, C. (2007) at p.354.

⁷⁶ Gatens, M., and Lloyd, G. (1999) *Collective Imaginings: Spinoza, Past and Present*, Routledge, at p.133.

⁷⁷ Ruddick, S. (2010) at p.24.

⁷⁸ Williams, C. (2007) at p.354.

⁷⁹ *Id.*

social order and individual volition, elevating him as a true progenitor of twentieth-century social theory.

Archetypal values of the Impartial Public Officer – stripped of their aspirational foundations

To act “...according to the laws of our own nature,” for Spinoza, constitutes virtue.⁸⁰ The pinnacle of this achievement is the *free man*, because only the free man exercises his power to act such that it exceeds and displaces the external powers that perennially act upon him and everybody. The so-called free man is, therefore, an *exemplar* of human nature in Spinoza’s rendering of him.⁸¹ Desire for such freedom, Spinoza says, is the essence of being, and the basis by which man “strives to persevere in his being,”⁸² despite that there is no guarantee that this kind of freedom will be realized. Rosenthal argues that it is the purpose of the *exemplaria* in Spinoza’s theory “...to transform value from an individual and subjective utility to a universal and objective standard.”⁸³ The construction of Spinoza’s *exemplaria* as a marker of virtue is unexceptional, although his logic is notably un-Aristotelian, for example, in his rejection of any place for a *telos*. However, considered from the standpoint of what Gatens and Lloyd refer to as the social imaginary,⁸⁴ it provides a useful lens by which to consider the structuralist implications of the *Values* and the *Code*. The argument that is raised here, following Bottici’s conception of political myth, is that far from constituting a departure from such constitutive mythological building blocks as Plato’s

⁸⁰ Spinoza, B. (1883) at p.194.

⁸¹ See: Kluz, C. (2012) *Determinism, Freedom and Ethics: Spinozistic Interventions in the Contemporary Discussions of Responsibility*, Unpublished Dissertation, Emory University, at p.95.

⁸² Spinoza, B. (1883) at p.193.

⁸³ Rosenthal, M. (1997) at p.211.

⁸⁴ Gatens, M., and Lloyd, G. (1999) at p.143.

clock-like cosmos and tripartite soul, and Aquinas' infallible God, the framework of ethics regulation in the APS is itself rendered as myth through its reliance upon archetypal idealizations as realizable (and, moreover, allegedly realized) mandated obligations, in the form of the *Values* and the *Code*. Therein, so the argument goes, the Impartial Public Officer ensures government propriety in his or her operationalization of Westminster public administration through a purportedly singular and successful actualization of the archetypal principles of *honesty*, *integrity*, and *impartiality* (among others), solely in the service of the public good.

For Spinoza, the free man stands as a *potential* - generated necessarily through interaction with others - with which individuals are constantly engaged to a greater or lesser extent and with greater or lesser success. The Impartial Public Officer is likewise an exemplar but is distinguished from the free man on the basis that he or she inheres the qualities of *honesty*, *integrity*, and *impartiality*, and exhibits these deliberately through his or her conduct as a function of free will and solely on the basis that they are promulgated as obligations. Spinoza denies that man can have free will, guided as he is, in Wood's description, in his deterministic recognition of a "...unity of God and nature."⁸⁵ Where, for Spinoza, until an actor is a free man, prophecy operates upon self-interest through the actor's own uncertainties and passions, rather than through reason,⁸⁶ the Impartial Public Officer is a reasoning actor whose decision-making deliberately conforms invariably to the promulgated mandatory principles of *honesty*, *integrity*, and *impartiality*. Each perspective relies upon archetypes or exemplars of perfectibility, and each is distinguished from the other in its relationship with perfectibility. So far as the Impartial Public Officer is concerned,

⁸⁵ Wood, E. (2012) at p.132.

⁸⁶ Rosenthal, m. (1997) at p.221.

compliance is the result of the exercise of a free power of choice where a failure of compliance (i.e., with the *Values* and/or the *Code*) constitutes misconduct. From a Kantian standpoint, moral conduct is only possible where it is possible to ascribe the conduct to an exercise of the actor's will.⁸⁷ Spinoza's conception recognizes an internal duality as a fundamental element in the composition of the individual. From that standpoint, observes Ruddick, "...the reasoned self is, for Spinoza, only a *possibility* among humans: what they share is the *capacity to be affected* – from which adequate ideas may or may not arise. The capacity to be affected remains a constant feature of the human condition...the social nature of this experience is not a guarantor of reasoned thought..."⁸⁸ The construct of the Impartial Public Officer, as an invariably reasoned and independently-volitional agent, is obviously inconsistent with the internal dualism and determinism of Spinoza, as described here. But additionally, from a virtue-ethics perspective, the Impartial Public Officer represents an anomaly, because the Aristotelian ideal of the teleologically-constrained golden mean itself offers something far *less* than attainable moral perfectibility as a standard or generalized outcome. As Berkowitz says, the virtue that Aristotle defined, he defined "...in terms of some inherently elusive, controversial, and ultimately non-existent human perfection."⁸⁹ Plato's virtue-as-likeness-to-God⁹⁰ he saw as attainable only by philosopher-kings. Herdt contends that the Christian conception of this idea of the imitation of Christ "...is not to idolize a finite human virtue but rather to reflect in our finite way some limited aspect of God's inexhaustible perfection."⁹¹ In this conception, the archetype *virtuous man*, Jesus

⁸⁷ See Kluz, C. (2012) at p.80.

⁸⁸ Ruddick, S. (2010) at p.27.

⁸⁹ Berkowitz, P. (1999) at p.44.

⁹⁰ See text associated with note 185, Chapter 1.

⁹¹ Herdt, J. (2010) *Putting on Virtue: The Legacy of the Splendid Vices*, University of Chicago Press, Chicago U.S.A., at p.8.

Christ, “...exemplifies virtues perfectly and indefeasibly” says Herdt; an *exemplar* to which humans can only aspire, given their “...own imperfect grasp of Jesus as the image of God.”⁹² Berkowitz argues that both Hobbes and Locke indulged in misrepresentations of Aristotle as being solely concerned with human perfection and its attainment,⁹³ despite that neither considered their own respective political ideals to rely upon any kind of human perfectibility. The mandating of archetypal obligations - realistically beyond the normative reach of mortal APS officers - seems to resonate with just that scenario warned of by MacIntyre in which Aquinas’ scholastic ethics have become stripped of the substance that gave them meaning; and stripped also of a *telos*, traditionally understood.⁹⁴ But this is what the *Values* and the *Code* do.

Following this perspective, the narrative regarding ethical conduct in the APS that is established through consecutive *State of the Service Reports* reifies the APS Commissioners’ purported confirmation that APS officers do *as a matter of fact* conduct themselves solely in the service of the public good. In this narrative – founded, as it is, upon the myth of the Impartial Public Officer - the characterization of the APS as an organization in which, effectively, the entire body of officers actualizes a commitment to the public good, at once perpetuates and relies upon a binarized conception of good and evil, in which anything that is not consistent with the public good (i.e., evil) is necessarily external (i.e., ‘Other’). The narrative of an entire cohort of Impartial Public Officers conforming – for all intents, perfectly – to archetypal principles of *honesty*, *integrity*, and *impartiality*, is, really, an account of human perfectibility of Kantian proportions. For Kant, archetypes comprise representations of the “greatest possible perfection” that could

⁹² *Id.*

⁹³ Berkowitz, P. (1999) at pp.9, 194 (n.8).

⁹⁴ See text associated with note 230, Chapter 1;

be attained by pure reason.⁹⁵ However, in terms of such questions as that of human freedom, the making of laws, or the state of the human condition, Kant regards the idea of the archetype in strictly *aspirational* terms (i.e., not in any mundane sense realizable):

This perfect state may never, indeed come into being; none the less this does not affect the rightfulness of the idea which in order to bring the legal organization of mankind ever nearer to its greatest possible perfection, advances this maximum as an archetype.⁹⁶

Kant's analysis derives directly from Plato; he says:

But it is not only where human reason exhibits genuine causality, and where ideas are operative causes (of actions and their objects), namely, in the moral sphere, but also in regard to nature itself, that Plato rightly discerns clear proofs of an origin from ideas. A plant, an animal, the orderly arrangement of the cosmos – presumably therefore the entire natural world – clearly show that they are possible only according to ideas...⁹⁷

For Kant, the highest good includes both virtue and happiness, being, he says, the whole object of a pure practical reason. However, the highest good is represented as a dual modality; as that of an intelligible world on the one hand, and of a sensible world on the other. The highest good of an intelligible world is the kingdom of God, and this alone “satisfies the strictest demand of practical reason.”⁹⁸ In the sensible world, the highest good attainable by a human being is, at best, virtue, because, Kant says, “[t]he *worth* of a disposition *completely* conformed with the

⁹⁵ Kemp-Smith, N. (1929) at p.312.

⁹⁶ *Id.*

⁹⁷ *Ibid.*, at p.313.

