

Standing and Civic Virtue

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[A]ll the difference between a good and a bad system of judicature lies in the contrivances adopted for bringing whatever moral and intellectual worth exists in the community to bear upon the administration of justice, and making it duly operative on the result. – JOHN STUART MILL¹

1. A SCALY START

A giant snake is roaming a local park. The council seizes the beast, and a destruction order is swiftly issued. But the snake has luck on its side; for just as it is about to be destroyed, Alfred seeks leave to apply for judicial review of the destruction order. To obtain leave, Alfred must show he has standing, which according to s 31(3) of the Senior Courts Act 1981 means he must have a “sufficient interest” in the matter to which the application relates, where the sufficiency of an interest is partly a function of the merits of the case. Upon hearing that the snake is actually Alfred’s pet python, Pretzel, and upon finding that there is an arguable case that the destruction order is invalid, any court would conclude that Alfred has a sufficient interest to challenge the decision.

Beatrix lives down the street from Alfred. A member of the local branch of the British Herpetological Society, Beatrix has just discovered that the council plans to build a power station on public land – land which also happens to be one of the few remaining habitats of the endangered smooth snake.² Incensed at the threat posed to the environment, Beatrix seeks leave to apply for judicial review of the council’s decision. Her case is better than arguable. Even so, Beatrix has a problem: unlike Alfred, Beatrix has no personal interest in the matter to which her application relates. If Beatrix is entitled to standing, it is because she has some other interest in the matter to which her application

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¹ J.S. Mill, *Considerations on Representative Government*, 2nd edn (London: Parker, Son, and Bourn, 1861), at p.31.

² Inspired by *R. v Poole B.C. Ex p. Beebee* [1990] E.G.C.S. 160 (Q.B.D.).

relates. What interest is that? To see the answer, we need to place Beatrix within her social context.

We are all part of communities: classes, neighbourhoods, and offices; teams, clubs, and universities; towns and cities, nations and states. When you belong to a community, you have an interest in its success or flourishing or proper functioning – in the good of that community. When the community does well, your life goes a bit better, too. As a member of a community, you also have an interest in the things that contribute to the good of the community. You might have an interest in the preservation of a local park, because its presence helps your neighbourhood thrive. As a member of a football team, you might have an interest in the team being well-coached, because that contributes to the team's success.

There is a community to which we all belong: the community of citizens as a whole, i.e., the public. Every citizen has a stake in the public good or – as it is often called – the public interest, as well as rights and duties associated with their community membership. Citizenship in this sense extends to permanent residents and long-term migrants regardless of their legal immigration status. When then is this community of citizens – the public – a successful or flourishing enterprise? The standard response is that the public good is the good of all its members. Thus, what promotes the public interest are those “background institutions, social practices and norms, economic and social conditions, and public goods (such as police protection and roads) under which people are likely to have good lives”.³ Every member of the public – every citizen – has an interest in making these preconditions of a good life a reality.

To say that a claimant has an interest “in the matter to which an application relates”, per s 31(3), is to say that the resolution of the matter affects some interest of hers; or, more simply, that she has a stake in the matter. Alfred has a stake in what happens to Pretzel, but this interest does not derive from an interest Alfred has in any community. Beatrix, by contrast, claims an interest in what happens to the smooth snake's habitat as a member of the public. Specifically, she claims that she has a stake in the public interest as a citizen; that the public has a stake in what happens to the smooth snake; and therefore that she, qua citizen, has a stake in what happens to the smooth snake. Beatrix is seeking what is usually called *public interest standing*.

How will a court decide whether Beatrix is entitled to public interest standing? It will first determine whether there actually is, as Beatrix says, a public interest in the matter to which her application relates. Also, just as in Alfred's case, the court will want to know that there is some merit to Beatrix's claim that the council's decision was invalid. These are both features of the claimant's *case*. It is no mystery why a court would care about them. However – and here is where things get interesting – the courts have also repeatedly treated features of the *claimant* as relevant to public interest standing. Thus, in Beatrix's case, a court could be expected to want to know:

³ J. Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2012), at p.48. See also I. Honohan, *Civic Republicanism* (New York: Routledge, 2002), at p.151-152.

1. that she has a “genuine concern”⁴ for the matter to which her application relates;
2. that she is not a “mischiefmaker”⁵, “meddler”⁶, troublemaker⁷ or “busybody”⁸;
3. that she is not acting out of “ill-will”⁹ or “ill-motive”¹⁰, or for an “improper purpose”¹¹;
4. that she is “public spirited”¹²;
5. that she has the right “history” and “experience”;¹³
6. that she is “responsible”¹⁴;
7. that she is “well-informed”¹⁵;
8. that she has the right “expertise”¹⁶;
9. that she has the right “credentials”¹⁷; and
10. that she holds a position of “respect”¹⁸.

None of these claimant-based factors depends on whether there is merit to Beatrix’s application or whether the matter to which her application relates is of public interest. The absence of any – or, indeed, all – of these considerations would be no bar to Alfred obtaining standing in his case.

Many scholars have doubted whether there is any good rationale (or set of rationales) for factors 1-10. Some of these factors – expertise, experience,

⁴ *R. (Feakins) v Secretary of State for the Environment, Food, and Rural Affairs* [2003] EWCA Civ 1546 at [23]; [2004] 1 W.L.R. 1761 at 1768-1769.

⁵ *R. v Inland Revenue Commissioners, Ex p. National Federation of Self Employed and Small Businesses Ltd* [1981] UKHL 2; [1982] A.C. 617 at 653 per Lord Scarman.

⁶ *R. v Somerset County Council and ARC Southern Limited, Ex p. Dixon* [1998] Env. L.R. 111 at 121.

⁷ *Dixon* [1998] Env. L.R. 111 at 121.

⁸ *R. v Inland Revenue Commissioners, Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617 at 653 per Lord Scarman; *AXA General Insurance Ltd v H.M. Advocate* [2011] UKSC 46; [2012] 1 A.C. 868 at [63] per Lord Hope; *Walton v Scottish Ministers* [2012] UKSC 44 at [88]; [2013] P.T.S.R. 51 at 74 per Lord Reed.

⁹ *R. (Feakins) v Secretary of State for the Environment, Food, and Rural Affairs* [2003] EWCA Civ 1546 at [23].

¹⁰ *R. v Somerset County Council and ARC Southern Limited, Ex p. Dixon* [1998] Env. L.R. 111 at 121.

¹¹ *R. (Feakins) v Secretary of State for the Environment, Food, and Rural Affairs* [2003] EWCA Civ 1546 at [23].

¹² *R. v Inland Revenue Commissioners, Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617 at 630 per Lord Wilberforce.

¹³ *R. (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) at [2]; [2003] 1 F.L.R. 484.

¹⁴ *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, Ex p. Greenpeace* [1994] Env. L.R. 76 at 10.

¹⁵ *Greenpeace* [1994] Env. L.R. 76 at 101.

¹⁶ *R. v Secretary of State for Foreign Affairs, Ex p. The World Development Movement Ltd* [1994] EWHC Admin 1; [1995] 1 W.L.R. 386 at 396.

