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The Public Trust

Timothy Endicott*

*Professor of Legal Philosophy, University of Oxford, and Fellow in Law, Balliol College. I am very grateful to Evan Fox-Decent and Evan Criddle for their support and advice and tolerance, and to all the participants in the Fiduciary Government Symposium at UCLA in 2017, and in particular to Paul Miller and Steven Galoob for explaining aspects of the fiduciary theory of government. Achas Burin, Evan Fox-Decent, and John Finnis gave me very helpful comments on a draft.

I. Introduction

All public power is held and exercised in trust. Fiduciaries in private law hold power in trust. The fiduciary theory of government treats the duties of trustees and other fiduciaries in private law as an explanatory analogue for the duties of public officials and agencies, including the state. That analogy gives the theory a structured model for the requirements of legal and political and social justice. The model is a provocative interpretation of the crucial insight that law –and governance in general– are for persons, and not for the benefit of the powers-that-be. It is full of potential to serve as a model for Roman republicanism, or for certain strands in American or English republicanism.[1] It invites us to think of ways in which you and I (if we are subject to government) are like beneficiaries of a trust, and (if we are engaged in government) are like trustees.

But I will argue that public duties are not generally fiduciary (although public agencies and officials have many fiduciary duties). And I will argue that the differences between private fiduciary duties and public duties in general are very important for political morality, and for the role of law in a society.

If there is any force in my argument, it will be useful to those who defend and articulate the fiduciary theory. They need disagreement, and not just because it may help them to hone the theory and to take it further. A theory of how public agencies ought to act would be merely inert, if it did not say something that someone else will disagree with. Provoking disagreement is one criterion for success for the fiduciary government project (admittedly subordinate to the other two criteria, which are the truth of the fiduciary theory and its explanatory significance). The greatest risk to the project is not that you or I may conclude that it is a mistake, but that it will turn out to be impossible to disagree with the theory. And that is a live danger. Everything, after all, is somewhat like everything else.

A. Instances, analogues, metaphors

I take the fiduciary theory to claim that public duties are instances of fiduciary duty, and therefore are analogous to fiduciary duties in private law, so that private fiduciary duties provide an instructive paradigm for elucidating the nature of public duties. It might be argued instead that fiduciary duties are a metaphor for public duties, which would mean that there is some striking similarity –but it will be striking because they are so different, and we had better be careful in drawing conclusions about the nature of public duty from the similarity. Paul Finn, in the seminal article that has done much to stimulate the fiduciary government project, argued that it is a mistake to think that 'the trusteeship of government is but a metaphor'.[2] Like Finn, proponents of the theory generally seek to use the model of fiduciary relationships in private law to support conclusions as to the content of the ideal of good government.

The project of working out the content of public duties by analogy with private fiduciary duties is made the more tantalising –and creative– by the diversity of private fiduciary relationships, the corresponding variety of fiduciary duties, and the vagueness of a notion that developed largely in the exercise of equitable jurisdictions to determine the special duties that arise from the particularities of a variety of relationships in which it is the courts' concern to insist that power be used for the sake of particular persons, somewhat in the way in which a trustee must use the power involved in ownership of property that is held for others. An analogy with private fiduciary duties is an analogy with an analogy: as Peter Birks wrote, 'A fiduciary relationship is a relationship analogous

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[1] See Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEXAS LAW REVIEW 993 (2017). On English republicanism, see the discussion of John Locke's fiduciary theory in the Conclusion to this Chapter.
[2] Paul Finn, *The Forgotten 'Trust': The People and the State,* in MALCOLM COPE, ED., EQUITY: ISSUES AND TRENDS (1995) 139 at 151.

to that between express trustee and beneficiary, and a fiduciary obligation is a trustee-like obligation exported by analogy.'[3]

I will argue that public duties are not generally fiduciary, and are not analogous to fiduciary duties in private law. That is, they are not generally trustee-like. I will discuss disanalogies between public duties and private fiduciary duties, and I will offer an explanation of public duties as duties to serve the public good, which is the array of aspects of the good of the community that can be the legitimate concern of public agencies and officials (and often *must* be their concern, as a matter of duty to the community). The community mediates between public agencies and the persons subject to their authority; the relationship between trustee and beneficiaries is private because no community mediates between them.

Part II explains what it takes for a duty to be fiduciary, and sets out the Fiduciary Principle: that public power is held in trust in the sense that it is to be exercised altruistically in the interests of a beneficiary or a class of beneficiaries, as a trustee is to use a power over trust property. Part III explains the attraction of the Fiduciary Principle, which lies chiefly in the many important fiduciary duties of public agencies, and in the fiduciary duties of officials to the public agencies in which they serve. Part IV sets out my argument in favour of explaining the public trust, instead, by means of the Responsible Government Principle: that public power is held in trust in the sense that it is to be exercised for the public good. Part V illustrates the wide variety of duties of public officials and of public agencies, and argues that their duties are not generally fiduciary. Part VI discusses the fiduciary duties of public officials to public agencies. Part VII unpacks the notion of 'beneficiaries', and I try to explain why I think that the persons subject to the authority of public agencies are not beneficiaries in the same sense as the beneficiaries of private fiduciary duties.

As you will soon see, the whole argument depends on an understanding of community in which the good of a public *res* –a republic– is not analogous to the beneficial interest of a class of beneficiaries in the private *res* of a trust. Part VIII, the Conclusion, outlines the structure of the public good as the good of a political community, and the duties involved in serving that good.

II. What is fiduciary?

'The public trust' is a time-honoured phrase for the overarching duty of public officials and agencies.[4] But as Lord O'Hagan said in the *Kinloch* decision in the 1880s, 'there is no magic in the word "trust." In various circumstances, it may represent many things'.[5] To say that public power is held in trust implies that it is held and exercised subject to a duty to be trustworthy in its exercise. That applies both to the public trust, and to private relationships of trust.

Without trust, it would be impossible to walk down a busy sidewalk. Trust is essential for all human community,[6] and for all good governance. The fiduciary theory of government appeals to its proponents because it offers an epitome of the trust relationship as a model for the duties of states and of government agencies.

We need trust in all areas of the law. For examples, think of the role of the private law of contract in commerce, and the role of the private law of negligence in road traffic. Without trust, you would not be able to set out on the road in your car. And commerce would grind to a halt. The law of contract and the law of tort support trust and respond to failures in trustworthiness, first by

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[3] Peter Birks, *The Content of Fiduciary Obligation,* 34 ISR. L. REV. 3 (2000) at 8. Compare another statement of the analogy: 'A fiduciary is someone whom one can trust and rely on, as a beneficiary can trust and rely on his trustee.' Ib. at 8.