⁹⁸ *Ibid.*, at p.243.

moral law is infinite.”⁹⁹ But, as duty demands that we strive “...to produce and promote the highest good in the world” in the sensible world,¹⁰⁰ the highest good of the intelligible world must stand as an *archetype*. The archetype here represents supreme perfection expressing a complete *whole-ness*. Kant says that the moral *ideas* of this highest good of the kingdom of God, “...as archetypes of practical perfection, serve as the indispensable rule of moral conduct and also as the *standard of comparison*.”¹⁰¹

But, far from simply constituting a standard of comparison for the purposes of an aspirational ideal, the archetypes promulgated in the *Values* and the *Code*, of *honesty*, *integrity*, and *impartiality*, among others, are *mandated obligations* that stand to be complied with (or not) by the entire body of APS officers. Any deviation from the statutory obligations under the *Values* and the *Code* constitutes misconduct; routine, normatively commonplace departures from these stringent expectations represent a departure from the narrative of the Impartial Public Officer, but one, in all likelihood, never to be accounted for as a statistic that will be reported in the *State of the Service Reports*.

Kant’s conception of archetypes stands in dramatic contrast to that of Jung, who considers archetypes to be biologically inherited supra-individual predispositions of the collective unconscious.¹⁰² Like Kant, Jung also conceives of archetypes in terms of their dual nature. But quite unlike Kant, although very much in sympathy with Spinoza, Jung’s conception of evil does

⁹⁹ *Id.*

¹⁰⁰ *Ibid.*, at p.241.

¹⁰¹ *Ibid.*, at p.242.

¹⁰² Pietikainen, P. (1998) “Archetypes as Symbolic Forms” in 43 *Journal of Analytical Psychology* 325 at p.325.

not constitute an 'Other' in respect of the archetype and its wholeness. For Jung, duality is an intrinsic feature of the *internal* structure of any archetype:

Just as all archetypes have a positive, favourable, bright side that points upwards, so also they have one that points downwards, partly negative and unfavourable, partly chthonic...¹⁰³

Jung's conception of archetypes, of course, reflects the moral ambivalence of the self that 'depth' psychology brought to modernist, scientized, conceptions of voluntarism.¹⁰⁴ The idea of the Impartial Public Officer beset by Augustinian internal psychic and moral conflict,¹⁰⁵ purportedly dedicated to archetypal principles similarly conflicted, has no place in the Westminster paradigm and its attendant narratives that require a persuasive account of effectively responsibilized public officers dedicated solely to the public good. The aspirant governor, seeking to gain the trust of those who hold the power to consent-or-not and, thus, to be legitimized, would be compromised by any frank acknowledgement, by the governor, of a public administration so-afflicted *as an incident of its nature*; as William Connolly contends in relation to this issue: "[w]ho wants to elect representatives who concede the inefficacy of the unit they represent?"¹⁰⁶ It does, however, resonate, to a far greater degree, with the myriad reports of misconduct and malfeasance selectively reviewed in Chapter 4.

¹⁰³ Jung, C. "The Archetypes and the Collective Unconsciousness" in Read, H., and Fordham, M. (Ed.) (1959) *The Collected Works of C. G. Jung, Volume 9 Part I*, at §413.

¹⁰⁴ See text associated with note 144, Chapter 5.

¹⁰⁵ See text associated with note 40, Chapter 3.

¹⁰⁶ Connolly, W. (1991) *Identity\Difference: Democratic Negotiations of Political Paradox*, at p.81.

Example – The APS statutory obligation of *honesty*

The statutory obligation of *honesty* provides a particularly good example of how the instantiation of binary conceptions operate as a lens through which the discourses about government, public administration, and even the social contract, are perceived and influenced. The unreconstructed, unqualified, obligation of honesty is an essential component of Westminster constructions of the Impartial Public Officer. Honesty is necessary in order to legitimize the claims of trustworthiness that the aspirant governor desires to make, so as to win the consent of any who would offer it and thereupon submit to his rule. The quality of honesty, so construed, has no gradations, incorporating an obverse (i.e., deceit) rather than a series of gradations from unalloyed truth to perfected deceit. This is the narrative of honest conduct that has emanated from the British Civil Service, and that may be implied from the accounts of purportedly spartan instances of misconduct in the APS *State of the Service Reports*; that consistent honesty, so-framed, is achievable, and, indeed, is achieved. It is also, crucially, the unidimensional and binarized conception of honesty (*viz: honesty – good, deceit – bad*) that is architectonically created by its statutory promulgation; at once conceptually framing and thence infusing any discourse which bears upon the subject of Australian Commonwealth public sector ethics, thereby lending itself to the creation of the myth of the Impartial Public Officer.

Of course, it is a normative commonplace that honesty in the context of human organization is essential. As Shulman emphasizes, deceit is a severe threat to societies with complex and impersonal divisions of labour,¹⁰⁷ noting Simmel's comment that:

¹⁰⁷ Shulman, D. (2007) at p.7; See Wolff, K. (Ed.) (1950) *The Sociology of Georg Simmel*, at pp.315-6.

Our modern life is based to a much larger extent than is usually realized upon the faith in the honesty of the other....We base our gravest decisions on a complex series of conceptions, most of which presuppose the confidence that we will not be betrayed.¹⁰⁸

The historic resort to oaths and contracts evidences the normatively perceived necessity of achieving this kind of confidence. From a formal standpoint, the proper functioning of any organization is generally reliant upon the honesty of its officers.¹⁰⁹ It is this quality of confidence that connects the imperatives of *trust*, *legitimacy*, and *consent* in the social contract; for the very reason that these imperatives go directly to the validity of the contract, and there could be no contract capable of sustaining any amount of deceit where that deceit happens to implicate the trust upon which it is based.¹¹⁰ Furthermore, that factor which oftentimes attends dishonest conduct in organizations – the silence of colleagues who are aware of the dishonesty – is equally morally corrosive due to its capacity to constitute practical consent to the deceit.¹¹¹ However, these normative conceptions of honesty, which cast deceit as deviant, are confronted by another equally valid normative reality regarding human conduct; one which casts deceit as itself normative. As David Livingston Smith writes:

Deceit is the Cinderella of human nature; essential to our humanity but disowned by its perpetrators at every turn. It is normal, natural, and pervasive. It is not, as popular opinion

¹⁰⁸ Shulman, D. (2007) at p.7.

¹⁰⁹ Grover, S. (1993) "Lying, Deceit, and Subterfuge: A Model of Dishonesty in the Workplace" in 4(3) *Organization Science* 478 at p.478.

¹¹⁰ Jay, M. (2010) *The Virtues of Mendacity: On Lying in Politics*, at p.71.

¹¹¹ Zerubavel, E. (2006) *The Elephant in the Room: Silence and Denial in Everyday Life*, at p.85.

would have it, reducible to mental illness or moral failure. Human society is a “network of lies and deceptions” that would collapse under the weight of too much honesty.¹¹²

Trivers mirrors Livingston Smith’s take on deceit, in stating,

Deception is a very deep feature of life. It occurs at all levels – from gene to cell to individual to group...¹¹³

Livingston Smith’s point, that not only do falsehoods sit at the centre of our cultural heritage but come also with a biological – *evolutionary* – imperative,¹¹⁴ is supported by a raft of commentators. Leslie notes that deceit has driven human evolutionary development and is attended always by the claim of truthfulness on the part of the perpetrator.¹¹⁵

Researchers utilizing qualitative and statistical methodologies, including ethnographic and longitudinal fieldwork, have produced significant empirical evidence of the impact of environmental context upon ethical conduct and determinations in workplace settings. Much of this research finds a concurrence regarding the penetration of influential normative factors in organizational culture which militate against the kinds of values crucial to the integrity of the imperative to honesty in the *Values* and the *Code*. Erving Goffman, for example, elaborated upon his findings in extensive fieldwork regarding the ‘subterrain’ and necessarily deceitful sensibility that characterizes what is actually the *meaningful* interaction between actors in organizations; a phenomenon he refers to as the *underlife* of the institution.¹¹⁶ A crucial realization is that beyond

¹¹² Smith, D. L. (2004) *Why We Lie: The Evolutionary Roots of Deception and the Unconscious Mind*, at p.2.

¹¹³ Trivers, R. (2011) *The Folly of Fools: The Logic of Deceit and Self-Deception in Human Life*, at p.6.

¹¹⁴ Smith, D. L. (2004) at pp. 1, dust-jacket.

¹¹⁵ Leslie, I. (2011) *Born Liars: Why We Can’t Live Without Deceit*, at pp.3, 1.

¹¹⁶ Goffman, E. (1961) at p.199.

the evidence of individual self-reported deceit accounting for the vast majority of respondents in some research samples, i.e., even greater than 90% in some instances,¹¹⁷ Goffman's research reveals the collaborative nature of deceit which also attends organizations. Shulman notes the multiplicity of potential collaborators to such deceits, which deceits may involve the avoidance of work, or some form of protective action, and may indeed operate specifically for the purpose of falsely contriving compliance with an obligation.¹¹⁸ In many settings including in organizations, a cultural emphasis may often operate in relation to a known deceit wherein actors feign a failure to notice it;¹¹⁹ the word given to this cooperative masquerade in the Russian language being *vranyo*.¹²⁰ What is more, many of these proclivities arguably operate as a function of normal human psychology. Sackeim and Wegner, for example, report that a significant body of research in social psychology finds that "...normal cognitive functioning is characterized by pronounced cognitive bias or distortion...[comprising] ...self-serving biases, unrealistic optimism, egocentric attributions, illusions of control, "beneffectance," and self-deception."¹²¹ On this point, Charles V. Ford observes,

Taylor and Brown (1988), in their superb review of numerous papers dealing with self-illusions (self-deceptions), concluded that "the mentally healthy person appears to have

¹¹⁷ See Ford, C. (1996) *Lies! Lies!! Lies!!!: The Psychology of Deceit*, at pp.4, 5.