¹⁷ *R. (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) at [2].

¹⁸ *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, Ex p. Greenpeace* [1994] Env. L.R. 76 at 100.

credentials, responsibility, respect – may appear to be justified by the desirability of effective and efficient litigation. But even they have been strongly criticised. Peter Cane argues it would not be right to turn away a litigant “because of inadequacy of competence or resources”.¹⁹ Timothy Endicott worries that factors such as respect and prominence are thinly-veiled proxies for power and prestige, leading to standing “in favour of the famous and against the underprivileged”.²⁰ The other claimant-based factors do not fare better. Endicott also criticises the factors concerned with a litigant’s motivation. A court can, he says, grant a litigant “leave to seek judicial review without deciding that they are acting in the public interest; it just has to be in the public interest to hear them”.²¹ Liz Fisher and Jeremy Kirk argue that the rule of law might be served well by those challenging administrative decisions from motivations that the courts deem unacceptable.²² Overall, they say that the litigant-centred factors do not have a “unifying or coherent theme”²³ and that there is nothing that “integrates them into the sufficient ... interest test”.²⁴ Similarly, Joanna Miles claims that the courts have “failed to articulate a coherent *theory* of standing to guide their application of the sufficient interest test”.²⁵ Some of these critics favour open standing, while others do not; but none think the current list of litigant-centred factors is justified.

Are these criticisms well-aimed? Given the sufficient interest test, is there any reason for courts to care about who a claimant is, as well as about the case she brings? This *general justificatory issue* entails several more specific issues. One is the *unity issue*. Supposing there is some rationale for factors 1-10, is it the same rationale? In asking about 1-10, is a court driving at the same thing in ten ways, or ten things each in their own way? There is also the *interaction issue*. Are some of the claimant-centred factors more important than others? Are some of these factors more general versions of the others? Must all these factors be present for Beatrix to be entitled to standing, or only some of them? Then there is the *doctrinal relevance issue*. To be entitled to standing, a claimant must have an interest in that matter. Also, her interest must be sufficient for standing, i.e., her interest must be a good enough reason for a court to hear her case. So, which are 1-10 relevant to: the existence of an interest, or its sufficiency (or both)? Finally, there is the *reform issue*: how, if at

¹⁹ Cane, “Standing Up for the Public” [1995] Public Law 276 at 283.

²⁰ Endicott, *Administrative Law*, 2nd edn (Oxford; New York: Oxford University Press, 2011), at p.421.

²¹ Endicott, *Administrative Law*, 3rd edn (Oxford; New York: Oxford University Press, 2015), at p.429.

²² Fisher and Kirk, “Still Standing: An Argument for Open Standing in Australia and England” (1997) 71 Australian Law Journal 370 at 381.

²³ Fisher and Kirk, “Still Standing: An Argument for Open Standing in Australia and England” (1997) 71 Australian Law Journal 370 at 380.

²⁴ Fisher and Kirk, “Still Standing: An Argument for Open Standing in Australia and England” (1997) 71 Australian Law Journal 370 at 380.

²⁵ Miles, “Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication” (2000) 59 Cambridge Law Journal 133 at 134 (emphasis in original).

all, should the test for public interest standing be improved or refined? No one has undertaken any detailed analysis of these issues.

In this article, we provide an account of the claimant-centred factors, one which explains the bulk of the case law, while also offering both a rationale for it, as well as proposals for reform. At the heart of our account is the notion of *civic virtue*. In brief, we claim that factors 1-10 can be understood as measures of a claimant's civic virtue. By asking about these factors, a court is asking, in different ways, whether the claimant is a virtuous citizen acting virtuously by making the application. Some of the factors are about the claimant's motivations; some are about evidence of her long-term dispositions; and others are about her practical wisdom. There is good reason for courts to care about a claimant's civic virtue. For one thing, civic virtue is evidence that there is a public interest in the matter. There are also good consequences from treating a virtuous claimant's interest in a case as sufficient for the purposes of standing.

We should be clear that our interest is strictly the sufficient interest test for standing in public interest cases. We are not concerned here with the "victim" test for standing under the Human Rights Act 1998. However, since the victim test is often contrasted with the sufficient interest test,²⁶ our account of the one may refine our understanding of the other. Our account may also contribute to understanding and evaluating rules relating to third party intervention in the public interest,²⁷ which raises many of the considerations canvassed in this paper. In focussing on public interest standing, we also set aside what is sometimes called "associational standing".²⁸ Whereas in public interest cases a claimant is granted standing to defend an interest she derives from her membership in a group, in associational cases a group is granted standing to defend either its own interests, or more commonly the interests of its members.

2. CIVIC VIRTUE

We said that civic virtue is at the heart of our account. What is civic virtue? Like other virtues – honesty, courage, fidelity, gratitude, prudence, and so on – civic virtue is a character trait or deeply embedded disposition.²⁹ Virtues are stable features of a person's character, not passing fancies. Virtues are also

²⁶ See e.g. Miles, "Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication" (2000) 59 Cambridge Law Journal 133 at 134-135.

²⁷ For considerations relating to public interest intervention, see S. Hannett, "Third Party Intervention: In the Public Interest?" [2003] Public Law 128; M. Arshey and C. O'Conneide, "Third Party Interventions" [2004] Public Law 69.

²⁸ See e.g. Cane, "Standing Up for the Public" [1995] Public Law 276 at 277-279.

²⁹ J. Annas, "Virtue Ethics" in D. Copp (ed), *The Oxford Handbook of Ethical Theory* (New York: Oxford University Press, 2006); S. Burt, "The Good Citizen's Psyche: On the Psychology of Civic Virtue" (1990) 23 Polity 23 at 35. For general treatments of virtue, see J. Champan and W. Galston (eds), *Virtue: Nomos XXXIV* (New York: New York University Press, 1992); S. Darwall (ed), *Virtue Ethics* (Oxford; Malden: Blackwell, 2003); S. van Hooft (ed), *The Handbook of Virtue Ethics* (Abingdon; New York: Routledge, 2014).

“multi-track”³⁰ dispositions, associated with a range of motivations, expectations, sensibilities, and attitudes. For example, an honest person is disposed to tell the truth; to be motivated to do so out of respect for others; to feel regret when she acts dishonestly; to praise honesty in others; to value honesty in friends and loved ones; and to criticise dishonesty when she encounters it.³¹ Likewise, while civic virtue begins with the disposition to contribute to the public good,³² it manifests itself in a range of ways. Thus, a virtuous citizen is disposed to feel sympathy with her fellow citizens; to praise those who devote themselves to the public good (through, for example, running for office or performing military service); to be alert to possibilities for serving the public good herself; to support policies that she thinks will improve the conditions in her community; to condemn corruption and self-dealing in office; and so on.³³ When the virtuous citizen goes to vote, she does not drag her feet or grumble at the time wasted. When it is her turn to serve on a jury, she does not try to evade her duty.³⁴ “To possess a virtue is to be a certain sort of person with a certain complex mindset”,³⁵ as Rosalind Hursthouse says. And the mark of the virtuous citizen’s mindset is the “wholehearted acceptance”³⁶ of the public good as a strong (though not necessarily conclusive) reason for action.³⁷

A. Virtue and Wisdom

³⁰ R. Hursthouse, “Virtue Ethics” in E.N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2013), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [Accessed 23 November 2016].