[4] Among many old uses of the term, see *Purdy v Stacey* (1771) 5 Burrow 2698, 98 ER 417, a defamation action in which the defendant had said that the plaintiff had paid £200 for a warrant as purser on the man of war *Magnanime*. Lord Mansfield held that paying the Commissioners of the Admiralty for the warrant would have been 'a corruption of a public trust' (417).

[5] *Kinloch v Secretary of State for India* (1882) 7 AC 619, Lord O'Hagan at 630.

[6] Onora O'Neill has explained the need very eloquently: A QUESTION OF TRUST (2002).

imposing and determining rights and duties and powers and liabilities (so that the parties know what it is that they ought to be able to trust each other for) and then by providing processes for resolving disputes, identifying failures, and giving remedies and imposing sanctions. We might call contract and tort the law of trust in commerce and the law of trust in traffic. One person ought to be able to trust another, and the law must determine what each ought to be able to trust the other for, and must give effect to duties to act as a trustworthy contractor or driver acts.

But we do not call duties in contract and tort 'fiduciary'. Trust among vendors and purchasers and trust among road users does not generally involve fiduciary relationships. Duties in contract and tort are not analogous to the duties of trusteeship.

The feature of trusteeship that grounds the analogy that, as Peter Birks pointed out, explains the use of the term 'fiduciary' is often described as *loyalty*.[7] But the notion of loyalty is controversial among proponents of the fiduciary theory of government.[8] Birks, having earlier used the notion of loyalty to explain the analogy with trusteeship, came to think that 'On further reflection it [i.e., loyalty] seems less than useful'.[9] He preferred 'self-denial'[10] or 'altruism' –or rather, *the highest degree* of altruism. He identified three degrees of 'legally obligatory altruism' in private law,[11] which respectively yield duties not to harm another, duties to improve another's position, and duties 'to improve another's position disinterestedly' –that last and highest degree of altruism being fiduciary.[12]

Birks' explanation is very helpful, but with respect I think that it incidentally makes sense of the view of those scholars who explain fiduciary duty in terms of loyalty. The extraordinary feature of fiduciary duty in private law is that a power must be used 'disinterestedly', by which Birks meant that a fiduciary must not only benefit another, but must also refrain from using the power in question for his or her own benefit. There is a rationale for this extraordinary arrangement in private law, where it is useful to arrange for a person or a class of persons (paradigmatically, the beneficiaries of a trust) to benefit specially and exclusively from an exercise of a private legal power (typically for the administration of property) in his or her or their interest, by another private person.

For all their variety, the fiduciary duties of parents, directors, doctors and solicitors are characterized (and are distinguished from other duties in private law) by the specialty of the duty-bearer's relationships to their children, the company, their principals, their patients and their clients, which calls for the extraordinary fiduciary arrangement. The beneficiaries ought to be able to trust the fiduciary for something special: an exclusionary concern for and attention to the beneficiaries' interests.[13] Since the legal power is exercised by a private person who has private interests, the

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[7] See, e.g., Ponet, D. & Leib, E., *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U.L. REV. 1249 (2011) at 1255, 1257: 'In the fiduciary relationship, the beneficiary is dependent on the fiduciary to act after her interests and the fiduciary is, accordingly, obligated to use her entrusted discretionary power in pursuit of the beneficiary's interests… Most centrally, fiduciaries have a *duty of loyalty*…'. See also Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, in D. GORDON SMITH & ANDREW GOLD EDS. RESEARCH HANDBOOK OF FIDUCIARY LAW (2018). Evan Criddle wrote that 'The duty of undivided loyalty obligates fiduciaries to act "solely in the interest of the beneficiary" without giving consideration to personal advantage.' – *Fiduciary Foundations of Administrative Law*, 54 UCLA LAW REVIEW 117 (2006) at 131.

[8] Evan Fox-Decent wrote in SOVEREIGNTY'S PROMISE: 'the most fundamental and general fiduciary duty is not loyalty to an individual or a discrete class of beneficiaries, but fidelity to the other-regarding purposes for which fiduciary power is held' (at 37).

[9] Birks, *The Content of Fiduciary Obligation* at 12.

[10] Ib. n 21.

[11] Ib. at 6.

[12] Ib. at 17.

[13] Not the beneficiaries' interests in general, but quite often some restricted set of interests, as determined by an act of settlement or by the nature of the relationship that gives rise to the fiduciary duty. I use the term 'interest' roughly interchangeably with 'good', so that (e.g.) when I talk of serving the public interest, I am talking about serving the good of the community, and when I talk of serving a private interest, I am talking about serving some good of a person that is distinguishable from what is good for the community.

arrangement (the use of the power solely for the good of the beneficiaries) can only work if the fiduciary acts with the highest degree of altruism, in Birks' term. But the reason for the duty of self-denial –the highest degree of altruism– derives from the duty to act in the special interest of the beneficiary. And I think that 'loyalty' is a fair way of describing the attitude of a fiduciary who does that. As Andrew Gold and Paul Miller say,

> Loyalty, like justice, calls on the fiduciary to suppress greed, but it does more: the loyal fiduciary will have the feeling that the well-being of the object of his or her loyalty takes precedence over the fiduciary's own good.[14]

For public agencies, too, a duty is fiduciary if it is distinguished by its specialty: as when a public trustee is made responsible for dealing with a person's property, where the owner and his or her family cannot deal with it. Then, that public agency becomes a fiduciary, and must use its power for the special benefit of the beneficiary -and the public agency must not use the power, or take the property, for any other public purpose (although the community benefits, in a very important sense, from success in pursuit of the public purpose for which the role of fiduciary was assumed).

III. The attraction of the Fiduciary Principle

I take the fiduciary theory of government to offer the following Fiduciary Principle as an explanation of the public trust. I wouldn't mind if Birks' word 'altruistically' were replaced with 'loyally', or 'solely', or 'with self-denial', or 'disinterestedly'; we need some such term –and the analogy with trusteeship– to distinguish the fiduciary theory of government from the unspecific idea that government ought to pay *appropriate* attention to the interests of persons.

> **The Fiduciary Principle:**
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> Public power is held in trust in the sense that it is to be exercised altruistically in the interests of a beneficiary or a class of beneficiaries, as a trustee is to use a power over trust property.

I will argue against the Fiduciary Principle. Yet there is a really significant kernel of truth in the fiduciary theory. Consider the following points. I do not mean them as concessions to be downplayed; they are crucial aspects of a sound and complete theory of good governance. They have been neglected, and one benefit of the fiduciary project is that it focuses attention on them.