¹¹⁸ Shulman, D. (2007) at p.78.

¹¹⁹ *Ibid.*, at p.5.

¹²⁰ Jay, M. (2010) at p.36.

¹²¹ Sackeim, H., and Wegner, A. (1986) "Attributional Patterns in Depression and Euthymia" in 43(6) *Archives of General Psychiatry* 553 at p.553.

the enviable capacity to distort reality in a direction that enhances self-esteem, maintains beliefs in personal efficacy, and promotes an optimistic view of the future (p.204).¹²²

The role of self-deception as an arguably functional component of personal psychology, i.e., to make us ‘feel better about ourselves,’ leads us back to Sigmund Freud, whose theories are argued to have wrecked the monopoly of Cartesian conceptions of a unified self.¹²³ Trivers, however, arguing for the functionalism of self-deception from an evolutionary science standpoint, contends that self-deception has evolved primarily in the service of deception itself.¹²⁴ Ford agrees that deception and self-deception are integral to the dynamic relationships which make up human organization, and that research evidence supports Trivers’ contentions.¹²⁵ Leslie, in discussing this connection in the organizational context, argues “each begets the other.”¹²⁶ And the functional role of self-deception can be argued to operate in respect of that kind of deception which exists out in the open. So, Zerubavel contends that it is an operating self-deception that extends to the meta-denial constituted by the silences which attend something not to be spoken of, and the likewise attendant denial that there exists any such silence.¹²⁷

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A promissory obligation of the kind herein taken to operate in respect of the Impartial Public Officer assumes, normatively, an obligation of veracity; as Baier observes, “[w]hen under an oath

¹²² Ford, C. (1996) at p.253; citing Taylor, S., and Brown, J. (1988) “Illusion and Well-Being: A Social Psychological Perspective on Mental Health, in 103 *Psychological Bulletin* 193.

¹²³ Smith, D. L. (2004) at p.23.

¹²⁴ Trivers, R. (2011) at p.4.

¹²⁵ Ford, C. (1996) at pp.276-7.

¹²⁶ Leslie, I. (2011) at p.230.

¹²⁷ Zerubavel, E. (2006) at pp.52-3.

or oath equivalent, the truth is expected of us.”¹²⁸ At least in the context of the *Values* and the *Code*, it brings with it, in her words, an obligation not to lie or otherwise deceive, which itself is conditional on a clear understanding that the truth is then to be spoken.¹²⁹ In terms of conventional normativity, this obligation coincides with the mandated expectations regarding the conduct of all APS officers; expectations that are purportedly met in exemplary fashion, year-in, year-out, according to consecutive *State of the Service Reports*. Within the law-centered paradigm, the idea of such an obligation is simply an extension of the notional rule of law; itself “universally recognised”¹³⁰ as a paradigmatically-central and unifying principle of the modern liberal democratic state. But proclivities to deceit – both deliberate and as a function of human foible - pervade all cultures and institutions. When the myth of the Impartial Public Officer falls away in the face of myriad examples evidencing that APS officers stand in a more banal light - one that is psychologically indistinguishable from that which illuminates all who are subject to the realities of the human condition and the vagaries of social and psychological context – there is little to distinguish, psychologically-speaking, the Australian private individual from the individual employed by the APS.

And so, the proposition that now stands at this juncture of the thesis is that officers of the APS resort to the use of dissimulation, deceit, denial, rationalization, conspiracies of silence, moral disengagement, and other challenges to the ‘proper’ discharge of their Westminster obligations, as normative strategies for reconciling incidental or strategic imperatives that present in their

¹²⁸ Baier, A. “Why Honesty is a Hard Virtue” in Flanagan, O., and Rorty, A. (1990) *Identity, Character, and Morality*, at p.270.

¹²⁹ *Ibid.*, at p.272.

¹³⁰ Jennings, W. (1959) *The Law and the Constitution* (5th Ed.) at p.45.

day-to-day professional interactions. The revelations of myriad and arguably systemic departures from the mandated archetypal standards of the *Values* and the *Code* suggest a generalized failure on the part of the APS to meet its obligatory standards of conduct; and more, that this failure constitutes an undeniably commonplace – albeit, largely disguised – characteristic of APS performance. Within the framework of liberal democracy, such an interpretation raises the possibility that claims to legitimacy upon which the notional contract between government and the people is based is legitimately open to challenge. Philosophical accounts of virtue see nothing unusual in instances of (non-virtuous) deceit normally-distributed (in statistical terms) in respect of a particular cohort; i.e., in conventional terms, only the very few clustered at one tail of the bell curve are truly virtuous. And from a philosophical standpoint, it might be questioned whether virtue, as an operating concept, necessarily plays any part, or, at least, any impactful part, in the normative determinations of incumbent APS officers (or, of any particular officer) in their day-to-day interactions as (presumed) autonomous, agentic, and rational decision-makers. But it is a live question as to whether we must, in fact, look beyond armchair philosophy conceptions of virtue to understand the place of virtue as a normative – let alone, determinative – account of action in these (or any) settings. The likes of MacIntyre and Anscombe et al – as has been discussed throughout this thesis – have argued that virtue, as an operating concept, has become so degraded in the modernist world as to be of no practical value. Anscombe's contention, that discussion of virtue ethics should be put aside until such times as a philosophy of psychology is made available, necessarily assumes an analytical perspective that draws upon theoretical sources outside of the traditional boundaries of armchair philosophy. Albeit that it is not a dedicated philosophy of psychology, social theory provides a significant opportunity to critique

traditional conceptions of volitional agency (its relationship with normative structures generally accepted as constitutive of the moral framework within which modern society operates), and the claim that virtue plays a determinative role in those arrangements.

Interactionist theories and the implications for *virtue* of a de-centered self.

The tension - noted by Harold Garfinkel - between the “awesome mystery” of the Kantian “moral order ‘within’” and the “technical mystery” of the “moral order ‘without’”¹³¹ turns upon the question of how moral order itself is framed in respect of the individual and, indeed, how the individual-as-*actor* is conceived within it. The possibility that this could be a question had been illuminated, as was mentioned earlier, by Spinoza, who emphasized a *relational* ontology in which the individual did *not* occupy centerstage as an autonomous agent in the socio-moral machinations determinative of social order. But modernist conceptions of social order take for granted the centrality of human reason as a transcendental quality of consciousness that provides the foundation upon which it is constructed; in Parsons’ formulation: an observable “‘factual order’ of patterned, standardized, coordinated behavioural routines.”¹³² The normative order that this makes possible, in Parson’s view, conforms in its basic structure with the forms of traditional, coercive, and institutional, authority in respect of which rule-based attributions of responsibility to otherwise autonomous actors are taken for granted. Parsons’ normative order comprises

¹³¹ Garfinkel, H. (1964) “Studies of the Routine Grounds of Everyday Activities” in 11(3) *Social Problems* 225 at p.225.

¹³² Hilbert, R. “Ethnomethodology” in Ritzer, G. (Ed.) (2005) *Encyclopedia of Social Theory Volume 1*, at p.253.

...a culture of norms and values, which both transcends societal members generationally and assimilates to members' consciousness through socialization and internalization...[and in respect of which]...[m]embers thereby follow norms and values not only as a matter of necessary adaption to real culture but also as a matter of subjectively given voluntary compliance.¹³³

His theoretical account of human life comports with modernist accounts of the social order and resonates also with those structures of volitional agency identified by Wilcox, above.¹³⁴ But however recognizable from the standpoint of modernist liberal societies, Parsons' account offers no panacea to the likes of MacIntyre and Anscombe regarding the socio-philosophical crisis they opine. For MacIntyre, the "...key theoretical conceptions of the contemporary social order" are Weberian and Nietzschean.¹³⁵ And from his standpoint, the modernist world is the world of the bureaucratic *expert* constituted in a bifurcation of the social order respectively into the emotivist and (therefore) teleologically-unanchored "realm of the organizational...[and]... the realm of the personal..."¹³⁶ As mentioned, Anscombe intimated that the answer to the so-called crisis requires the establishment of a philosophical substrate capable of underpinning the science of the internal human world. But, for his part, MacIntyre felt compelled to highlight not so much *sociology's* possibilities as its *inevitability*, recognizing no difference between moral philosophy and the sociology of morals.¹³⁷ From somewhere within that sentiment, Anne Rawls observes that it was indeed Rousseau who first argued that "...social relations create and transform biological beings

¹³³ *Id.*

¹³⁴ See text associated with note 18, this chapter.