³¹ Hursthouse, “Virtue Ethics” in E.N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2013), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [Accessed 23 November 2016].

³² See e.g. S. Besson and J.L. Martí, “Law and Republicanism: Mapping the Issues” in S. Besson and J.L. Martí, *Legal Republicanism* (Oxford: Oxford University Press, 2009), at p.23; Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2012) at 46; G. Brennan and A. Hamlin, *Democratic Devices and Desires* (New York: Cambridge University Press, 2000), at p.177; Burt “The Good Citizen’s Psyche: On the Psychology of Civic Virtue” (1990) 23 *Polity* 23 at 24; R. Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (New York: Oxford University Press, 1997), at p.14; W. Galston, “Pluralism and Civic Virtue” (2007) 33 *Social Theory and Practice* 625 at 630.

³³ Honohan, *Civic Republicanism* (New York: Routledge, 2002), at p.160.

³⁴ Frank Lovett “Republicanism” in E.N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2016), <http://plato.stanford.edu/archives/spr2016/entries/republicanism/> [Accessed 23 November 2016].

³⁵ Hursthouse, “Virtue Ethics” in E.N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2013), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [Accessed 23 November 2016].

³⁶ Hursthouse, “Virtue Ethics” in E.N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2013), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [Accessed 23 November 2016].

³⁷ M. Slote, “Agent-Based Virtue Ethics” in R. Shafer-Landau (ed), *Ethical Theory* (Malden: Blackwell, 2007), at p.711; H. Sidgwick, *The Methods of Ethics*, 7th edn (London; New York: Macmillan, 1907), at p.202.

A virtue is something that makes a person admirable or good.³⁸ A generous person cannot be all bad, whatever his other faults. A courageous person is, in at least one respect, a good person. And yet we are accustomed to saying things like “he should not be so generous with his money”, “he is too loyal”, and “now is not the time for prudence”. How can a trait be good, and yet someone be open to criticism for manifesting it?

The answer is that full virtue requires an appreciation of when, and where, and how, and with regard to whom a virtue should be shown. It requires what Aristotle called *phronesis* and what is usually translated as *practical wisdom* – that is, the knowledge and understanding needed to recognise the features of a situation that are morally significant, and their relative importance.³⁹ Suppose you discover that your friend is about to be laid off. You could impart this devastating news over lunch, in front of his co-workers, without warning. That would be honest – to a fault. Or, you could break the news to him gently, after work, in private. In both cases, you had the right intention. But in the latter case you showed an appreciation of the situation, so you showed the virtue of honesty in its fullest sense.⁴⁰ In the civic context, practical wisdom may require an appreciation of the competing concerns among members of the public on some issue; the arguments for and against the relevant policy proposals; the means by which, and the forums in which, the proposals can be pursued; the tradeoffs implicit in pursuing the public good; a knowledge of the legal and political context in which a policy will be settled on; and so forth.⁴¹

B. Civic Virtue and Moral Virtues

Civic virtue is constituted partly by other virtues, including fairness, veracity, loyalty, and benevolence.⁴² If a citizen is unfair as a person, she will struggle to make societal arrangements more fair. If she is dishonest, her fellow citizens

³⁸ Aristotle, *Nicomachean Ethics* (translated by R. Bartlett and S. Collins, Chicago: University of Chicago Press, 2011), at Book II, Part V; R. Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999), at p.13.

³⁹ J. Annas, “Being Virtuous and Doing the Right Thing” in Shafer-Landau (ed), *Ethical Theory* (Malden: Blackwell, 2007), at p.742; Aristotle, *Nicomachean Ethics* (translated by R. Bartlett and S. Collins, Chicago: University of Chicago Press, 2011), at Book II, Part VI; Hursthouse, “Virtue Ethics” in E.N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2013), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [Accessed 23 November 2016].

⁴⁰ Hursthouse, “Virtue Ethics” in E.N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2013), <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> [Accessed 23 November 2016]; Aristotle, *Nicomachean Ethics* (translated by R. Bartlett and S. Collins, Chicago: University of Chicago Press, 2011), at Book II, Part VII.

⁴¹ Honohan, *Civic Republicanism* (New York: Routledge, 2002), at p.160; Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2012), at p.46; Galston, “Pluralism and Civic Virtue” (2007) 33 *Social Theory and Practice* 625 at 630.

⁴² See, e.g., R. Audi, “A Liberal Theory of Civic Virtue” (1998) 15 *Social Philosophy and Policy* 149 at 152; T.A. Spragens, *Civic Liberalism: Reflections on our Democratic Ideals* (Lanham; Oxford; Rowman & Littlefield, 1999), at p.226; A. Peterson, *Civic Republicanism and Civic Education: The Education of Citizens* (Basingstoke: Palgrave Macmillan, 2011), at p.85-87.

will not trust her to act in their best interests. If she is disloyal, she will be swayed by the many challenges and temptations that are part of a life of public service. If she lacks benevolence for her fellow citizens, her motivation to serve the public interest will be weak or non-existent. The particularities of the community in question dictate what other virtues civic virtue requires. In a democracy, civic virtue requires deliberative virtues like sincerity and candour. In a liberal society, civic virtue requires tolerance and respect for rights.⁴³ And in a rule of law society, like the United Kingdom, civic virtue requires an appreciation for that ideal and its demands. However, while the possession of other virtues is necessary for civic virtue, it is not sufficient. Someone with every moral virtue could still fail to develop civic virtue, for instance because they have failed to develop the practical wisdom required to promote the public interest.

So much for what civic virtue shares with other virtues; what sets it apart? Civic virtue attaches to people serving a distinctive *role*, namely, citizen, as opposed to friend, parent, or employer. Civic virtue is associated with a distinctive *motivation*, specifically, the desire to benefit the public.⁴⁴ Civic virtue also has distinctive *beneficiaries*.⁴⁵ Honesty properly benefits the audience, while fidelity properly benefits friends, family, the tribe, etc. Civic virtue, by contrast, properly benefits citizens in general. Civic virtue is also distinguished by the *knowledge* and *understanding* it requires, a point implicit in our examples of the practical wisdom needed to possess civic virtue. To have courage or gratitude, for example, you do not need to know a good policy proposal when you see one; to have civic virtue to its fullest extent, you do. But the most important feature of civic virtue, and the feature that helps to unite the others, is the distinctive *field* of civic virtue (to borrow a term from Robert Audi).⁴⁶ Every virtue is characteristically operative in some human situation, and civic virtue is operative in the public sphere. Civic virtue, alone among the virtues, is shown exclusively through contributions to public life and participation in public institutions.