1. Public officials characteristically have fiduciary duties toward the public agencies in which they serve (for example, in respect of the use of its property, but in many other respects too); see Part VI.
2. Public agencies have many fiduciary duties, which arise whenever there is public reason for an agency to attend to particular interests of a person or class of persons in the way that a private fiduciary must. Those genuinely fiduciary duties are a complex, little-noticed and tremendously important aspect of good governance. To take one massively complex and important example (among an unlimited and diverse array of examples), doctors in a national health service have fiduciary duties for the same reasons as doctors in a private health service. Such duties are very widespread, and arise incidentally –but on a very large scale– from public enterprises (all public employment generates such duties). And such duties may arise from projects that *must* be undertaken, where governmental action is the only way to meet *necessities* in a community such as

[14] Andrew S Gold and Paul B Miller, *Introduction*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014), 1-17 at 5-6, commenting on Paul Miller's chapter in that volume.

incarceration, quarantine, and provision for the care of children who have no family who can care for them (through state social care, or regulation of adoption…).

3. There is a similarity between public agencies and private fiduciaries: they all ought to be accountable for the discharge of their legal duties, and appropriate measures ought to be taken to prevent abuse of their power.

Points (1) and (2) reflect the fact that fiduciary duties are extremely important in public life. Yet those duties do not provide a general model of government. The duties in (1) are duties of persons *to public agencies*, and do not support a theory that public agencies are fiduciaries toward the persons affected by their actions (see Part VI). The duties in (2) –as widespread and important as they are– arise only when the public good demands special protection for private interests. Point (3) reflects the value of preventing abuse of power, which does not depend on whether the power is fiduciary. The general extension by analogy of duties of private trusteeship to public service is unwarranted.

IV. The argument against the Fiduciary Principle

I will argue that responsible government does not require the service of a fiduciary toward a class of beneficiaries, but service to a community.

The Responsible Government Principle:

Public power is held in trust in the sense that it is to be exercised for the public good.

A good trustee acts altruistically. A good public agency acts for the public good. Trustee-like altruism, I will argue, ought to characterise the behaviour of public officials *toward* public agencies: they must leave aside their private interests (see Part VI). But altruism (in Birks' sense of self-denial) is not generally a virtue for public agencies. Imagine you work in a public museum: to do a good job, you must put aside your private interests. But the museum does not need to put aside its interests, because its interest is the public interest. If you and your colleagues do what is *good for the museum*, you and the museum will be serving the public good. The fiduciary analogy is misplaced, because altruism does not translate as a general requirement from private fiduciary to public agency.

When public agencies have fiduciary duties, it is for the same special and *essentially private* reasons for which other fiduciaries have duties analogous to those of a trustee. The law ought to impose fiduciary duties on a public agency only when the community needs the agency, on its behalf, to act in the interests of a particular private person or class of persons (as good company directors or solicitors or trustees do). There can be a public reason –a reason that the community ought to act on– for an official or an agency to be bound to promote or to protect a particular private interest. A public duty is always to be understood *as public* by reference to the community, the polity, the body politic.

That is true both of the moral duties of public agencies and public officials, and also of the duties that the law ought to impose on public agencies. Trust may be juridical (meaning apt for identification, elaboration, imposition, and enforcement by law) or not, as Lord Selborne pointed out:

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and authority of

> the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not.[15]

In Lord Selborne's spatial metaphor, there is no 'higher' trust than the public trust, in our sense of the overarching moral duty of public authorities. The Fiduciary Principle is juridical;[16] the public trust is not generally juridical. It is not generally administered by courts, although the law ought to protect it in various ways. The public duties that make up the public trust do not generally have the specialty that distinguishes fiduciary duties. They are radically heterogeneous (see Part V), but they all reflect an overarching duty to serve the public good. I will argue that the Responsible Government Principle explains the public trust.

The public trust requires public officials and agencies to fulfil any fiduciary duties they may have (and they have many; see Part III). But the public trust is not itself a fiduciary duty. Service to private interests is different from service to a community. There is nothing more private than a fiduciary duty in private law, and that makes it a misleading analogue for the public trust. There is nothing more public than the public trust.

By now it should be obvious that the public good is at the centre of the argument. The public good is open-ended, not very amenable to theorizing, and highly dependent on the circumstances of a community. But in the Conclusion I will try to identify its structure and some of its elements.

V. Public duties are heterogeneous

Here is one similarity between private law and public law: the duties that public law imposes on public officials and agencies are no more generally fiduciary than the duties that private law imposes on private persons. They are heterogeneous. I hasten to point out that the fact that public agencies have duties that are not fiduciary does not entail that those agencies are not fiduciaries. Fiduciaries such as doctors and solicitors may have non-fiduciary duties to the persons to whom they owe fiduciary duties. And as Andrew Gold and Paul Miller write, 'It is sometimes thought that independent, non-fiduciary wrongs (eg, a breach of contract) can qualify as fiduciary wrongs, at least where disloyalty is also involved in the underlying conduct.'[17] When Evan Fox-Decent argues that 'an overarching fiduciary relationship exists between the state and each person subject to its authority',[18] that is compatible with the proposition that public duties are heterogeneous.

Yet I think that the heterogeneity supports my argument. It reveals a diversity in the attitudes that public decision makers (officials, or agencies) may legitimately take, and that the law may legitimately require them to take, toward the interests of persons affected by a public decision. The argument is that the overarching public duty is to serve the public good, and that serving the public good is not the same as acting with altruistic concern for the interests of a class of beneficiaries. The legal duties of public agencies in the law of tort may have no fiduciary aspect at all. Legal duties under human rights law are heterogeneous; some (like the law of social security) may appear to have a quasi-fiduciary aspect; but the duties of public agencies under the law of human rights and social security do not support a general fiduciary theory of government. And the duties of public agencies engaged in the prevention of crime and the enforcement of criminal law are heterogeneous, and do not have any general fiduciary component, and include duties of hostility toward the purposes and the interests of persons.

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[15] *Kinloch v Secretary of State for India* (1882) 7 AC 619 at 625-6. The Queen had assigned booty to the Secretary of State 'in trust' for soldiers involved in a campaign; the House of Lords held that the Secretary of State 'was not constituted a "trustee" for a cestui que trust entitled, according to the rules of Equity, to ask for the administration of a fund.' –Lord O'Hagan at 630.

[16] Evan Fox-Decent suggests that fiduciary duties are generally juridical: 'Because the fiduciary relationship is legal in nature, it generates legal duties…' SOVEREIGNTY'S PROMISE 28.

[17] Andrew S Gold and Paul B Miller, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014), *Introduction*-at 7.

[18] SOVEREIGNTY'S PROMISE 28-9.

A. Duties in tort

In the landmark English case of *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, a public agency with public power and public duty to remedy flooding tried to build a dam to remedy flooding on the plaintiff's farm. They made a careless mess of the job, and the flood continued to swamp the farm for six months, when it would have abated within a few days if the agency had acted with due care. The farmer sued the agency in negligence.

The House of Lords held that the agency's duty of care in negligence was a duty to take reasonable care not to make things worse, and not a duty to take reasonable care to remedy the flooding. When a defendant attempts to help someone, and fails through carelessness, there is no general liability to compensate. If one of Mr Kent's neighbours had seen the breach in their neighbour's dike and tried to help, and failed out of carelessness, they would not be liable.