¹³⁵ MacIntyre, A. (1984) at pp.114-5.

¹³⁶ *Ibid.*, at p.34; see text associated with note 385, Chapter 3.

¹³⁷ *Ibid.*, at pp.72-3.

into social beings, with social reason and social morality.”¹³⁸ And the crucial element in Rousseau’s theory of a social contract, she argues, is not a structure in which a mechanism for governance coalesces in subjective human experiences of *trust*, *legitimacy*, and *consent*; it arises, rather, in the mundane and fundamental *sociality* that connects actors – i.e., whether, governor, administrator, or citizen - in their day-to-day lives.¹³⁹ From this reconstituted perspective on the place of sociality in human life, Rawls challenges the law-centred paradigm that Anscombe relies on in her analysis of the decline of virtue; a paradigm in which rule-based social structures are assumed to be the fundamental framework according to which social order and the individual must be conceived and understood.¹⁴⁰ Rawls’ challenge, which comes out of the social theory tradition of Garfinkel directly, and that of interactionists such as Goffman and Giddens to a lesser degree, is a challenge to the individualized conception of the self as a “unifying container of roles, values, and projects.”¹⁴¹ Constructs such as Garfinkel’s ethnomethodology, Goffman’s dramaturgy, and Giddens’ structuration theory, reframe – each in their own way – the volitional, and therefore, moral capacities of the discrete *self*, radically de-centering it in its relation to the moral landscape and the external structures upon which conventional accounts of volition rely. And so, rather than seeing *situation* as an element to be accounted for in the trajectory of an agent’s morality, as would be the case from a social psychology perspective, the agent is conceived *primarily* as situated in interaction.

¹³⁸ Rawls, A. (2009) “An Essay on Two Conceptions of Social Order” in 9(4) *Journal of Classical Sociology* 500 at p.512.

¹³⁹ *Ibid.*, at p.515.

¹⁴⁰ *Ibid.*, at p.511.

¹⁴¹ Rawls, A. (Ed.) “Respectifying the Study of Social Order – Garfinkel’s Transition from Theoretical Conceptualization to Practices in Details” in Rawls, A. (2006) *Seeing Sociologically: The Routine Grounds of Social Action*, at p.46.

Interactionism, howsoever formulated, enjoys little traction in the face of universal modernist conceptions of social order as an organized aggregation of discrete, concrete identities; each imbued with volitional agency and naturally susceptible to responsabilization. That is not to say interactionism is represented by fringe commentators; in 2007, the *Times Higher Education Guide* listed Anthony Giddens and Erving Goffman as respectively the fifth and sixth most cited authors in the humanities. But because society and the academy are so wedded to notions of *individualism*, concepts such as, for example, *constitutive orders* - rather than being accepted as first-order phenomena (argues Rawls)¹⁴² - have been marginalized by the academy generally, and by mainstream sociology; both unwilling to question their own theory and method. That *action* - rather than dispositional qualities which inhere in a 'whole' identity - might figure much more prominently in what is actually *meaningful* in the production of social life, is, to be sure, a possibility contemplated by more than just interactionist theorists. Nietzsche's preoccupation with Greek Tragedy in *The Birth of Tragedy*,¹⁴³ and with the profoundly *performative* dimension of the social world in Ancient Greece, reprioritized those markers of pre-Socratic normative importance that were displaced by the Socratic *knowledge* of which Plato's philosopher king was the exemplar. As Hawhee observes, identity did not precede actions in the eyes of the ancient Greeks.¹⁴⁴ But Plato reconceived justice-as-a-virtue, detaching *arête* from its necessary connection with the *agôn*, such that it could now inhere as a component of a man's *identity* in that slowly solidifying *self*; by which self, the beneficiaries of the Enlightenment could eventually contemplate and demand satisfaction of their 'interests.'

¹⁴² Rawls, A. (2009) at p.504.

¹⁴³ Nietzsche, F. (1995) *The Birth of Tragedy*.

¹⁴⁴ Hawhee, D. (2002) at p.187.

It has been since the seismic events of the second world war,¹⁴⁵ in particular, that the theoretical landscape traversed by the subject individual-as-*actor* has intersected a conflation of mutually contested and contesting postmodern, post-structuralist, and theoretically conventional (i.e., basically, structuralist) perspectives. In the world of Wilcox' volitional agent - and of that of the Impartial Public Officer - the moral certainty of one's *self* and of one's place and moral objectives provides a comforting basis for reconciling questions of truth and falsity, right and wrong, and good and evil. That certainty provides the substrate upon which conventional formal systems for regulating ethical conduct have been built, and the resulting structures are commonly regarded as essential to human society. As Chou argues, "for human lives and civilizations to flourish, to be meaningful and productive, certain concrete structures and systems of knowledge must be established;" what this amounts to, in a word, is *institution*.¹⁴⁶ However, Nietzsche radically contests the structuralist assumptions that underpin conventional ideas of the physical world and the discrete self within it, as well as the social orders created therefrom. In his essay *On Truth and Lying in an Extra-moral Sense*, he says,

Everything that sets man off from the animal depends upon this capacity to dilute the concrete metaphors into a schema; for in the realm of such schemata, something is possible that might never succeed under the intuited first impressions: to build up a pyramidal order according to castes and classes, a new world of laws, privileges, subordinations, boundary determinations, which now stands opposite the other,

¹⁴⁵ See Rawls, A. (2009) at p.513.

¹⁴⁶ Chou, M. (2010) "Democracy in an Age of Tragedy: Democracy, Tragedy and Paradox" in 11(2) *Critical Horizons* 289 at p.297.

concrete world of primary impressions, as the more solid, more universal, more familiar, more human, and therefore as the regulatory and imperative world.¹⁴⁷

For Nietzsche, this world of arbitrarily-constructed metaphor, hardened into concepts constitutive of, and constituted by, conceptions of *truth* and *knowledge*, and given architectonically-defined structure through language and, later, science, extends in every way to man's conception of *self*. As Spinoza contended that each individual endeavours to "persevere in its own being,"¹⁴⁸ so Nietzsche contends – in language which resonates with Goffman's conception of *presentation of self*¹⁴⁹ – that this endeavour is prosecuted by way of the intellect, whose chief powers are that of dissimulation:¹⁵⁰

This art of dissimulation reaches its peak in man; here deception, flattery, lying and cheating, slander, false pretenses, living on borrowed glory, masquerading, conventions of concealment, playacting before others and before oneself, in sum, the constant fluttering about the flame of vanity, is so much the rule and the law that almost nothing is more incomprehensible than how an honest and pure desire for truth could arise among men.¹⁵¹

¹⁴⁷ Nietzsche, F. "On Truth and Lying in an Extra-Moral Sense (1873)" in Gilman, S., Blair, C., & Parent, D. (1989) *Friedrich Nietzsche on Rhetoric and Language*, at p.250.

¹⁴⁸ See text associated with note 52, this chapter.

¹⁴⁹ See Goffman, E. (1959) *The Presentation of Self in Everyday Life*.

¹⁵⁰ Gilman, S., et al. (1989) at pp.246-7.

¹⁵¹ *Ibid.*, at p.247.

Nietzsche here is referring to those aspects of life (and the self) – to take Gambino’s description of it – that have been ignored since the Ancient Greeks learned to exclude them from their established identities.¹⁵²

Nietzsche’s theory of self is surely a radical departure from our conventional normative conceptions of social order and the place of the individual within it. And, in any conventional sense, such notions are challenging. Diprose characterizes Nietzsche’s philosophy of the self as interposed between mainstream social and political theory on the one hand, preoccupied with sameness and stability, and reducible to the contractual relations negotiated by mutually “arms-length” and “self-present” individuals;¹⁵³ on the other, an array of theoretical positions committed in varying degrees to “...the declaration that self-mastery and self-identity are dead along with the ideal of uniform social relations these notions of self support.”¹⁵⁴ The myriad paths made possible to anybody confronted by this landscape necessarily implicates conceptions of moral conduct in any applied sense, for, as Diprose observes, “[h]ow the self is made as a social structure is first a question of how the body is unified through social concepts”¹⁵⁵ – and, she goes on, “...related to this process of unification, is the question of how thought and the ego are instruments of the body.”¹⁵⁶ This re-framing of conventional conceptions of the self draws together the idea of a relational ontology as proposed by Spinoza, and the emphasis given to *sociality*, as the glue which binds Rousseau’s social contract within a *constitutive or situated order*

¹⁵² Gambino, H. (1996) “Nietzsche and the Greeks: Identity, Politics, and Tragedy, 28(4) *Polity* 415 at p.427.

¹⁵³ Diprose, R. “Nietzsche and the Pathos of Distance” in Patton, P. (2002) *Nietzsche, Feminism and Political Theory*, at p.2.

¹⁵⁴ *Id.*

¹⁵⁵ *Ibid.*, at p.3.

¹⁵⁶ *Id.*

– to borrow from Garfinkel’s nomenclature – into an aggregation of perspectives radically-removed from the normative social order envisaged by Parsons. Inevitably, it also problematizes the conventional ontologies of the social contract itself; not to mention ontologies of contract theory, generally.

Theories of interaction: problematizing rule-structures; and social order re-framed.