C. Virtue in Politics and Law

Virtuous citizens will fulfil their civic duties, as called upon, but their civic virtue will show itself more generally in political involvement.⁴⁷ As Richard Dagger says:

“Good citizens will undertake public responsibilities when called upon ... but they will not always wait for others to issue the call. Instead, they will

⁴³ See, e.g., W.A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge; New York: Cambridge University Press, 1991), at p.222; Spragens, *Civic Liberalism: Reflections on our Democratic Ideals* (Lanham; Oxford; Rowman & Littlefield, 1999), at p.12.

⁴⁴ See references at fn.31.

⁴⁵ Audi, “A Liberal Theory of Civic Virtue” (1998) 15 *Social Philosophy and Policy* 149 at 150.

⁴⁶ Audi, “A Liberal Theory of Civic Virtue” (1998) 15 *Social Philosophy and Policy* 149 at 150.

⁴⁷ But see J. Brennan, “For Profit Business as a Civic Virtue” (2012) 106 *Journal of Business Ethics* 313, for an argument that civic virtue need not show itself through political engagement.

take an active part in public affairs. They need not be ‘political junkies’ who have little interest in any other area of life; they may even share Oscar Wilde’s concern that ‘socialism [or any political cause] takes too many evenings’. But the good citizen will not think that an occasional evening devoted to public affairs is one too many, nor that politics is a nuisance to be avoided or a spectacle to be witnessed”.⁴⁸

A virtuous citizen will vote in elections, read the news, take an interest in local and national affairs, and contribute to discussion of political issues. She might organise political campaigns, join a political party, and even run for office herself.

The political activities that attract a good citizen may depend on the nature of the public to which she belongs. A citizen’s virtues are held “in relation to the constitution”,⁴⁹ as Aristotle says. Thus, while both civic republicans and liberals think civic virtue is important, they think it entails different roles. Republicans tend to emphasise the connection between civic virtue and deliberation.⁵⁰ Liberals tend to emphasise the connections between civic virtue and enterprise and self-reliance.⁵¹ But republicans and liberals agree that civic virtue involves a certain attitude towards government. The good citizen is not overly suspicious of government. She does not treat all officials as “knaves” (a possibility which Philip Pettit, among others, cautions against).⁵² But the good citizen is not naïve or complacent either. She knows that liberty requires vigilance, and she is alert to the potential for abuse of power. When government goes too far, she does not stand on the sidelines. The good citizen may be moved to act out of “indignation at abuse, discrimination, corruption, or vulgarity”,⁵³ as Maurizio Viroli says. Iseult Honohan makes the same point: the good citizen is “prepared to raise”, and to support others who raise, “issues of concern in the public arena, and to defend the interests of fellow citizens subject to injustices as well as defending themselves”.⁵⁴ By raising issues of concern, the virtuous citizen contributes to good government, and thence to the public good.

In what way, or by what means, will the virtuous citizen resist abuses of power? She might involve herself in protests, petitions, letter-writing, etc. She might engage in extra-legal acts, such as civil disobedience, if the conditions warrant it. These are all political acts. Politics is not, however, the only means

⁴⁸ R. Dagger, “Republican Citizenship” in E.F. Isin and B.S. Turner, *Handbook of Citizenship Studies* (London; Thousand Oaks: Sage, 2002), at p.150. Text in square brackets is Dagger’s.

⁴⁹ Aristotle, *Politics* (translated by T.A. Sinclair, Harmondsworth: Penguin, 1962), at Book III, Part IV, 1276b20.

⁵⁰ See, e.g., P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford; New York: Oxford University Press, 1997), at c 8; Honohan c 7.

⁵¹ See, e.g., Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge; New York: Cambridge University Press, 1991), at c 10; S. Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford; New York: Oxford University Press, 1990) c 7.

⁵² Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford; New York: Oxford University Press, 1997), at fnn.216.

⁵³ Viroli, *Republicanism* (translated by A. Shugaar, New York: Hill and Wang, 2002), at p.77.

⁵⁴ Honohan, *Civic Republicanism* (New York: Routledge, 2002), at p.162.

by which virtuous citizens can oppose official action. Citizens can contribute to the public good by opposing official action through *legal* means, pursued in the courts. If that claim seems surprising, it is probably because liberal scholars have tended to see civic virtue as “inevitably leading to perfectionism or to unjustified paternalism”.⁵⁵ They have tended to leave the topic to republicans, who (especially in this country) have been keener on “political constitutionalism” than “legal constitutionalism”.⁵⁶ But there is no real tension between republicanism and judicial review. On the contrary, because republicans think of the public good mainly in terms of the non-domination of citizens, they ought to embrace judicial review insofar as it is a means of exposing arbitrary power (and thus, domination).⁵⁷

In summary, civic virtue is a complex disposition, marked principally by the wholehearted acceptance of the public good as a strong reason for action, and the practical wisdom to know how and when and by what means the public good should be served. Civic virtue is partly constituted by other virtues, such as benevolence, but it is distinguishable from other virtues, most importantly by its special field of operation, namely, the public sphere. William Galston put it succinctly: civic virtue is “a trait that disposes its possessors to contribute to the well-being of the community and enhances their ability to do so”.⁵⁸ There is much more that could be said about civic virtue, of course, and we will add to our account as we proceed.

3. SELECTING FOR VIRTUE

We said that courts grant public interest standing partly based on features of the claimant. And we said that no good explanation or justification for them doing so has been offered so far. Our claim is that the features of a claimant are relevant insofar that they constitute or evidence civic virtue, and that a claimant is normally entitled to public interest standing only if, by bringing her application, she is acting as a virtuous citizen characteristically would. In this section, we show that the features of claimants on which courts focus are indicators of civic virtue.

Let us imagine that a court wants to determine whether Beatrix (the claimant who wants to protect the smooth snake’s habitat) is acting as a virtuous citizen

⁵⁵ Besson and Martí, “Law and Republicanism: Mapping the Issues” in Besson and Martí, *Legal Republicanism* (Oxford: Oxford University Press, 2009), p.24. For honourable exceptions, see especially Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge; New York: Cambridge University Press, 1991); Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford; New York: Oxford University Press, 1990).

⁵⁶ R. Bellamy, *Political Constitutionalism* (Cambridge; New York: Cambridge University Press, 2007); A. Tomkins, *Our Republican Constitution* (Oxford; Portland: Hart, 2005).

⁵⁷ For this account of domination, see, e.g., Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford; New York: Oxford University Press, 1997), at c 2; F. Lovett, *A General Theory of Domination and Justice* (New York: Oxford University Press, 2010), at c 2; C. McCammon, “Domination: A Rethinking” (2015) 125 *Ethics* 1028.