Yet the agency had a duty to remedy floods that the neighbours did not have. In fact, the whole *raison d'être* of the agency was to remedy floods; that is not the *raison d'être* of the claimant's neighbours. You may say that private law does not impose a duty on Mr Kent's neighbours to take care in flood remediation because that would interfere with their autonomy, whereas public agencies do not have autonomy for their own sakes. You might therefore say (and some English lawyers think) that by imposing a duty of care on the public agency, the courts would only be giving just and genuine effect to the agency's *existing duty* to serve the interests of the claimant. Notice that such a duty of care would be rather analogous to the duty of trustee to promote the interests of beneficiaries.

Why not impose such a duty of care, when the defendants ought to be carrying out their public duty carefully? Even where it would cost little or nothing for a particular person to be careful in dealing with a particular problem of flooding, it may be difficult and expensive for the agency to ensure (through its hiring practices, or training, or oversight, or otherwise) that its personnel will take care. The agency would not only have the job of remedying flooding, but also the job of compensating property owners for careless failures. Giving the agency a duty in negligence to take care to promote the interests of the potential claimant will mean that it cannot responsibly start helping a landowner, unless it is prepared either to insure the property owner, or to invest enough in the project to reduce the risk of liability. So there is a risk that the liability (even liability for its own careless failure to help) would prevent the agency from doing good that can only be done if it is free to take measures at a cost that does not include the cost of compensation for careless failure to promote the potential claimant's interests.[19]

The majority of the UK Supreme Court rejected the duty to take care to help the claimant in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, on careless failure of police to protect a victim who had telephoned the emergency services number for assistance:

> It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organizational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible.
> (Lord Toulson [114])

Some UK judges would wish to move the law of tort towards a general liability to compensate for loss caused by careless failures by public agencies to use their public power to help a claimant. Those

[19] Why not say that liability for careless *causing of harm*, as where the agency makes the flood damage worse through its carelessness (for which it *is* liable), will distort the agency's decisions? Because when it is working out how to serve the public, the agency ought to factor in the cost that will result when it causes harm (and therefore when it causes risks of harm). That is why, in my view, the agency ought to be liable for carelessly causing harm, *even though it is not a fiduciary*.

judges have had successes in cases in which there is something particularly clinical, or professional (something more like the role of a fiduciary?) about the role of the public agency. One such pro-compensation judge, Lord Slynn, said in *Phelps v Hillingdon* [2001] 2 AC 619 at 654:

> …that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due skill and care are not exercised . . . A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist and a teacher including a teacher in a specialised area, such as a teacher concerned with children having special educational needs.

He said, '…will be injured', but the holding extended to claimants who *would not be helped* if due skill and care were not exercised.

If you are in favour of a generally fiduciary model of government, you may well conclude that there ought to be a legal duty on the part of every public agency to take care to help those persons whom the agency was established to help (and a remedy for breach of the duty). I think that there is nothing fundamentally unjust about establishing a flood defence agency with *no general duty to compensate for careless failure to help* a property owner.

The halfway house in England, in which there undoubtedly is a duty of care in negligence yielding such compensation for a careless failure to help in clinical and other 'professional' relationships, amounts to public provision of compensation– in addition to public provision of health care, professional services, and teaching. You might say that the duty to compensate is quasi-fiduciary, as it treats the claimant as a beneficiary in a private law sense.

The decisions in *East Suffolk* and in *Michael* illustrate the generally non-fiduciary nature of public agencies, and the non-fiduciary nature of their relationships with private persons. The decision to create an agency to remedy floods was a decision taken by the legislature for the public good. The duties of a flood defences agency and of the police are not actually duties to the particular landowner or the particular potential victim of crime, but are duties to serve the public good. If the courts created liability to compensate for careless failures to help, they would be treating the agency rather as if it had a fiduciary duty –that is, a juridical duty to serve the particular interests of the claimant with something like loyalty.

The English courts' refusal to create such legal duties is justifiable. The police and other public agencies ought to be liable in tort just like private persons. Their organisation and operations ought to be designed to prevent abuse of power and mere carelessness by their agents; but that is not a fiduciary principle, because it is not a juridical principle. There is no general failure in a legal system that does not create the sort of liabilities that really would be analogous to the liabilities of trustees.

B. Duties to respect human rights

Article 3 of the European Convention on Human Rights provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' The European Court of Human Rights has interpreted that as imposing an absolute ban on torture. The resultant duty of every single public official and public agency in the 47 state parties to the Convention is not fiduciary. It is a paradigm of a non-fiduciary duty. It does, of course, protect an interest of the right holder, but it is not even analogous to the highest degree of altruism. Like the private citizen who complies with the duty in tort and criminal law not to commit battery, you can comply with the duty not to torture, without altruism toward the person who could have been a victim.

But the Strasbourg Court has also identified (or, you might say, invented) positive duties in its interpretation of Art 3, including a duty not to deport a person to a state where he or she is likely to be subjected to torture or inhuman and degrading treatment (the Court has decided that those positive duties, too, are absolute[20]). The Convention has been interpreted as imposing a duty on states to protect persons within their jurisdiction against torture. There is something akin to a duty of altruism in the duty that the Strasbourg Court has imposed on the state, to protect persons from torture in other countries.

Human rights are not generally fiduciary, and are not generally non-fiduciary.[21] This is true whether we use the phrase 'human rights' for moral rights that every person has in virtue of his or her humanity, or for the legal rights protected by the famous instruments that people call 'human rights instruments'. The fiduciary duties of a parent are correlative to human rights, in the sense of rights that their children have just in virtue of being human. If you prefer to follow the 21st century vogue and to keep 'human rights' for rights that ought to be protected against the state,[22] some are and some are not correlative to quasi-fiduciary duties. The duty to protect persons from torture by other people in other countries bears a similarity to the duties of a trustee to promote the interests of beneficiaries, as do many other positive duties under human rights law; the duty not to torture bears no similarity to the duty of a trustee, except that both are duties. It is a reminder that the duties of the state are not generally fiduciary. Perhaps part of the attraction of the fiduciary theory, for some of its proponents, is that it is apt to support the judicial development of the relation between the state and persons subject to its authority, in new ways that treat the state as having positive juridical duties to promote the interests of every human being.

C. Duties of social assistance

If you have a right, conferred by legislation, to a defined welfare benefit, the department's duty to pay it is no more fiduciary than a duty not to collect tax from a person who is not subject to the tax. But what about discretionary duties to provide housing or other forms of assistance? Those start to sound fiduciary, because of the duty to use a discretion for the special benefit of a person or persons. You may say that the legislature has imposed them on the department because of a quasi-fiduciary element in the community's moral duty to care for the interests of those persons who need social assistance.