From Garfinkel’s perspective; arguably the most radical of the interactionists considered here, social order is a central component of human life. Garfinkel is concerned with “tactics and strategies as oriented toward the orderly production of situated sequences of practice;”¹⁵⁷ Interaction, in this sense, “...to be meaningful and coherent...must display an expected order, and recognizably.”¹⁵⁸ Order is effected in a manner which is sensitive to the prevailing contingencies of the situation. In this, Garfinkel argues that an adequate understanding of social order requires that individuals not be seen as unities of roles.¹⁵⁹ He states, “...an actor is not a ‘concrete individual;’ an actor is a series of propositions.”¹⁶⁰ In respect of both identity and social order, the *state of being* in the interaction is the crucial factor¹⁶¹ and the resulting identities, and orders, are fundamentally contingent upon this. As such, “[p]ersons...do not act; nor is a group made up of persons. *Actors* act, and a group is made up of *actors*.”¹⁶² Identity (i.e., and *identities*), in this formulation, is something constantly sought to be achieved, moment-to-moment.

¹⁵⁷ Rawls, A. (2006) at p.40.

¹⁵⁸ *Ibid.*, at p.41.

¹⁵⁹ *Ibid.*, at pp.56-7.

¹⁶⁰ *Ibid.*, at p.193.

¹⁶¹ *Ibid.*, at p.56.

¹⁶² *Ibid.*, p.193.

This alternative schema profoundly implicates the kind of normative social organization by which we comprehend rule-structures and questions of compliance, deviance, dispositional virtue, and social order. In such a world, virtue, if found at all, is found not in the character of individual whole persons, but in *action*, as in the days of Homer. In short, the idea of virtue, as a quality which inheres in an individual as a stable element of that individual's 'whole' identity, has no place in this kind of interactionist perspective. Under such a scheme of *situated practice*, 'rules' – conventionally organized in normative structures – are reorganized according to re-conceptualized social practices, known variously as constitutive or situated orders (Garfinkel/Rawls), working consensus or interaction orders (Goffman), or dualities of structure (Giddens). Rawls argues that where rules belong to situated practices of these kinds, rather than to conventional 'social structures,' "...then participants – in choosing to participate – are also choosing the sets of rules (or constitutive expectations) that they will/must use/orient in enacting that participation intelligibly."¹⁶³ The scenario is not one of individuals 'pitted against rules,' but sets of rules which enable meaningful participation; "Rules – in this sense – facilitate the sociality that stands under and makes possible human reason, identity and morality."¹⁶⁴ This is the basis of Rawls' assertion that there exists no crisis in modernity of the kind warned of by MacIntyre and Anscombe; subject, however, to her assertion that "...participation in a society based on a reciprocal commitment to situated constitutive practices only works if participation is voluntary and egalitarian;" this necessitating a requirement for justice.¹⁶⁵

¹⁶³ Rawls, A. (2009) at p.511.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

The implications of such an *alternative reality*, in which “...an actor or identity belongs to a location or situation, not a person,”¹⁶⁶ for conceptions of social order in which rigidified, promulgated rules constitute the normative roadmap to the public good, are obviously profound. Garfinkel’s ideas, however, can be distinguished in important ways, from other interactionists, such as Goffman and Giddens, whom he would contend are too-wedded to reified constructs of a “whole self.”¹⁶⁷ Goffman, for example, in his conception of *presentation of self*, might be argued, from Garfinkel’s standpoint, to conceive of “...strategic and false presentations of self – with a ‘true’ self and ‘true’ motives hiding somewhere in the background.”¹⁶⁸ Anthony Giddens offers an alternative take on this interactionist perspective, although Rawls observes that his formulations concedes too much to notions of individual choice and motivation.¹⁶⁹

Fundamentally, the preoccupation with social order in a way that leads to a reliance on value-consensus to explain normative moral order, as is the case with Parsons, is flawed, according to Giddens, who states:

Given such an orientation to social theory, it is impossible to make satisfactory conceptual recognition of the diversification of interests in society which intervene between the actions of its members and of the overall structure of the global community, of the conflicts that are predicated upon these, or the power alignments with which they are interlaced.¹⁷⁰

¹⁶⁶ Rawls, A. (2006) at p.57.

¹⁶⁷ *Ibid.*, at p.72.

¹⁶⁸ *Ibid.*, at p.79.

¹⁶⁹ Rawls, A. (2009) at p.503.

¹⁷⁰ Giddens, A. (1976) *New Rules of Sociological Method*, at p.98.

For Giddens, the key to understanding social order “is not the ‘internalization of values,’ but the shifting relations between the production and *reproduction* of social life by its constituent actors.”¹⁷¹ This involves the production of “structures of interaction”¹⁷² as a meaningful enterprise¹⁷³ which is “actively and continuously negotiated”¹⁷⁴ by knowledgeable actors whose recursive engagement represents a “diversification of interests.”¹⁷⁵ The central point to be taken from Giddens’ account is that “structure is not ‘external’ to individuals;”¹⁷⁶ agents and structures are not two independently given sets of phenomena, but represent a *duality of structure*, such that “the structural properties of social systems are both medium and outcome of the practices they recursively organize.”¹⁷⁷ Giddens refers to this as ‘structuration.’

Within this construct, Giddens considers *power* to be of central importance.¹⁷⁸ He characterizes it as a *capability*¹⁷⁹ to ‘act otherwise’ or, to intervene or to refrain from such intervention so as to influence a specific process or state of affairs.¹⁸⁰ Notably, Giddens proposes that power is not exclusive to those in dominant positions but can be exercised by those who are subordinate to influence the activities of their superiors.¹⁸¹ In respect of this *dialectic of control*, “those in subordinate positions...might have a greater penetration of the conditions of social reproduction than those who otherwise dominate them.”¹⁸²

¹⁷¹ *Ibid.* at p.102.

¹⁷² *Ibid.* at p.103.

¹⁷³ *Ibid.* at p.104.

¹⁷⁴ *Id.*

¹⁷⁵ *Ibid.* at p.98.

¹⁷⁶ *Id.*

¹⁷⁷ Giddens, A. (1984) *The Constitution of Society*, at p.25.

¹⁷⁸ Giddens, A. (1979) *Central Problems in Social Theory*, at p.68.

¹⁷⁹ *Id.*

¹⁸⁰ Giddens, A. (1984) at p.14.

¹⁸¹ *Ibid.*, at p.16.

¹⁸² Giddens, A. (1979) at p.72.

The contention that actors are not simply constituents of an organizational *milieu* but are actually constitutive of the structures by which they are connected sits dramatically at odds with the dominant normative – including *official* - accounts of how action (and compliance with rules) in organizational environments is mediated. Giddens makes the point that the constitution of interaction as a moral order may be understood as the actualization of *rights* and the enactment of *obligations*.¹⁸³ And in the bureaucratic world of the Impartial Public Officer particularly, as Bourdieu asserts, law is the quintessential form of “active” discourse.¹⁸⁴ It “consecrates the established order by consecrating the vision of that order which is held by the State.”¹⁸⁵ The *Values* and the *Code* are the primary means by which interaction both within the bureaucracy but also between the bureaucracy and the citizenry is mediated. However, Schlag argues that the values and discursive criteria presupposed by the law “are not shared at a sufficiently concrete level” by those subject to its jurisdiction, but rather, are “far too abstract to enable an unproblematic resolution of serious disputes amongst the contestants.”¹⁸⁶ The risk for the law’s ability to effectively mediate interaction as contemplated by the regulatory prescriptions and proscriptions of the *Values* and the *Code* is that it is “incapable of recognizing, let alone reconciling, the concrete psychological, social and rhetorical motivating forces that lead actors to disagree.”¹⁸⁷

¹⁸³ Giddens, A. (1976) at p.108.

¹⁸⁴ Bourdieu, P. (1986-7) “The Force of Law: Toward a Sociology of the Juridical Field” in 38 *Hastings Law Journal* 814 at p.839.

¹⁸⁵ *Ibid.* at p.838.

¹⁸⁶ Schlag, P. (1991) “Normativity and the Politics of Form” in 139(4) *University of Pennsylvania Law Review* 801 at p.874.

¹⁸⁷ *Id.*

The possibility of a divergence between promulgated statutory rules of conduct and the *operative* mechanisms governing interaction in human environments is made clear in H. L. A. Hart's observation that "[s]tandards of conduct cannot be endowed with, or deprived of, moral status by human *fiat*..."¹⁸⁸ That it is arguable – to take Giddens' perspective - that structuration is the necessary consequence of actors negotiating intervening *constraints* imposed on their interactions seems evident in the phenomena of *informal* action considered by Dalton in his seminal work *Men Who Manage*.¹⁸⁹ Dalton notes "the sociologist Tönnies long ago implicitly denied the possibility of a purely official, or planned, structure, and Urwick ridicules the emphasis placed on 'official channels.'"¹⁹⁰ The tension resulting from statutory prescriptions as to conduct, and conflicting imperatives arising from myriad and competing social norms, is argued to inspire what sociologists know as negotiated orders. Giddens states "an actor may approach moral claims in exactly the same way as he does technical prescriptions; in each case he may... 'calculate the risks' involved in a particular act in terms of the probability of escaping sanction."¹⁹¹ Goffman coins the term *secondary adjustment* to describe "any habitual arrangement by which a member of an organization employs unauthorized means, or obtains unauthorized ends, or both, thus getting around the organization's assumptions as to what he should do and get and hence what he should be."¹⁹² In this formulation, structuration arguably leads to the *shadow*

¹⁸⁸ Hart, H. L. A. (1961) *The Concept of Law*, at p.171.