⁵⁸ Galston, “Pluralism and Civic Virtue” (2007) 33 *Social Theory and Practice* 625 at 630.

by bringing her application. What might the court consider important? First, the court will want to know that Beatrix has the *motivation* appropriate to a virtuous citizen. It will want to know that she desires to contribute to the public good by protecting the smooth snake. And, indeed, this is the sort of consideration that courts do ask about, in case after case.⁵⁹ In *R. v Secretary of State for Foreign and Commonwealth Affairs, Ex p. Rees-Mogg*, for example, standing was granted to a member of the House of Lords to challenge the United Kingdom's ratification of the Maastricht Treaty because of his "sincere concern for constitutional issues".⁶⁰ In *R. v Inspectorate of Pollution, Ex p. Greenpeace (No 2)*, Greenpeace was granted standing to challenge a decision concerning an industrial project in Cumbria partly because of the organisation's "genuine concern for the environment" and its "bona fide interest" in the decision.⁶¹ In *Walton*, the claimant was entitled to standing because of his "genuine concern" about the effect of the impugned decision on the environment.⁶²

Conversely, the courts have been clear that litigants will normally not be entitled to public interest standing unless they are motivated by the public good. Sedley L.J. said in *Dixon* that even a claimant with an arguable case would be denied standing if she acted from an "ill motive".⁶³ In *Feakins*,⁶⁴ Dyson L.J. held that it would normally be an "abuse of process" to grant a litigant standing if she is "acting out of ill-will or for some other improper purpose".⁶⁵ Someone who wants to interfere in other peoples' private affairs is a "busybody" and a "meddler" and will be denied standing – a point made both in *Walton*⁶⁶ and, much earlier, in *National Federation*.⁶⁷

A virtuous citizen is not simply a citizen who contributes to the public good on one occasion, any more than an honest person is someone who told the truth once. Civic virtue requires a disposition, and a disposition is fostered and demonstrated over time (more on this point below). In assessing whether Beatrix is a virtuous citizen, a court would want to know whether Beatrix has a history of involvement in public affairs. Has she participated in civil society?

⁵⁹ In addition to the cases cited in the main text, see *R. v Poole B.C. Ex p. Beebee* [1990] E.G.C.S. 160, where the British Herpetological Society was granted standing based partly on the genuine interest it had in the subject sites; also in *Walton v Scottish Ministers* [2012] UKSC 44 [2012] UKSC 44 Mr Walton was entitled to standing because of his "genuine concern" about the effect of the impugned decision on the environment.

⁶⁰ [1993] EWHC Admin 4; [1994] Q.B. 552 at 562.

⁶¹ *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, Ex p. Greenpeace* [1994] Env. L.R. 76 at 100.

⁶² *Walton v Scottish Ministers* [2012] UKSC 44 [2012] UKSC 44 at [154] per Lord Hope.

⁶³ *R. v Somerset County Council and ARC Southern Limited, Ex p. Dixon* [1998] Env. L.R. 111 at 121.

⁶⁴ *R. (Feakins) v Secretary of State for the Environment, Food, and Rural Affairs* [2003] EWCA Civ 1546.

⁶⁵ *Feakins* [2003] EWCA Civ 1546 at 1769.

⁶⁶ *Walton v Scottish Ministers* [2012] UKSC 44 [2012] UKSC 44 at [88] per Lord Reed.

⁶⁷ *R. v Inland Revenue Commissioners, Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617 at 653 per Lord Scarman.

Does she have experience with political activities, or advocacy groups? How far back does her concern with the smooth snake stretch?

Again, such matters have occupied courts in actual cases in which public interest standing was at issue.⁶⁸ The Honorary Secretary of the London Railways Heritage Society was granted standing in *R. (Hammerton) v London Underground*⁶⁹ to challenge a decision affecting a railway site given his “longstanding” involvement in historical railway preservation issues.⁷⁰ The Howard League’s “history” in the area of prison advocacy, and its “particular focus” in the “last decade” on children in the criminal justice system, helped entitle the group to challenge the conditions in young offender institutions.⁷¹ In *R v Foreign and Commonwealth Secretary, Ex p. World Development Movement*, the World Development Movement’s “20 year” experience and intense involvement in development issues was relevant to its standing.⁷² Similarly, Greenpeace was granted standing partly because of its deep “experience in environmental matters”.⁷³ All of these claimants had more than a passing interest in the matter to which their applications related. Their applications were part of a practice, and demonstration of a disposition to act in the public interest.

To return to Beatrix, while she may be motivated to serve the public good, civic virtue requires more of her. To possess civic virtue, Beatrix needs a degree of practical wisdom. How is a court to determine whether Beatrix has practical wisdom? Beatrix is unlikely to have practical wisdom if she is an amateur (she knows nothing about the smooth snake, for example), or if she is untested (she has paper qualifications, say, but no practice at putting them to use). On the other hand, if Beatrix is an expert on the smooth snake; if she builds support for its protection in her community; if she works with others, including civil society groups; if she pursues her claim, with an awareness of the complexity of the public good; and if she is conscious of the institutional framework within which environmental and planning decisions are made – then Beatrix has knowledge, understanding, and appreciation associated with practical wisdom.

Courts in actual cases care about markers of practical wisdom, too. It mattered that Greenpeace was “well-informed”;⁷⁴ that it had “access to experts

⁶⁸ Indeed, in the case on which the Beatrix example is modelled, the long-established association of the British Herpetological Society with certain sites was mentioned as relevant to standing to challenge planning permission in relation to those sites: *R. v Poole B.C. Ex p. Beebee* [1990] E.G.C.S. 160.

⁶⁹ [2002] EWHC 2307.

⁷⁰ *Hammerton* [2002] EWHC 2307 at [10].

⁷¹ *R. (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) at [2]. Note that standing was not argued in this case.

⁷² *R. v Secretary of State for Foreign Affairs, Ex p. The World Development Movement Ltd* [1995] 1 W.L.R. 386 at 392.

⁷³ *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, Ex p. Greenpeace* [1994] Env. L.R. 76 at 101.

⁷⁴ *Greenpeace* [1994] Env. L.R. 76 at 100.

in the relevant realms of science and technology (not to mention the law)”;⁷⁵ and that it was able to mount a “carefully focused, selected, relevant” challenge,⁷⁶ pursuing only two of the initial six grounds of review, thereby saving “scarce court resources” and leading to an early result.⁷⁷ It mattered that the Howard League had “credentials” and a reputation for effective advocacy.⁷⁸ It mattered that the World Development Movement had a diverse and knowledgeable membership; that it conducted “research and analysis” of foreign aid issues;⁷⁹ that it had associations with numerous respected non-profit groups, and experience at lobbying “the British government, the European Union, the banks and other businesses for better trade access for developing countries”.⁸⁰ Significantly, Rose L.J. emphasised the World Development Movement’s “national and international expertise and interest in promoting and protecting aid to underdeveloped nations”.⁸¹ There was a similar emphasis in *R. v Secretary of State for Social Services, Ex p. Child Poverty Action Group*,⁸² in which the Child Poverty Action Group was granted standing partly because of its “prominent role in giving advice, guidance and assistance” to the vulnerable people affected by those decisions.⁸³ In all these cases, the claimants knew something about how to make good intentions a reality. They aimed to contribute to the public good, and they had an appreciation of how to go about it.⁸⁴

Evidence of civic virtue may also be provided through external markers of status and respect. Thus, for a court trying to determine whether a litigant possesses civic virtue, it would be worthy of note that the Howard League was a “leading NGO”,⁸⁵ that Greenpeace was a “respected” organisation;⁸⁶ and that the World Development Movement was held in esteem by various other virtuous groups.⁸⁷ If a claimant has the respect of those whose respect must be

⁷⁵ *Greenpeace* [1994] Env. L.R. 76 at 100.