There is an analogy, and it is not far-fetched to say that the law of social assistance is a quasi-fiduciary body of law. That fact incidentally shows that governance is not generally fiduciary, because it is so obvious and so important that the quasi-fiduciary role of the law of social assistance distinguishes it from other areas of law (such as the law of taxation: the legal incapacity of the revenue agency to take more tax than is legally owing is no more fiduciary than the tort of conversion, or the criminal offence of theft).

The law of social security imposes duties on welfare agencies that are analogous to the duties of trustees. And then, what should we say of the moral duty of a state to provide social assistance? It is a duty of justice, correlative to a human right. It is akin to a duty to rescue (which is a duty of the navy of every state; and it is a duty of navies because it is a moral duty of every seafarer).

Is that moral duty fiduciary? The right of recipients of social assistance to concern for their very own good bears a similarity to the equitable right of the beneficiary of a trust. So you might say that there is a quasi-fiduciary moral duty on the state to establish and to maintain and to fund services to provide social assistance (and to give the navy standing orders to rescue shipwrecked seafarers).

But notice the difference between such human rights, and the rights of the beneficiaries of private fiduciaries: a human right to welfare is radically conditional on the need of the recipient, and

[20] *Chahal v United Kingdom* (1996) 23 EHRR 413.

[21] For an argument to the contrary, 'reframing human rights and peremptory norms as legal entitlements grounded in the state-subject fiduciary relationship', see EVAN CRIDDLE AND EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016) at 79ff.

[22] For an articulation and defence of the vogue, see Laura Valentini, *Dignity and Human Rights: A Reconceptualisation*, 37 OXFORD JOURNAL OF LEGAL STUDIES 862–885 (2017).

on the capacity of the person or community that ought to meet the need. No private person becomes a trustee *just because someone needs what the person could provide*. A recipient of welfare benefits really is a beneficiary (see Part VII). But people in general are not beneficiaries of the state, just because it has a moral duty to provide social assistance to people in need.

And moreover, recall the argument that a good museum is not acting altruistically when it provides a good service to the public. The state, likewise, when it provides just social assistance, is not acting altruistically, or with self-denial, in the way that a trustee does. The state is accomplishing a public good –that is, its own good. We could put it that the state is acting in its own interest. The Conclusion offers an account of that good that supports this view.

D. Duties of implacable hostility

The state and its legislative and executive agencies have a public duty (an indispensable component of the public trust) to fight and to punish the commission of crimes of violence. Modern states have found no just and effective way to respond to such crimes without incarceration. And incarceration creates a relationship between the prison authorities and the offender (and therefore between the community and the offender) that has fiduciary aspects.

That relationship gives the penal authorities a crucial responsibility for the prisoner's wellbeing. Their duty goes far beyond the non-fiduciary duty not to torture him. Because government is responsible for regulating its own functions, the duties of public agencies can include a quasi-fiduciary duty to take steps to protect a prisoner from torture by the agents of the state. The authorities are responsible for his nutrition. They are responsible for his safety (from fire, from abuse by other prisoners…). They even have duties (to a limited but very important extent) to protect and to respect his privacy.

This is just one instance, but a very striking instance, of the importance of quasi-fiduciary duties in public administration. You might well say that they are simply and centrally fiduciary, and I think some of them are. But they are diverse, and not generally juridical: the community's response to breaches of some of these duties may or may not call for legal remedies analogous to remedies for breach of fiduciary duties. The fiduciary or quasi-fiduciary duties of penal agencies entail responsibilities (which may be discharged in various ways, and some of which ought to be enforced by law) on the part of law enforcement agencies, and on the part of the legislature (including fiscal responsibility, oversight of administration, and responsibility for law reform where it is needed).

And the quasi-fiduciary relation between the state and the convicted offender arises as a crucial *incident* of action that must be taken on behalf of the community, in the state's organised and violent opposition to (for example) murder. At the point of preventing murder, the community's attitude to the would-be killer should not be one of fiduciary altruism. A good community responds to crime as an adversary, not a fiduciary. This is true even though the agencies have duties, such as to use non-lethal means if possible; that duty is not fiduciary, or every duty would be fiduciary.

And at the crucial point where the jury decides on behalf of the community whether to convict a person of murder, no fiduciary duty is owed to the accused. The requirement of a fair trial and the requirement –if the offender is to be punished– of a conviction by the court and of a sentence according to law (even where there is no dispute on the part of the defendant) are not fiduciary. You can hear me out before deciding whether to condemn me, with no altruism toward me.[23] The interest of the accused is in *being acquitted*, and the institutions of the community do not owe a duty even to weigh that interest in the balance, let alone to promote it (even as one interest among very many interests of very many beneficiaries). If the case is not proved, that is a reason to acquit; but the fact that the acquittal would be better for the accused than a conviction is irrelevant.

The interplay of duties in criminal justice is very complex, and is best explained by this aspect of the public good: that law enforcement agencies ought to act with utter hostility to the

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[23] For an argument that the duty to give a fair trial is a fiduciary duty, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013).

would-be murderer's purposes, and also with a commitment to justice, even where the institutionalisation of that commitment stands in the way of protecting persons from crime.

Needless to say, no fiduciary theory will say that the state should act as if a would-be murderer were its sole beneficiary; and fiduciary theory has the equipment, in the putative public fiduciary's duty to the potential victim and perhaps to others, to support the proposition that the state should oppose crime. But I think that the problem that state agents face in responding to crime is misconceived, if we describe someone who is planning murder or who has committed murder as a beneficiary of the police service.[24] And so it does not make sense to think of the duties of the police to take steps to prevent murder or to arrest a murder suspect as duties of *fiduciaries for the offender*, even if we think of them as fiduciaries for everyone else at the same time.

VI. Fiduciary duties of public officials to public agencies

Much of the appeal of the fiduciary model arises from the duties of public officials not to profit from their positions, and not to act with a conflict of interest. And those are central duties of fiduciaries such as trustees and solicitors and company directors.

But those duties are fiduciary duties *to government agencies*. In their juridical form, the duties of a museum curator to protect the museum's artifacts and not to rent out the agency's facilities for private profit are duties to the museum. They are full-blooded fiduciary duties, in Birks' terms, because the curator owes a duty of altruism, just like a trustee, and must put aside his or her private interests. There ought to be criminal liability for embezzlement and profiteering, and there ought also to be civil redress, precisely as with other breaches of fiduciary duty, in the form of an accounting for profits, or an order for restitution of stolen property. And as Paul Finn wrote, 'the proper plaintiff in such proceedings …is ordinarily the authority under which office is held'.[25]

Yet Finn did not stop at the proposition (which he supported meticulously) that fiduciary law has a time-honoured and appropriate set of techniques for remedying corruption in public office.[26] He went further to assert:

> the unexceptionable conclusion that the state is, after all, trustee for the people of its power of government – a trust founded upon the constitutional principle that "the powers of government belong to, and are derived from … the people".[27]

If Finn was appealing to the notion of the state as 'trustee' in a juridical sense, his conclusion about the state is not supported by the rule that public officials have fiduciary duties toward the agencies in which they serve. An agent of a commercial company owes fiduciary duties to the company, and an agent of the Department of Work and Pensions owes fiduciary duties to the Department, for the same reasons. The rationale for the duties of the public servant is not just similar to the rationale for fiduciary duties of private fiduciaries; it is the same rationale. These are not fiduciary duties *of government*, they are fiduciary duties *to the government.* They do not support the fiduciary model of government.