¹⁸⁹ Dalton, M. (1959) *Men Who Manage*.

¹⁹⁰ *Ibid.* at p.224 (referring respectively to the citations: Herberle, R., "The Sociological System of Ferdinand Tönnies" in Barnes, H. E. (Ed.)(1948) *An Introduction to the History of Sociology*, at p.234); and Urwick, L. (1952) *Some Notes on the Theory of Organization*, at p.52.)

¹⁹¹ Giddens, A. (1976) at p.109.

¹⁹² Goffman, E. (1961) at p.189.

administration,¹⁹³ in which the *Values* and the *Code* are subverted whilst the appearance of compliance is at once effected.

The ‘Underlife’ of the organization: *coup de grâce* of the *Values* and the *Code*.

Nineteenth Century statesman and Prime Minister Charles Maurice de Talleyrand-Périgord reportedly said in 1807 “speech...was given to man to hide his thoughts.”¹⁹⁴ The political utility in the opacity of one’s undisclosed thoughts was well recognised by Machiavelli.¹⁹⁵ For that matter, its utility is well recognised by children, which is no wonder given Jay’s observation: “...that training in ambiguity, nuance, duplicity, deception, and even outright lying is part and parcel of the normal socialization of children into the human community, one based to a greater or lesser degree on the beneficent lies of politeness.”¹⁹⁶ But Jay also notes that, in addition, socialization teaches us

...to be sensitive to context and audience...[so as to gain]...a *savoir-faire* that relativizes the imperative always to tell the truth....It compels us to judge between competing moral commands, including the command always to be honest, which may not invariably be the best policy in all circumstances.¹⁹⁷

But whilst these are all considerations and/or devices which factor into an agent’s moment-to-moment interaction, mundane and otherwise, the mandatory statutory obligation that the Impartial Public Officer, for example, is to conduct himself or herself honestly,¹⁹⁸ renders his or

¹⁹³ Shulman, D. (2007) *From Hire to Liar*, at p.162.

¹⁹⁴ Jay, M. (2010) at p.38.

¹⁹⁵ See Jay, M. (2010) at p.5.

¹⁹⁶ *Ibid.* at p.37.

¹⁹⁷ *Ibid.* at p.31.

¹⁹⁸ Section 13(1) *Public Service Act 1999*.

her conformity with the obligation of *honesty* as one of those matters implied¹⁹⁹ in each of his or her performative utterances, and upon which the “happiness” of the utterance (to use Austin’s term) is consequently conditional. Particularly in the case of honesty, this implication is important because, as is observed by Williams, “[t]ruth, and specifically the virtues of truth, are connected with trust.”²⁰⁰ He notes the connection, which dates to the times of Early and Middle English, was to be seen in the original meaning of the word “truth”: *fidelity, loyalty, or reliability*.²⁰¹ Similarly, it is the case that many of the promulgated obligations in the *Values* and the *Code* also implicate trust, and the trustworthiness of the Impartial Public Officer in the discharge of his or her duties, ongoingly.

But under the Westminster-inspired mandatory obligations that anchor the Impartial Public Officer’s responsibility as regards, ultimately, the fate of the social contract, departures therefrom are characterized - in the spirit of the binarized ‘Other’ - “as a lack of motivational commitment to consensual norms”²⁰² and, therefore, deviant.²⁰³ As Shulman contends, “[o]ur culture usually explains wrongdoing by segregating responsibility...”²⁰⁴ Such normative ascriptions represent a sedimented and rationalist bureaucratic aesthetic in which, once it is revealed, “the character, identity and possibility of the ethical becomes highly problematic.”²⁰⁵ In considering this point, Schlag asks whether traditional moral virtues such as honesty, sincerity, loyalty, honour of craft, etc., could be said to be “authentically” applicable or even intelligible in

¹⁹⁹ See Austin, J. (1962) *How To Do Things With Words*, at p.45.

²⁰⁰ Williams, B. (2002) *Truth and Truthfulness: An Essay in Genealogy*, at p.93.

²⁰¹ *Ibid.* at p.94.

²⁰² Giddens, A. (1976) at p.95.

²⁰³ *Id.*

²⁰⁴ Shulman, D. (2007) at p.144.

²⁰⁵ Schlag, P. (1991) at p.880.

the context of bureaucratic institutions.²⁰⁶ How could it not be that the Impartial Public Officer, as constrained *agent*, must be significantly challenged in the face of this? Consider for example that the responsabilization of an agent within this liberal-democratic rubric is problematized, given Laidlaw's observation that responsibility can comprise of divergent causative elements which "may be distributed among the entities involved in a network or a chain of events".²⁰⁷ No public servant has ultimate or complete control – in a practical sense – over any decision-making chain in respect of which they hold some kind of 'responsibility.' But, despite this, and put bluntly, the resort to dissimulation, deceit, denial, rationalization, conspiracies of silence, moral disengagement and other challenges to the 'proper' discharge of Westminster obligations, far from reflecting deviant hearts of the kind reserved for the morally-externalized 'Other,' constitute commonplace normative tools by which agents – often acting collaboratively; and even unwittingly so - seek to reconcile the presenting imperatives of their day-to-day interactions. Diverse interests intersect with asymmetrically distributed power, often resulting in silence and denial, according to Zerubavel.²⁰⁸ He states:

...what we notice and what we discuss with others is socially delineated not only by normative pressures to suppress certain information from our awareness or at least refrain from acknowledging its presence, but also by political constraints. Power, after all, involves the ability to control the scope of the information others can access as well as

²⁰⁶ *Id.*

²⁰⁷ Laidlaw, J., "Agency and Responsibility: Perhaps You Can Have Too Much of a Good Thing" in Lambek, M. (Ed.) (2010) *Ordinary Ethics*, at p.150.

²⁰⁸ Zerubavel, E. (2006) *The Elephant in the Room: Silence and Denial in Everyday Life*, Oxford University Press, New York, at p.34.

what they pass on and thus promotes various forms of forced *blindness, deafness, and muteness*.^{209,210}

What APS officers are left with in the institutions of Westminster democracy, insofar as their obligation to vindicate the purported efficacy of the *Values* and the *Code* is concerned (and, for the sake of the social contract), to use Schlag's term - borrowing from the dramaturgy of Goffman - is the *theatre of the rational*.²¹¹ Therein, credibility is essential to the performance, and as has been observed by Manning, "[c]redibility is the quality of being believable, and this quality is integral to both trust and deception."²¹²

²⁰⁹ My emphasis; i.e., the *Three Monkey Defence*; see Davidson, K. (2002).

²¹⁰ Zerubavel, E. (2006) at p.15.

²¹¹ Schlag, P. (1991) at p.807.

²¹² Manning, P. (2000) "Credibility, Agency, and the Interaction Order", in 23(3) *Symbolic Interaction* 283, at p.283.

CONCLUSION

The divergence interrogated in this thesis may be summarized as one of mutually incompatible narratives. One is an official account of superlative compliance with a limited promulgated range of virtue-like values; the other comprises both official and non-official reports of widespread failures of compliance in respect of those same values. The proposal - that a public officer's compliance with the promissory obligations that operate as a function of that officer's position is primarily a question of virtue - provides the analytical leverage for this thesis. However, virtue in this analysis is really just a convenient vehicle by which to interrogate the efficacy of public sector statutory regulatory structures set within a broader context of social order. The *APS Values* and *Code* are set within the edifice of Westminster liberal-democracy; itself founded upon a sub-structure of Enlightenment-inspired politico-philosophical moral assumptions emphasizing the primacy of the *individual*. Fundamental to those assumptions is the place of the conception of contract (i.e., the so-called social contract), in respect of which the autonomous citizen - as 'party' - carries the power of consent to an arrangement of governance. This assumption remains a central feature of political discourse in modern accounts of representative politics in Westminster systems of government. Allusions to its fundamental role in the relationship of governed and governor litter the adumbrations of modern-day politicians. And so, following the election victory of the Liberal-National Coalition in May 2019, the newly elected prime minister of Australia, Scott Morrison, said that government members of parliament and senators would

...burn for the Australian people every single day...[t]his was a victory for the Australian people and it is our job to govern humbly for this nation, to have them very much at the centre of our thoughts each and every day.¹

And in politico-philosophical terms, the discourses and narratives of representative government under Westminster echo - in one distillation or another - the triumvirate essences of the social contract: *trust*, *legitimacy*, and *consent*, as faithfully today as at any time in the history of the democratic project. Achen and Bartels contend that such distillations, as are reflected in Abraham Lincoln's reference in his Gettysburg Address, viz: "of the people, by the people, and for the people," constitute a kind of "folk theory" of democracy, in which politically engaged citizens are governed by representatives acting in their interests.² But they argue that the credibility of such romantic accounts is significantly compromised by a large and growing body of credible research evidence regarding the actual political behaviour of populations under democratic rule.³ In short, their contention is that the advent of Enlightenment forms of so-called evidence-based knowledge has come to threaten the Enlightenment assumptions of human reason and volition that support democratic theory. They argue that the great majority of citizens pay little attention to politics and are motivated by many subjective factors in their voting behaviour that contemporary democratic theory would consider "random."⁴ Caplan, arguing from an economic perspective, contends that democracies frequently institute policies harmful to most people; and

¹ Martin, S. "Morrison Says His Government Will 'Burn for the Australian People Every Single Day'", *The Guardian*, 28 May 2019.