⁷⁶ *Greenpeace* [1994] Env. L.R. 76 at 100.

⁷⁷ *Greenpeace* [1994] Env. L.R. 76 at 100.

⁷⁸ *R. (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) at [2].

⁷⁹ *R. v Secretary of State for Foreign Affairs, Ex p. The World Development Movement Ltd* [1995] 1 W.L.R. 386 at 393.

⁸⁰ *World Development Movement* [1995] 1 W.L.R. 386 at 393.

⁸¹ *World Development Movement* [1995] 1 W.L.R. 386 at 396.

⁸² [1990] 2 Q.B. 540; [1989] 3 W.L.R. 1116.

⁸³ *Child Poverty Action Group* [1990] 2 Q.B. 540 at 546. See also *R. v Secretary of State for Foreign Affairs, Ex p. The World Development Movement Ltd* [1995] 1 W.L.R. 386 at 395.

⁸⁴ Conversely, in *R. (Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087; [2014] W.L.R.(D) 361 a litigant attempted to challenge the legality of an interrogation technique known as “challenge direct”, but he was denied standing partly because he lacked any experience with – and hence first-hand knowledge of – challenge direct.

⁸⁵ *R. (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin) at [2].

⁸⁶ *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, Ex p. Greenpeace* [1994] Env. L.R. 76 at 100.

⁸⁷ *R. v Secretary of State for Foreign Affairs, Ex p. The World Development Movement Ltd* [1995] 1 W.L.R. 386 at 393 (official consultative status with UNESCO, promoter of international conferences, facilitator at OECD, etc).

earned through virtuous acts, then high status can be a proxy for virtue, rather like an honour (e.g. the Order of the British Empire), medal (the Victoria Cross), or award (the Nobel prize).

With these points in mind, let us return to the list of claimant-based factors we set out in the first section. Factors 1-3 – that a claimant has a “genuine concern” in a matter, that she is not a “busybody”, and that she is not acting out of “ill-will” – are relevant to the motive appropriate to civic virtue, as we said. Factors 4-6 – that a claimant is “public-spirited” and that she has suitable “experience” and “history” – are relevant to the existence of the disposition that constitutes civic virtue. Factors 7-9 – that a claimant has relevant “knowledge”, “expertise”, “credentials”, and “prominence” – go to the practical wisdom essential to full civic virtue. Meanwhile, the esteem or respect in which the claimant is held (Factor 10) may serve as evidence of her civic virtue. There are certainly other factors relevant to civic virtue which a court could also consider. The point is that, by thinking of civic virtue as essential to public interest standing, we can account for *all* of the claimant-based factors courts rely on. So, an account of public interest standing which gives pride of place to civic virtue has significant explanatory power.

Before we go on, we should address a doubt that will have occurred to some readers. In our hypothetical examples, the claimant is always an individual. In many public interest cases, though, the claimant is a group (Greenpeace, say, or the World Development Movement). Does it make sense to talk of the civic virtue of a group? Is it even intelligible to say that a group has a disposition or character trait? While these questions lie at the edge of some deep philosophical waters,⁸⁸ they do not trouble our account. For one thing, just as it is common to talk of group intentions and obligations, it is common to talk about group virtues. It would be unremarkable to say that a company is loyal to its employees, for example, or that a church is generous to the homeless. Such statements could be understood literally. In that case, groups could indeed have virtues, and there would be no difficulty for our account. Alternatively, such statements could be taken metaphorically, to mean that not the group itself but its members are loyal, generous, etc. In that case, when a court talks about a group being public-spirited or responsible, it should be understood as describing the virtue of the group’s members. Again, there is no difficulty for our account. So either way it is unproblematic to talk about civic virtue in relation to groups.

4. WHY VIRTUE?

To be entitled to standing, a claimant must have an interest in the matter to which her application relates, and that interest must be sufficient for standing. So the sufficient interest test requires a court to ask two questions when Beatrix applies for leave to challenge the council’s decision to build the power plant.

⁸⁸ For discussion, see S. Cordell, “Group Virtues: No Great Leap Forward with Collectivism” (2016) *Res Publica* 1.

First, does Beatrix have any interest at all in the matter to which her application relates? Second, if she has an interest, does it give the court a good enough reason to hear her claim? If civic virtue is relevant to standing, it must be relevant to at least one of these questions. In fact, it is relevant to both. Beatrix's civic virtue is relevant to the existence of a public interest. In addition, her civic virtue gives the court two good reasons to hear her claim: she is likely to be a good advocate for the public interest, and hearing her claim could cultivate civic virtue.

A. Identifying the Public Interest

If the public has a stake in what happens to the smooth snake, then so does Beatrix. But how is a court to know whether the public has a stake in the smooth snake's survival? How, in general, is a court to know whether a matter is one in which the public has an interest? Many official acts are obviously *not* of public concern, for example, a decision whether to grant someone's visa extension application.⁸⁹ Some official acts obviously *are* of public concern, such as an arguable case alleging a serious breach of the rule of law. Often, though, it is not obvious whether the public has a stake in a matter. Does the public have an interest in the preservation of a particular cobblestone path of historical interest? Does it have an interest in the continuation of traditions of street dancing? Does it have an interest in keeping some public spaces free from commercial advertising? These are difficult questions for courts.

Enter civic virtue. Suppose that Beatrix is an exemplary citizen. She has the disposition, practical wisdom and motivations we spoke of earlier. Beatrix is not only a member of the British Herpetological Society; she is an authority on the smooth snake. When she thinks about the public interest, she deploys her practical wisdom – her good judgment, her intellectual discernment, and her modesty about the breadth and depth of her knowledge. Because Beatrix is a virtuous citizen, she possesses the virtue of veracity, so she would not knowingly make a false claim about the public interest. Her virtue makes Beatrix a reliable guide to the matters that affect the lives of the people in her community. She could be mistaken, of course. Reliable is not infallible. But when Beatrix, a virtuoso at citizenship, says that the council's decision is of public concern, a court should listen. Her involvement in the case is evidence that the public has a stake in the matter. Accordingly, it is evidence that Beatrix has a stake in the matter, too.

B. Effective Advocacy

The virtuous citizen makes a better advocate for the public good than the selfish, the indifferent, or the inept citizen, other things being equal. In one way, this is obvious. The virtuous citizen uses her good judgment, her

⁸⁹ While there is a public interest in the maintenance of the rule of law, not every breach of law threatens the rule of law: see Endicott, *Administrative Law*, 2nd edn (Oxford; New York: Oxford University Press, 2011), at p.422.

knowledge, and her experience when crafting her challenge. She fits Otton J.'s admiring description in *Greenpeace* of a litigant capable of mounting a "relevant", "well-argued", and "effective" challenge.⁹⁰ The virtuous citizen also has traits that help her persevere in her challenge. She is willing to sacrifice the time, effort, and money to pursue her claim. Temptations and obstacles will no doubt arise, but the virtuous citizen will remain determined. Beatrix, say, will not yield to private corruption or intimidation. She will not accept an easy compromise (a few smooth snakes for the local zoo, say). The virtuous citizen began her case for the right reasons, and she is unlikely to quit unless the public good can be better served some other way.