VII. People are not *beneficiaries* of the public trust

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[24] The murderer is the beneficiary of duties of the police to protect him against lynching. But he is not a beneficiary of their duty to prevent him from committing murder, or their duty to apprehend him afterward.

[25] Finn *Fiduciary Reflections* 143.

[26] Lionel Smith has shown that those techniques have sometimes been extended to apply to representative politicians: *Loyalty and Politics*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014). See Paul Finn, *Fiduciary Reflections* 127, and *The Forgotten 'Trust': The People and the State,* in MALCOLM COPE, ED., EQUITY: ISSUES AND TRENDS (1995) 139.

[27] Finn *Fiduciary Reflections* at 131, citing *Nationwide News Pty Ltd v Wells* (1992) 177 CLR 1 at 72.

Another way of looking at the distinctive feature of a fiduciary or trust-like relationship is to focus on the role that the law ascribes to the beneficiary. A contracting party benefits from the law's imposition of duties on the other party to the contract, and a potential victim of a tort benefits from the law's imposition of duties on a potential tortfeasor. But they are not *beneficiaries* in the same sense as the beneficiary of a fiduciary duty. What does it take to make someone a beneficiary in the relevant sense? Here is Paul Finn's explanation:

> What must be shown is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his or her interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement.[28]

To that account of the role of a beneficiary in a fiduciary relationship, we should add the element that Birks pointed out, which takes fiduciary duty to the highest degree of 'legally obligatory altruism' –that the beneficiaries are entitled to expect that the fiduciary will act in their interests, to the exclusion of the fiduciary's own interests. But the interest of a public agency is the public interest, and the persons served by a public agency are not entitled to have the agency exclude the public interest. There is, as a result, a crucial disanalogy between being the beneficiary of a trust, and being the beneficiary of a public service.

Paul Finn's careful advocacy of the fiduciary theory included the caveat that we have not 'veered to the view that public property is held on trust (in the sense known to equity) for the people'.[29] Imagine that we do. Imagine that class actions are available on behalf of the beneficiaries in the tort of conversion against a public official who embezzles, and any amounts paid as a remedy are to be distributed among the beneficiaries. Representative plaintiffs can also bring a class action on behalf of the people as beneficiaries for an accounting for profits improperly made by officials. There are some difficult questions as to the distribution of the resulting pay-outs to the beneficiaries (a matter of determining how the remedy for the fiduciary's wrong should be allocated among taxpayers, or citizens, or members of humanity…[30]). Actions can be brought for an injunction against the building of a bridge or some other project, on the ground that it would be a waste of the trust property. In principle, the beneficiaries can apply to a court to wind up the trust and to convey to them the legal entitlement to the property (in England, under the rule in *Saunders v Vautier* (1841) Cr & Ph 240, 41 ER 482) –although it is difficult or impossible in practice, as some members of the class are children or lack capacity or are unidentifiable.

The fiduciary theory could explain the absurdity of such arrangements by reference to the convenience for the beneficiaries of having their cause of action assigned to other fiduciaries (to the state, or to an Attorney General or other officer), who could represent them in legal action against the defaulting fiduciary.

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[28] Paul Finn, *Fiduciary Reflections* (2014) 88 A.L.J. 127 at 139. Cf. Evan Fox-Decent, SOVEREIGNTY'S PROMISE: 'the duty of the fiduciary is to act with due regard for the best interests of the beneficiary' (21).

[29] Paul Finn, *The Forgotten 'Trust'* at 139.

[30] I do not have room to discuss the problem of *who counts as a beneficiary* of putatively fiduciary public duties. I will follow the solutions that are most provocative but also most promising, and treat the fiduciary theory as counting the whole of humanity (including future humanity) as potential beneficiaries, with the class of actual beneficiaries depending on how a public action affects people. As Evan Fox-Decent wrote, 'The basic cosmopolitan idea is that although states are fiduciaries of their people, they are also, across a range of subjects, fiduciaries of humanity.' *Challenges to Public Fiduciary Theory: An Assessment*, in D. GORDON SMITH & ANDREW GOLD EDS. RESEARCH HANDBOOK OF FIDUCIARY LAW (2016) (D. Gordon Smith & Andrew Gold eds., forthcoming, 2018). See also Fox-Decent, SOVEREIGNTY'S PROMISE: 'the set of candidate public beneficiaries may include some or all of the public (including some *and* all of the public in a single case)' - at 152. Cf Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA LAW REVIEW 117 (2006) at 138. For discussion see Endicott, *Equity and Administration: A Commentary*, in P.TURNER ED, EQUITY AND ADMINISTRATION (2016).

But the absurdity, it seems to me, is more radical. It concerns (1) the unnecessity in the interest of political and legal and social justice of such processes on behalf of putative beneficiaries, and (2) the utter impossibility of providing fiduciary remedies on behalf of those putative beneficiaries *against the state*. It is impossible because the people have no agency except the state for carrying through the form of reflexive control of power that is the rule of law.

Now consider the following reasons for thinking that persons in the actual world (in their relation to the state) are different from beneficiaries (in their relation to a trust). Perhaps they are various ways of restating one reason.

- Proceedings in real life by a public agency against an official who has embezzled are not representative proceedings, but proceedings by the genuine claimant.
- If a trustee steals from a private trust, the list of beneficiaries of the trust is a list of those whose rights the trustee infringed. If a police chief steals police force property, the list of persons affected by the function of the police force is not a list of persons whose rights he infringed.
- A public agency that owns public property holds both the legal title and the beneficial interest. Taking public property back from a thief and distributing it among the people on the list of persons affected by the public agency's functions would not be a way of returning the property to its rightful owners.
- No individual has any right, legal or beneficial, to any share of public property. Beneficiaries of a trust in private law, by contrast, are 'the persons who are entitled to the trust property'.[31]
- A theory of justified political rebellion is not even analogous to a theory of the justification of *Saunders v Vautier* proceedings to wind up a trust at the instance of the beneficiaries, and to convey to them the legal title to the trust property.
- The citizens of France cannot wind up France and distribute the property. France bears no analogy with a private trust.