² Achen, C., and Bartels, L. (2016) *Democracy for Realists: Why Elections Do Not Produce Responsive Government*, at p.1.

³ *Ibid.*, at pp.2-3.

⁴ *Ibid.*, at pp.1-2.

that voters are irrational – a position he contends is empirically justified – and that they vote accordingly.⁵

These incommensurate positions are generally coincident with the kind of divergence that is the subject of this thesis. The questions that are raised in the face of these inconsistencies are similar to those which have been pondered for centuries. As Thomas Jefferson remarked at his inaugural address as President-elect in 1801,

Sometimes it is said that man cannot be trusted with the government of himself. Can he then be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question.⁶

Jefferson himself was an advocate of democracy and democratic institutions. But his proposal - that we must look to history - helps to establish the dimensions of the dialectic which frames the philosophical components of the divergence to which this thesis is addressed. To put the matter in the words of R. M. Hare,

If we were to ask of a person 'What are his moral principles?' the way in which we could be most sure of a true answer would be by studying *what he did*.⁷

At its simplest, the mutual inconsistency in the competing subject narratives in this thesis regarding the compliance of APS officers with the *Values* and the *Code* is constituted by a contest between what these agents are said to be and what they are shown to have done (or, to have allegedly done). It should be noted here that the few examples of the latter condition selected

⁵ Caplan, B. (2007) at pp. 1, 2, 3.

⁶ See Bernstein, R. (2004) *Thomas Jefferson: The Revolution of Ideas*, at p.166.

⁷ Hare, R. (1952) *The Language of Morals*, at p.1. My emphasis.

for illustration in this thesis are very much the tip of the iceberg; myriad new examples of concerning questions of public propriety involving public officers continue to percolate through media organs even as this conclusion is finalized. And it is arguably also the case that the real evidence of public sector corruption, misconduct, and malfeasance, is not constituted by ‘big-ticket’ instances that become the subject of media reports or parliamentary inquiries; they are contained, rather, in the mundane incidents of public workaday life and in the contingent interpersonal and uncomfortable silences that chronically pervade our contemporary bureaucracies. So, for example, research findings of Gino, Ayal, and Ariely, suggest that relatively minor incidents of dishonesty by in-group members can have a large influence on the overall extent of dishonesty within the group.⁸ But, all the same, it is of no small moment that in the late stages of the completion of this thesis, Mr John Lloyd - the Australian Public Service Commissioner - abruptly resigned his position and was subsequently found by the Australian Merit Protection Commissioner to have breached the APS Code of Conduct.⁹ And, it is also of note that Mr Lloyd subsequently publicly attacked the inquiry and rejected its finding.¹⁰

Undeniably, political narratives comprise and equally support each pole of this contest. But it is not the point of this thesis to resolve competing political justifications in order to clarify an existing regulatory policy. It is a contention of this thesis that no policy which supports a regulatory structure intended to ensure and moderate compliance with ethical norms can claim

⁸ Gino, F., Ayal, S., & Ariely, D. (2009) “Contagion and Differentiation in Unethical Behaviour” in 20(3) *Psychological Science* 393 at p.398.

⁹ See: Dingwell, D. “John Lloyd Breached Code of Conduct Over Email To Think Tank, Inquiry Finds”, *The Canberra Times*, 8 August 2018.

¹⁰ See: Dingwell, D. “Investigator Defends Misconduct Inquiry After John Lloyd Attack”, in *The Sydney Morning Herald*, 19 October 2018.

coherence where it cannot articulate – and, coherently so – the philosophical and scientific substructure which supports it. It is a concomitant contention of this thesis that the true position in this respect is tantamount to that articulated by Alasdair MacIntyre in his recent book *Ethics in the Conflicts of Modernity*, viz:

What is notable is what and how much is taken as given and unquestioned: the shared background beliefs concerning not only fundamental values, but the institutions that are taken to embody those values, the confidence in the principles that one and one's contemporaries bring to problematic situations, the value attached to consensus, the assumption that there is indeed a standard, a set of scales, that enables one to assign due weight to each set of considerations, in spite of the fact that this standard is never made explicit.¹¹

And it is arguably the primary contention of this thesis that the claim that compliance with the *Values* and the *Code* is down to virtue is not made out – if only because any question of virtue as an object of policy in applied philosophy terms remains contested and far from resolved. And the complexities which attend the various dimensions of philosophical and other inquiries that necessarily bear upon such resolution are significant. The crisis of modernity averred to by Anscombe and MacIntyre, along with similar expressions of concern from the likes of Solzhenitsyn and Arendt, identifies the loss of pre-Enlightenment teleological markers as organizing principles for social morality as the reason for modernity's moral decline. But in their advocacy for a morality founded upon teleological referents, their perspective nonetheless

¹¹ MacIntyre, A. (2016) *Ethics in the Conflicts of Modernity: An Essay on Desire, Practical Reasoning, and Narrative*, at p.271; (hereafter: “*Ethics*”)

accommodates general Enlightenment assumptions regarding the place of the individual as an autonomous reasoning agent in society. And whilst it is so - that we take this assumption for granted in the practical machinations of our day-to-day lives - MacIntyre's contention is questioned (from so-called *interactionist* perspectives as discussed in Chapter 6) on the basis that assumptions regarding identity are misplaced and immaterial to the meaningful consequences of the incidents of human sociality. The question of identity is central to MacIntyre's conundrum; not the assumption of a discrete reasoning agent, but the question of an attendant external morality that can legitimately and effectively bind agentic conduct. The emotivism against which MacIntyre opines, however, looks, as John Haldane points out, something very much like the kind of authenticity to be found in that essential human desire and commitment championed by Bernard Williams.¹² MacIntyre's commitment to the central thesis of *After Virtue* remains undiminished in his *Ethics* – a book published in his eighty-seventh year and more than three decades following the publication of *After Virtue*. MacIntyre's nostalgia for a pre-modern ethics is Aristotelian before it is Platonic, in terms of the conventional views of the evolution of identity and 'self' as have been recounted and interrogated through each of the three parts of this thesis. But that is another distinction – i.e., the claimed differences in 'identity' between Homeric Greeks and we moderns - of which Bernard Williams is also sceptical.¹³ In theoretical terms that are relevant here, the distinction is material because it represents the difference between a virtue evident only in *action* and a virtue which can be claimed for oneself as a component of one's *character*. The advent of Enlightenment rationalism, with its dedication to evidence-based

¹² Haldane, J. (2017) "MacIntyre Against Morality" in 273 *First Things* 49 (online).

¹³ Williams criticizes the claimed philosophical distance between Homeric Greeks and modern man in Williams, B. (1993) *Shame and Necessity*.

knowledge, has not resolved these philosophical contests regarding identity and normativity, let alone the question of what it is to be virtuous. Of course, the strict transcendentalist perspective of MacIntyre and Anscombe can be distinguished from competing virtue-based perspectives that do not rely on a rigid *telos*. Nussbaum, for example, criticizes MacIntyre's account of the human incapacity for reason and reliance upon external authority (i.e., "...the new rule of St. Benedict that he obscurely promises at the end of *After Virtue*...[which]... becomes the authority of the institutionalized Church in *Whose Justice?*").¹⁴ She argues that virtue theories need to account for moral psychology and the fact that so-called *passions* are not devoid of thought and intentionality,¹⁵ as MacIntyre's account of emotivism might have it. But a rehabilitated virtue of this kind would make little difference, in any event, to the present conundrum of the *Values* and the *Code* because, whatever its utility, it would not have the power to habituate the entire population of APS officers so to make them perfectly compliant with their mandatory statutory (and, virtue-like) obligations.

That MacIntyre's own analysis is eminently challengeable is evident in at least one (and possibly all) of the four case studies he describes in the closing chapter of *Ethics*. In it, he recounts the circumstances of Russian writer and journalist, Vasily Semyonovich Grossman, in his struggle to traverse the Stalinist landscape of the Soviet Regime, in which, as MacIntyre describes it,

¹⁴ Nussbaum, M. (1999) "Virtue Ethics: A Misleading Category" in 3 *The Journal of Ethics* 163 at pp.196-7.

¹⁵ *Ibid.*, at pp.171-5, generally.