There is another, more subtle way in which virtuous citizens make effective advocates. There is an affinity between the moral traits associated with civic virtue and some of the grounds of judicial review. Judicial review is, of course, about the legality of official acts. But judicial review often requires moral reasoning and a sound understanding of the factual situation in which an official decision is made. What is procedurally unfair, for example, is a highly context-sensitive question. As a virtuous citizen, Beatrix possesses the virtue of fairness, particularly as applied to the structures and processes that make up the life of her community. When the council makes its decision, Beatrix is better suited than the average citizen to evaluate the process by which the decision was made in the context of the needs of the community, the case for building the power station, the nature of the threat to the environment, and so on. If, taking the whole context into account, Beatrix is left with a "sense of unfairness",⁹¹ then she will also be able to explain why.

C. Cultivating Virtue

The final reason for a court to care about a claimant's civic virtue takes us beyond the claimant's particular case. Civic virtue is of value to society. Legal and political institutions need citizens who are willing to contribute their "moral and intellectual worth", as Mill says in our epigraph.⁹² Virtuous citizens will answer this call to contribute, in their votes, words, and deeds. Virtuous citizens will, within limits, sacrifice their personal interests to meet community needs and provide and improve public goods. They will step up in times of emergency, when the police, health services, or military are insufficient. And, as we said, virtuous citizens will do their part to make sure that officials stay within their powers, and that government continues to serve the people. In all these ways, virtuous citizens are essential to flourishing societies.

Given its value, it is important to create and foster civic virtue. But how can this be accomplished? Part of the answer lies in the way that virtue is acquired.

⁹⁰ *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, Ex p. Greenpeace* [1994] Env. L.R. 76 at 101.

⁹¹ *R. v Inland Revenue Commissioners, Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617 at 634 per Lord Wilberforce.

⁹² Mill, *Considerations on Representative Government*, 2nd edn (London: Parker, Son, and Bourn, 1861), at p.31.

A virtue is like an ability to play a musical instrument or a skilled sport: it takes practice and habituation to acquire the disposition and practical wisdom that constitute a virtue.⁹³ So, while virtue cannot be forced on citizens, it can be cultivated. The state can, for instance, require citizens to contribute to the public good (as voters or jury members, say), in the hope that what was done once as a matter of duty will be done again as a matter of habit. As de Tocqueville said:

“... what was intentional becomes an instinct, and by dint of working for the good of one’s fellow citizens, the habit and taste for serving them are at length acquired”.⁹⁴

The state can also cultivate virtue by creating avenues for civic involvement: forums, petitions processes, public consultations, ombudspersons, and of course, public interest litigation. Another way to foster civic virtue is by creating incentives for acting virtuously. A system of honours, such as those favoured by Rousseau,⁹⁵ can help create role models for civic virtue, demonstrating to the public how a good citizen lives their life.⁹⁶

Consider then the opportunities for fostering (and for undermining) virtue presented by Beatrix’s case. Suppose that Beatrix is refused standing. It is easy to imagine her being dispirited and disengaged as a result. Given the language courts characteristically use in such cases, she may wonder whether she too is regarded as a “busybody” or “mischiefmaker”. “Why should I get involved”, she might think, “when no one wants to hear from me?” Her motivation to serve the public interest might get worn down by frustration and cynicism. If she is denied standing more than once, she may be less likely to apply for judicial review in the future, and less likely to contribute to public life in other ways. Virtues are dispositions, and Beatrix’s disposition to work for the public good is weaker for the court’s rejection of her standing.

Now suppose that Beatrix is *granted* standing instead. She has been included in an important process. Her attempt to contribute has been successful, her civic virtue validated, her disposition of doing good for others reinforced. Granting standing to Beatrix also honours her, and marks her as an example of civic virtue that others can emulate. In a small but potentially important way, the granting of public interest standing is a court’s chance to hold Beatrix up as a role model for her community.⁹⁷ Whatever else can be said of the court’s

⁹³ Aristotle, *Nicomachean Ethics* (translated by R Bartlett and S Collins, University of Chicago Press 2011), at Book II, Part IV. Annas, “Being Virtuous and Doing the Right Thing” in Shafer-Landau (ed), *Ethical Theory* (Malden: Blackwell, 2007), at p.741.

⁹⁴ A. de Tocqueville, *Democracy in America*, vol II (translated by D Gilman, New York: Century, 1898), at p.128.

⁹⁵ J.J. Rousseau, *The Government of Poland* (Indianapolis: Bobbs-Merrill, 1972) c 3.

⁹⁶ Annas, “Being Virtuous and Doing the Right Thing” in Shafer-Landau (ed), *Ethical Theory* (Malden: Blackwell, 2007), at p.742.

⁹⁷ This role modelling is most prominent in public interest litigation in India, where public interest claimants, and their claims, are given extensive coverage by newspapers. For example, see this article profiling a prominent public interest litigant: “Death by Breath: ‘Big Talk When in Opp, Talk of Lobbies When in Power’ *The Indian Express* (New Delhi, 31 March 2015)

decision, it makes Beatrix, and others, more likely to contribute to the public good.

5. IMPROVEMENTS

At this point, we have provided a rational reconstruction of the test for public interest standing. According to this test, a claimant will normally be entitled to public interest standing if and only if: first, the matter to which her application relates is of public interest; second, her application has merit; and third, the claimant is acting as a virtuous citizen would by bringing her application. This reconstruction explains the test, on the one hand, and goes some way towards justifying it, on the other. However, our reconstruction is not meant as an unqualified defence of the courts' current approach. Public interest standing should be improved and refined, in several ways.

First, some of the factors that courts consider when assessing civic virtue, and the weight they give these factors, are rightly criticised as elitist.⁹⁸ Courts should sometimes demand less than they do. "Prominence" and "respect", for example, could be obstacles to standing for the poor and poorly connected. Ultimately it is a claimant's civic virtue that matters, not others' impressions of her virtue. And courts should sometimes demand more than they do. Courts' treatment of the issue of standing is often perfunctory. When dealing with well-resourced claimants, especially, courts should probe more thoroughly into claims about expertise, public-spiritedness and motives.

Second, current social and political conditions are not well suited to supporting virtuous public interest litigants. Indeed, the recent disparaging media coverage of the claimant in *R. (Miller) v Secretary of State for Exiting the European Union* is a lesson in how to *discourage* civic virtue.⁹⁹ Virtuous public interest litigants ought to be validated and encouraged, not just by the court, but by the public at large. The state should continue to facilitate public interest litigants in accessing judicial review through legal aid, in the face of proposals to "choke off" judicial review in such cases.¹⁰⁰

Third, courts are not candid enough about what they are doing, and why, when they test for public interest standing. As Paul Craig says, the case law on standing will remain "complex and ... conflicting" until the courts have a "clearer idea as to what they believe the purposes to be served by standing

<http://indianexpress.com/article/india/india-others/death-by-breath-big-talk-when-in-opp-talk-of-lobbies-when-in-power/> [Accessed November 2016].