The role of a beneficiary of a private trust is a captivating but misleading metaphor for the role of a citizen in a polity, or more generally for the role of a person affected by the use of power in a polity.

Lionel Smith gives this explanation for the tendency of the common law not to impose fiduciary duties on *legislators*:

> It might be because the public trust in these cases is owed to the whole polity, and is therefore so public in nature that it would be difficult to translate into the private law model of a fiduciary relationship between a fiduciary and a beneficiary.[32]

This insight captures a crucial aspect of the public trust: it does not translate well into the private law model. If public authorities fulfil their duties, that makes for a good community, in a sense to be explained in the Conclusion. People stand to benefit greatly from belonging to a good community. But that benefit is not analogous to the private benefit that beneficiaries of a trust receive, when a trustee fulfils his or her duties in dealing with the trust property.

VIII. Conclusion: the One-ing

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[31] Lionel Smith, *Massively Discretionary Trusts* (2017) 70 CURRENT LEGAL PROBLEMS 17–54. That, Smith says, is the 'strict or narrow sense of the word "beneficiary"'. The word also has wider senses: 'We may talk of the beneficiary under a policy of life insurance, or under a will' (Ib). Recipients of welfare benefits may be 'beneficiaries' in that wider sense; this is why I suggested in Section V.C that duties of social assistance are quasi-fiduciary. But the people who benefit from the public trust in general are not beneficiaries in those wider senses.

[32] Lionel Smith *Loyalty and Politics*, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014).

I have argued that the overarching duty of public agencies –the public trust– is not analogous to the responsibility of a trustee altruistically to advance the interests of a beneficiary or of a class of beneficiaries. The overarching moral duty of public agencies and of public officials is to serve the public good.

One great merit of the fiduciary theory is the challenge that it poses: to articulate the nature of the public, and the nature of the public good, and to explain the difference between serving the public, and serving a class of beneficiaries as a good private fiduciary would serve a class of beneficiaries.

A. The public

The public is what Lionel Smith called 'the whole polity'. The whole polity needs to be constituted as a *thing*, in order to put the re- in the republic. That thing is what the 15th-century constitutional theorist John Fortescue, like many others, called 'the body pollitike':

> …this incorperacion, institucion, and onynge [i.e. 'one-ing'] of hem self [i.e. themselves] into a reaume.[33]

The 'one-ing' is the ongoing constitutive act of establishing a 'felowshippe' as Fortescue also called it. By 'felowshippe', he meant what I have been calling 'the community'.

The one-ing created and sustains (e.g.) France or the United States or Dayton, Ohio as political communities. The one-ing enables the community to act as a body politic, and in particular to act as a legal person (the city, the state…), which is the legal form of the body politic. The one-ing enables public officials to act for the community. The community (through its agencies including the state) mediates those officials' heterogeneous duties to persons in the community, and to humanity. Their duty is not to administer the affairs of members of the community or of persons in general; it is to administer the affairs of the republic.

In everything they do from day to day, public agencies and officials are constituting the people as a community that acts together, and that can be a good community. The public trust –the overarching general duty of public service– is to do what is within their responsibility to make the community a good one. The duties that public agencies and public officials owe to persons result from that primary duty.

B. The public good

A good community allows people to lead good lives together, supporting them in doing so in ways that are compatible with their autonomy. John Finnis has explained the common good of political community as:

> the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual of his or her personal development.[34]

Some of those conditions –such as the distance from the sun to the earth, or the sharing of a language– are not the responsibility of public agencies. But where such conditions can only be met through political action (or even where they could be met by other means, but there is nothing wrong in securing them by political action), they are elements in the *public* good. The public good is

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[33] John Fortescue, *The Difference between an Absolute and a Limited Monarchy* (c 1471) in C PLUMMER ED., FORTESCUE ON THE GOVERNANCE OF ENGLAND (1885) at 112.

[34] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2011) at 147. That point is the culmination of an extended discussion in Chapter VI of Finnis's book of what it means for a good to be held in common, and of the varieties of community that can have different goods, and of the goods of political community.

anything that makes for good community, that can rightly and effectively be secured or promoted by those who act on behalf of the political community, so that it demands their attention. Two principles result:

(1) that public servants should do what will make the community a good one, and
(2) that they should do so only in ways that can rightly and effectively be pursued by public action.

Principle (1) presupposes a condition (I will call it a 'principle', because it must be presupposed as a matter of principle in order for principle (1) to be a sound principle):

(0) that it is good for the community in question to exist as a community.

Notice that justice is not only built into principle (1) (because justice is a virtue of a good community), but also into principle (0) (because justice is a criterion of legitimacy in the formation and sustenance of communities –and in secession or federation…), and into principle (2) (because justice determines how public agencies can legitimately pursue goods).

More could be said about the demands of justice in community! All the principles of responsible government -the rule of law, the separation of powers, the need for accountability and openness in forms adapted to the circumstances…– could either be added to the above list, or built into principle (2) (as they determine how the community can rightly and effectively operate). But the abstractions that I have mentioned are enough of a reminder that the public good is not simply *that which advances the interests of the members of the public*. It is only attained where the community is justly established, and its agencies and officials act with justice.[35]

Yet the public good is also extraordinarily open-ended (and dependent on circumstances), because it includes whatever the political authorities of the community could justly be doing to make the community a good community. This means that we should not really expect a *theory* of the public good, in the sense of an explanation (with some significant unity and completeness) of its requirements. But it is possible to identify principles, such as (0), (1) and (2).

And one further, crucial, theoretical principle is

(3) that we should not truncate the public good.

Consider John Locke's brilliant and path-breaking account of the public trust. There is so much that is so good in it, but it is hamstrung by a truncated account of the public good. He called the legislative power 'a fiduciary power to act for certain ends'. And he grasped the crucial element in the public trust (which the English kings had not always kept fully in view!) that the *executive* prerogative 'is nothing but the power of doing public good without a rule,'[36] and that if the executive uses prerogative power 'to make or promote an interest distinct from that of the public', the people would be right to limit the power of the trustee. So he saw that 'the Foundation and End of all Laws' is 'the public good'.[37]

What is that foundation and end? What is the public good? Locke said that for the commonwealth to act 'according to its own nature' –that is, for its specific good– is for it to act 'for the preservation of the community'. Preservation of the community is undoubtedly a great example of the public good (in any community for which principle (0) holds good). Success in pursuing other goods rather depends on it. But as a *statement* of the public good it is fragmentary. It does not explain why the community is worth having (when people ought to expect more from political community than self-preservation). It yields a truncated picture of the nature and proper purposes of a republic, because it does not account for the open horizon on which a republic could do

[35] Finnis wrote that 'due respect for the human rights which embody the requirements of justice' is a 'component' of the common good of a political community. NATURAL LAW AND NATURAL RIGHTS (1980) at 23.
[36] PETER LASLETT ED., JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1988), written in the 1680s, 2.166.
[37] Ib, 2.165.