[t]he claim made by the party leadership was that the path to future human flourishing was that taken by the Soviet Union, that human goods were to be ordered *as the party ordered them*.¹⁶

MacIntyre characterizes Grossman's struggle as one for the realization of his virtue; of his ability to instantiate Aristotelian practical reasoning as his basis for living (and flourishing). MacIntyre goes on:

What always matters, both about individuals and about social orders, are the resources that they have within themselves for resolving dilemmas or for living with unresolved dilemmas, when considerations of these various kinds conflict. What Stalinist society imposed on those of its writers who over considerable periods of time attempted both to express their own imaginative vision and to secure the approval of the bureaucrats of the Writers' Union, the Party, and Stalin, was a double life, a life of oscillation, a life sometimes of dangerous risk taking, sometimes of self-serving silences, sometimes of self-serving speech. Such was Grossman's life.¹⁷

MacIntyre contends unequivocally that it is because of the assent of Soviet citizens to the Soviet promulgation of the goods of human flourishing "...that Stalin's Russia became to a remarkable extent Stalinist Russia."¹⁸ But with Stalin's death, and his subsequent denouncement by Krushchev in 1956, Grossman was presented with the opportunity to engage with a truthfulness in his writing that could only be inspired by his truthfulness about the narrative of his own life.¹⁹

¹⁶ MacIntyre, A. (2016) at p.245; (my emphasis).

¹⁷ *Ibid.*, at p.248.

¹⁸ *Ibid.*, at p.245.

¹⁹ *Ibid.*, at p.256.

In doing so, according to MacIntyre, Grossman exhibited a quality of practical reasoning emblematic of virtue.²⁰

Two points may be observed regarding MacIntyre's analysis of Grossman. Firstly, nothing in MacIntyre's description of the trajectory of Grossman's life in respect of his virtue obviates the possibility of a potentially persuasive competing interpretation of his actions from an interactionist standpoint; or, for that matter, a situationist interpretation of the kind which might be suggested by John Doris or Lee Ross. Secondly, the importance of truthfulness in respect of claims to virtue is not obviated by any of these competing perspectives. It is, finally, a further concomitant contention of this thesis – as has already been stated – that the real (or, most efficacious) purpose of the *Values* and the *Code* is to legitimize the idea of the social contract, or, perhaps more correctly, the narrative of the social contract, before it is to regulate the ethical conduct of APS officers. In promulgating purportedly mandatory values with which APS officers are required to comply (presumably a function of their successful internalization), the system of ethics regulation established under the PS Act extinguishes any meaningful role for aspiration. At the dawn of the Enlightenment, the English Parliament and King – as adversaries – each appealed to those aspirations which characterized that hope - averred to by Launderville²¹ and theorized on by Spinoza²²- that has always attended the relationship of the marginalized and unenfranchised with their political elites; and so, the likes of Edward Sexby²³ aspired to a kind of freedom that could operate to transcend their experience of social order and give them a

²⁰ See *Ibid.*, at p.311ff.

²¹ See Ch 1, note 73; Chapter 6, Note 9;

²² See Chapter 6, Note 44.

²³ See Chapter 3, Note 131.

meaningful place in that order in their own right. In the crystallization of that aspiration, their agency as notional contributors and beneficiaries of a political relationship was cemented. So it is with truthfulness, argues Rosenfeld. She contends that the imperative of truth as a vital component of American republican democracy is abstract: “...as a key aspiration.”²⁴ Its value is in its pursuit, in agonistic engagement on the part of citizens and representatives; not in some purported final quality, but in the *process* of its achievement.²⁵ Such achievement is evinced in observed *action*; with virtue, as with truth.

Coincident with MacIntyre’s warnings regarding a prevailing emotivism, Rosenfeld identifies the increasing subordination of undogmatic truth to subjective feeling as a significant danger to democracy itself.²⁶ Democracy’s survival, she argues, must surely depend upon a shared commitment to “...verifiable truth and truth-telling from either the population at large or the powers on high.”²⁷ But, one narrative of concern about democracy, she notes, is that citizens are losing their grip on any shared view of reality itself.²⁸ And what is more, she notes, a significant component of the American citizenry – in their role as parties to the social contract - appears not to care about the profligate and institutionalized mendacity of the current president and his administration.²⁹ Even a cursory inspection of the detail of many of the incidents referred to in Chapter 4 herein reveals that what is real and what is not, and what is true and what is not, has itself become openly contested ground in the face of extant attempts at ethics regulation under

²⁴ Rosenfeld, S. (2019) *Democracy and Truth: A Short History*, at p.174.

²⁵ *Ibid.*, at p.27 and chapter 1 generally; see also: Rosenfeld, S. (2018) “Knowledge by the Slice: Democracy and Truth” (presentation).

²⁶ *Ibid.*, at p.9.

²⁷ *Ibid.*, at p.173.

²⁸ *Ibid.*, at p.4.

²⁹ *Ibid.*, at p.8.

the *Values* and the *Code*. To take the example of the former APS Commissioner, Mr Lloyd, again, he left no doubt following the decision of the Merit Protection Commissioner that he held a dramatically different view to the commissioner, as regards the implications for his impartiality of his private communications with the politically partisan so-called ‘think-tank,’ the Institute of Public Affairs.³⁰

Increasingly, contemporary commentators and pundits fear that institutional democracy itself is in crisis. Certainly, the lead-up to the recent Australian election saw a wide range of public figures, including many former senior judges, call for the establishment of an independent corruption watchdog organization; and many argue that increasingly evident institutionalized corruption and general dishonesty is threatening our system of government.³¹ Exhortations to honesty and good faith have been tried before – across millennia, in the form of oaths and covenants – with dubious effect. Surely the answer, if there is one, must lay elsewhere? Whether it is time for identity itself to be re-imagined, for example, in the form of something like Derek Parfit’s *disaggregated personhood*,³² is a matter for philosophers and political scientists to continue to debate and disagree upon. But notwithstanding the official narrative of the APS Commissioner, repeated in echolalic fashion in the annual *State of the Service Report*, the conflicting narratives of myriad examples - and much of it evident in observed *action* – suggest the need for an alternative account. If it is correct to say that the structural imperatives of the current social order

³⁰ See: Karp, P. “Public Service Chief Attacks ‘Political Correctness’ and ‘Do-gooders’ in Final Speech,” *The Guardian*, 7 August 2018.

³¹ See, for example: O’Malley, N. “Australia Becoming More Corrupt, Warns Former Judge,” *The Sydney Morning Herald*, 14 November 2018; Guardian Staff, “Dozens of Former Judges Urge Scott Morrison to Set Up Anti-Corruption Watchdog,” *The Guardian*, 25 November 2018.

³² See: Runciman, D. (2018) *How Democracy Ends*, at p.202.

have extinguished any true place for aspiration as it might operate in respect of either the social contract, or the Australian version of Westminster public administration, what could be the way forward? For without a place for genuine aspiration in the social order of our democratic institutions, and an acknowledgement that its achievement is ongoingly a *process*, ideals such as those that provide the basis for the social contract and public values such as *honesty*, *integrity*, and *impartiality*, amount to little; they could represent nothing better than the cynical incarnation of the same partisan and enervating mythologies that ultimately failed to legitimize notions of divine right, or of that of a tripartite soul, in the minds of newly autonomous, but ultimately unenfranchised hopeful agents.

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Appendix 1

PUBLIC SERVICE ACT 1999 - SECT 10

APS Values

Committed to service

(1) The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Ethical

(2) The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Respectful

(3) The APS respects all people, including their rights and their heritage.

Accountable

(4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

Impartial

(5) The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

Appendix 2

PUBLIC SERVICE ACT 1999 - SECT 13

The APS Code of Conduct

(1) An [APS employee](#) must behave honestly and with integrity in connection with [APS employment](#).

(2) An [APS employee](#) must act with care and diligence in connection with [APS employment](#).

(3) An [APS employee](#), when acting in connection with [APS employment](#), must treat everyone with respect and courtesy, and without harassment.

(4) An [APS employee](#), when acting in connection with [APS employment](#), must comply with all applicable Australian laws. For this purpose, **Australian law** means:

(a) any Act (including this Act), or any instrument made under an Act; or

(b) any law of a State or Territory, including any instrument made under such a law.

(5) An [APS employee](#) must comply with any lawful and reasonable direction given by someone in the employee's [Agency](#) who has authority to give the direction.

(6) An [APS employee](#) must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

(7) An [APS employee](#) must:

(a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's [APS employment](#); and

(b) disclose details of any material personal interest of the employee in connection with the employee's [APS employment](#).

(8) An [APS employee](#) must use Commonwealth resources in a proper manner and for a proper purpose.

(9) An [APS employee](#) must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's [APS employment](#).

(10) An [APS employee](#) must not improperly use inside information or the employee's duties, status, power or authority:

(a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or

(b) to cause, or seek to cause, detriment to the employee's [Agency](#), the Commonwealth or any other person.

(11) An [APS employee](#) must at all times behave in a way that upholds:

(a) the [APS Values](#) and [APS Employment Principles](#); and

(b) the integrity and good reputation of the employee's [Agency](#) and the APS.

(12) An [APS employee](#) on duty [overseas](#) must at all times behave in a way that upholds the good reputation of Australia.

(13) An [APS employee](#) must comply with any other conduct requirement that is prescribed by the regulations.