⁹⁸ See e.g. text at fnn 20-21.

⁹⁹ [2017] UKSC 5; [2017] 2 W.L.R. 583. The claimant was criticised in newspapers as a "foreign-born immigrant" trying to "subvert" British democracy. The High Court judges who upheld her claim were denounced as "enemies of the people". See Gina Miller, "Article 50 Claimant Gina Miller: 'It isn't safe for me to go outside'" *The Guardian* (London, 11 November 2016) <https://www.theguardian.com/politics/2016/nov/11/article-50-claimant-gina-miller-safe-outside-brexit> accessed 23 November 2016.

¹⁰⁰ S. Sedley, "Not in the Public Interest", *London Review of Books* (London, 6 March 2014) at 29 <http://www.lrb.co.uk/v36/n05/stephen-sedley/not-in-the-public-interest> [Accessed 20 November 2016].

actually are”.¹⁰¹ Courts should be open about the fact that public interest standing depends on civic virtue. And they should be open about how and why civic virtue matters.

Greater candour would also help allay a common concern about public interest standing. The concern is that courts in public interest cases engage in a kind of free-for-all, with a wide-range of interests being weighed in an effort to decide where the overall public interest lies. If this were truly part of the test for public interest standing, it would be worrying. Courts are poorly suited to play such a quasi-political role, not least because bipolar adversarial processes tend to be unsuitable for determining polycentric questions.¹⁰² But the concern is misplaced. To decide whether a claimant is entitled to public interest standing, courts do not need to assess what is in the public interest in an overall or all-things-considered sense. They only need to assess whether the public interest is *implicated* in a matter. Nor do courts need to arrive at that decision on their own; virtuous claimants can help. In Beatrix’s case, for example, a court does not need to choose which best promotes the public interest, protecting the smooth snake or building a power plant. The court only needs to decide whether the public has an interest in preserving the smooth snake’s habitat – a much simpler question, which Beatrix’s involvement helps the court answer in the affirmative.¹⁰³ By being clear about their limited role in public interest cases, courts could put much of the controversy about public interest standing to rest.

Finally, the test for public interest standing should be refined to allow for exceptional cases. We have described three conditions that are relevant to public interest standing (i.e., public interest, merit, and civic virtue). Normally, these conditions are individually necessary and jointly sufficient for public interest standing. But normally is not always, and exceptions are sometimes called for, depending on the presence or absence of other potential claimants.

Suppose that a private home overlooks the land Beatrix is trying to protect. The homeowner is concerned that the power plant will block her beautiful view, and that its emissions will damage her health. The homeowner is motivated to challenge the council’s plans on every available legal ground. In doing so, she will most likely cover the same ground as Beatrix would. Since the question is

¹⁰¹ Craig, *Administrative Law* (London: Sweet & Maxwell, 1989), at p.3760-3762.

¹⁰² As Carol Harlow put it: “Where no individual rights are directly or closely affected, the answer lies in the political process”. “This judicial self-restraint is the central premise of” what Harlow characterises, following John Griffith, as Britain’s “political constitution”: Harlow, “Public Law and Popular Justice” (2002) 65 *Modern Law Review* 1 at 5.

¹⁰³ But once a court decides that a claimant is entitled to public interest standing, it still needs to consider the merits of the claim; and is the court not required to assess the overall public interest at this stage? Not at all. There are a variety of other constraints on the court’s role. Justiciability and deference are two. The grounds of review are a third, for “[i]f the judges are self-disciplined and do not extend their reach beyond the lawful grounds of judicial review, then generous standing for campaign litigants does not raise a danger of illegitimate judicial interference with government”: Endicott, *Administrative Law*, 2nd edn (Oxford; New York: Oxford University Press, 2011), at p.423.

one of the legality of the government action, rather than the all-things-considered merits of the power plant, the homeowner is likely to effectively represent the public interest in the case, even if this is not her primary motivation. As the law stands, if there are other claimants willing and able to mount an effective challenge, public interest standing will not be granted.¹⁰⁴ In our example, the homeowner would be granted standing, but Beatrix would not. We think this exception to the normal approach to public interest standing is justified to maintain the efficiency of judicial review. However, where the public interest is inadequately represented by a claim based on personal interest, the public interest claimant should be heard as a co-claimant or intervenor.¹⁰⁵

In the homeowner example, there are two claimants who are both qualified to represent the public interest. Sometimes there are none. Suppose that a claimant possesses neither civic virtue nor a private interest in a matter. She is pursuing some personal grudge, say, and doing so without relevant expertise or experience. Even so, we think the claimant should be entitled to public interest standing if two exceptional conditions are met: (1) the case is obviously of profound public importance (e.g., it involves a flagrant abuse of the rule of law); and (2) the court either does not need guidance as to what is in the public interest to decide the case, or such guidance can be provided by an intervenor. These conditions will only rarely be satisfied because it is often *not* obvious whether the public has a stake in a matter.

6. SUMMARY

We began by setting out a puzzle: when deciding whether to grant a claimant public interest standing, why do courts care about the nature of the claimant, as well as about the case she brings? Because, we argued, courts rightly care about whether a claimant is acting as a virtuous citizen would by bringing her application. This answer to the general justificatory question also allows us to answer the more specific issues we raised. Courts ask about 10 factors. Are these factors driving at 10 different things? No, we said. They are 10 different ways of identifying the same thing – a claimant’s civic virtue. Are some of these factors more important than others? None are sufficient, we think, but some are more important than others. Specifically, when assessing a claimant’s civic virtue, a court should focus on the claimant’s motivations, disposition, and

¹⁰⁴ See, e.g., *R. (Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087 at [88]. What if there are two claimants, both of whom seek public interest standing? The court has a number of options open to it, but the most obvious is to grant the claimant with the greater capacity to represent the public interest standing, and the second claimant status as an interested party.

¹⁰⁵ This is especially important when a case falls under the “makes no difference” rule in the *Criminal Justice and Courts Act 2015*. Section 84 of that Act directs courts to refuse relief in judicial review proceedings if the result for the claimant “would not have been substantially different if the conduct complained of had not occurred” – unless, the Act goes on to say, it is appropriate to grant relief “for reasons of exceptional public interest”.

practical wisdom. Prominence and respect should carry little, if any, evidentiary weight in an inquiry into civic virtue. What is the doctrinal relevance of these factors? Do they go to the existence of the claimant's interest, or its sufficiency? To both, we said. The involvement of a virtuous citizen in a case helps demonstrate the public's interest in the case, on the one hand, and it provides a court with good reasons to hear from the claimant, on the other. How, if at all, should the test for standing be improved or refined? While courts are right to care about civic virtue, we argued that the current approach should be improved in four ways.