something worth doing. He went so far at one point as to say that public power has 'no other end but preservation'.[38]

Perhaps Locke thought that survival of the community is the only public good because he thought that it is the only *really* public purpose –the rest relating to the promotion of essentially private interests of beneficiaries, by public fiduciaries? Or perhaps he blinkered himself because, in combination with his fiduciary idea, the idea of preservation offered an account of something that much concerned him: justifiable popular resistance to public power. Since all power is 'given with trust for the attaining an end', he concluded, power is forfeit where the people 'think best for their safety and security'.[39]

The reason for agents of the community to preserve the community (where principle (0) holds good) is the common good, including all the great variety of things that those agents ought to accomplish, besides preserving the community, and a yet-wider variety of good things that they may justly choose to accomplish. In fact, the good that a commonwealth can accomplish is massively plural and diverse. The doctrine of the justification of public action and the doctrine of the public trust must depend on all of it.[40]

If you want to find an untruncated understanding of the public good, you will need to go back well before the Enlightenment: perhaps to Fortescue? Or perhaps to Thomas Aquinas, whom Fortescue was following.[41] As Finnis has pointed out, Aquinas accounted for the public good neither as demanding private virtue nor as conferring private gain, but as establishing and maintaining 'goods (and virtues) which are intrinsically interpersonal, other-directed…: justice and peace'.[42]

Aquinas's understanding would itself have been radically truncated, if he had thought of justice and peace in the narrow, law-and-order, sense that would only support a night watchman state, when in fact there are so many incredibly and incommensurably worthwhile things –great things, even– that a political community can justly and peaceably do.[43] They can include going to the Moon, and establishing public education and a public health system, and building a railway bridge over the Firth of Forth at Queensferry, and then a road bridge, and then another bigger and better road bridge. Those projects advance the public good –by which I mean that they advance the common good in a way that justifies public decision and planning and investment and action to achieve a purpose that can justly be chosen as the purpose of the community. Building the bridges across the Forth was a public good if there was reason for authorities of the community to come up with the ideas and to approve the projects and to spend the money and to bring them to completion, and then to start maintaining the bridges. If none of that was necessary or appropriate (if the authorities ought to have been investing the resources in different ways and letting people go to Stirling, to cross the Forth where it becomes a river), then building them was not a public good. So the public good can include not only preserving the community, and preserving law and order, but also, e.g., building bridges. And then, to fully accomplish the 'one-ing', we need a coordinated way of deciding what is for the common good, where the people disagree, or even where they haven't the foggiest.

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[38] Ib, 2.135.

[39] Ib, 2.149. For a helpful discussion of Locke's views on the ends of government see Alex Tuckness, *Locke's Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2016 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/spr2016/entries/locke-political/, section 4.

[40] The doctrine of legitimate opposition to state power, on the other hand, needs to refer to a restricted set of public goods, because rebellion cannot be justified by just any state failure to promote the public good.

[41] See John Finnis, *Aquinas and Natural Law Jurisprudence*, Chapter 2 in DUKE AND GEORGE EDS, CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE (2017) at 54.

[42] John Finnis, *Public Good: The Specifically Political Common Good in Aquinas*, in ROBERT GEORGE, ED. NATURAL LAW AND MORAL INQUIRY (1998) 174–209.

[43] And Finnis argues that Aquinas had in mind 'the peaceful condition needed to get the benefit(s) (utilitas) of social life…' Ib. 179.

Serving the public good involves the reflexive good of determining for the community what is to be counted as advancing the public good.[44] It is an aspect of the one-ing: the project of constituting and sustaining a political community.

C. Public duties

The overarching duty of a public official is not to prefer interests of a beneficiary or beneficiaries over the official's own; it is to pursue an aspect of our common good: the public aspect (i.e. the aspect that ought to concern those in government over the community). Public service is not all a matter of duty; the interests that are at stake in governance in general are open-ended, and there are very many indeterminacies as to their content and as to how best to pursue them. They allow many creative freedoms to public servants. Yet the public trust involves the most exigent duties on the part of all to whom the law accords public power or public privileges that ought to be used for the public good. Examples are the duties *not to torture or to slaughter persons*, no matter what could be gained. And the public trust can include responsibility for fulfilling moral duties of the community.[45] The public trust is not exactly a duty to act in the interests of others rather than your own interest; it is a duty to act in our common interest. The public good is your good as much as anyone else's, and is neither yours nor anyone else's in the way that a beneficial interest in trust property is an interest of a beneficiary or beneficiaries.

D. Public fiduciary duties

The massive plurality and the formal diversity of public duties has the consequence that fiduciary duties play an important role among them. The public good often demands that a public agency should have regard for particular interests of persons. The core, genuine fiduciary duties of public officers are duties to exercise a power for the specific benefit of a particular person or class of persons, where there is public reason to do so. And at that crucial point, the relevant interests of that particular person or class of persons take the role in public law that interests ought to play in the reasoning of a private fiduciary; they are interests of the same private kind as those that ground fiduciary duties in private law (such as the interests of a child taken into care, or the interests of a person whose property is controlled by a public trustee). In those circumstances, the community (in order to be a good community) needs the official and the agency to act with particular regard for those interests.

And the duties of public agencies are quasi-fiduciary when they involve some special concern to promote particular persons' interests (such as positive duties to protect a particular person from torture, or to care for prisoners, or to provide for the destitute).

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[44] Paul Miller gives a very striking picture of representation as 'personation': '…there is correspondence between private and public administration to the extent that each is carried out on representative basis through mandates under which one or more persons personate others in the authorized exercise of other-regarding legal powers' (*Fiduciary Representation,* in this volume). A proper response to this complex encapsulation of the fiduciary theory would need an explanation of the difference between the mandate of a private fiduciary, and the mandate of a public agency. I think that much legitimate public decision making, including decision making by elected representatives, is carried out with no mandate, but with an open-ended, reflexive responsibility for determining what is to be counted as the public good. And a mandate, in the sense of an authorization to exercise power with an associated requirement to exercise it for a specified purpose, is *fiduciary* only if it involves a concern for the interests of beneficiaries that is analogous to that of a good trustee. Public officials *have no general mandate*, except to serve the public good (which, as I have argued, gives rise to many very stringent requirements that really are mandatory). It will be evident, as well, that the account of the public good that I offer in this Conclusion portrays public agencies *not as personating others*, but as acting for a community.

[45] See Endicott, *Equity and Administration*.

Here is the respect in which government *must* fulfil fiduciary duties, even if I am right that public duties are not generally fiduciary: it is a necessary truth (the necessity is a practical necessity) that governments in modern states incur far-reaching and important fiduciary responsibilities. Explaining those responsibilities is not a mere detail; it is of central importance for legal theory and for political theory in general.