

Plunkett's Pluralism, and From the Public Good to the Common Good

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INTRODUCTION

John Hubert Plunkett (1802–1869) was born into a distinguished Irish family, once holders of the country's highest legal positions but dispossessed and debarred from university, the legal profession and crown appointments by the 1695 Irish Penal Laws. Following Catholic emancipation, he was among the first of his background to rise to high office in New South Wales, contributing significantly to law, education and health provision in the colony. His broadly pragmatic approach, based on Common Law, contrasts with the more philosophical Civil Law tradition, in which notions of the 'common good' are central. The latter, however, is often invoked confusedly and without understanding of its relation to other concepts of individual and social goods. This leads to ongoing dilemmas in social policy.

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The *Plunkett Centre for Ethics* at Australian Catholic University takes its name from that of John Hubert Plunkett, the first Catholic Solicitor General, and Attorney General of New South Wales, and the first Queen's Counsel in Australia.¹ The centre describes its mission as promoting the values of compassion, fairness and justice, particularly in relation to the provision of healthcare. These three qualities were notable facets of the life and public career of J.H. Plunkett himself. Also, since in exercising them he often met with considerable opposition both secular and religious, one may add to his virtues that of moral courage. Virtue spans several fields: ethical, political and religious, and I will touch on each, but I begin, and for some while will remain, with Plunkett himself, since, besides the importance of his contributions to the development of legal practice, education and healthcare in colonial New South Wales, his attitudes and practice bear upon the continually pressing question: What is the societal good, and how can it be pursued in a pluralist society?

FROM OPPRESSION TO PROFESSION

John Plunkett was born in 1802 into an Anglo-Irish Catholic family dating back to the period of Anglo-Norman settlement. The Plunketts of Roscommon had been on their land since the twelfth century, but lost their estates through the Irish Penal Laws of 1695, introduced in the wake of the defeat of the Catholic King James II by the Protestant William of Orange at the Battle of the Boyne four years earlier. Following the 1778 Papists Act, however, land was recovered, and John's father built a solid Georgian mansion at Mountplunkett, where John was born and grew up. The family was variously related to a number of senior legal figures in Irish history, including Richard Plunkett, Lord Chancellor of Ireland in the second half of the fourteenth century, Thomas Plunkett, Lord Chief Justice in the following century, and his nephew Sir Thomas, Chief Judge ('Baron') of the Irish Court of Exchequer, and Justice of the Dublin Bench through to the early years of the sixteenth century. He was also distantly related through his mother

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1. For overviews see T.L. Suttor, 'John Hubert Plunkett', in *Australian Dictionary of Biography*, vol. 2, ed. D. Pike (Melbourne: Melbourne University Press, 1967), and J.K. McLaughlin, 'John Hubert Plunkett: An Irish Lawyer in Australia', *Australian Bar Review* 50, no. 1 (2021). For a more extensive account of Plunkett's life and work, see J.N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales* (Canberra: Australian National University Press, 1973), and Tony Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (Melbourne: Australian Scholarly, 2009); and for a study of his twin prosecutions of perpetrators of the 1838 Myall Creek killings of unarmed Indigenous peoples, see Mark Tedeschi's *Murder at Myall Creek: The Trial that Defined a Nation* (Cammeray, NSW: Simon and Schuster, 2017).

to Oliver Plunkett, sometime Archbishop of Armagh, Primate of Ireland, scholar, educationalist, martyr and, as of 1975, a canonised saint.

Even this lineage and the historical prominence of Plunket(t)s among the Irish aristocracy and legal profession would not have permitted John's entry to Trinity College Dublin in 1819, had not the prohibition on Catholics entering the university been removed with the passing of the Irish Roman Catholic Relief Act of 1793, which also lifted the ban on Catholics entering the legal profession. As it was, he graduated on the twentieth anniversary of those reliefs, and within the next few years, following studies at King's Inns in Dublin, he was called to both the Irish and English Bars, serving with distinction on the Connaught circuit between 1826 and 1832.

Plunkett was an advocate of Catholic emancipation and caught the attention of Daniel O'Connell, the leader of that cause. O'Connell credited Plunkett with part of the success of Catholic 'Young Irelander' candidates in the 1830 election occasioned by the death of George IV. The previous year, the withdrawn, declining and frequently insensible Sovereign had complained that 'Wellington is King of England, O'Connell is King of Ireland, and I am only the Dean of Windsor'.² With the collapse of Wellington's Tory government, and the emergence of a Whig administration, O'Connell's position was further strengthened. Thereby, together with his emancipationist ally, Arthur Plunkett (a kinsman who, as Baron Fingall, was a member of the House of Lords), he lobbied in support of John Plunkett's wish for a colonial position. Their efforts were successful and he was appointed Solicitor General of New South Wales, something that could not have happened prior to the 1829 Catholic Relief Act. On 14 June 1832, having that month turned thirty, Plunkett arrived in Sydney from Cork aboard the convict ship *Southworth*, together with his wife Maria Charlotte, sister Kate Amelia, friend Fr John McEncroe, whom he appointed as official chaplain to the Catholics of Australia, and several female servants.

BEYOND SECTARIANISM

Through four decades Plunkett contributed significantly to life in Sydney and New South Wales. Apart from his work in law, he was elected to the Legislative

2. He was not, in fact, the last of these, but held the right of appointment to that office. The Dean of Windsor was Henry Hobart, brother of Robert, the 4th Earl of Buckingham and Secretary of State for War and the Colonies, after whom the capital of Tasmania takes its name.

Assembly and served as President of the Legislative Council. His impartiality in the exercise of his legal roles was much praised, and his early opposition to denominational sectarianism was expressed in the 1836 Church Building Act. This undid the de facto establishment of the Church of England in the colony and put Anglicans, Catholics and Presbyterians on equal legal footing by funding the employment of clergy and the building of churches. Although he was an important leader of Catholic opinion and advocate of Catholic interest, his application of the principle of impartiality in respect of institutions, however, was not always appreciated by other Catholics—including the English Benedictine, John Polding, who had been appointed bishop in 1834 (and in 1842 elevated to archbishop).

In company with the Governor of the colony, Sir Richard Bourke (a cousin and close friend of Edmund Burke), Plunkett wanted to introduce as a supplement to the Church Building Act the system of primary education established in Ireland after 1831. In this, children of different denominations were taught together in ‘mixed schools’ for secular subjects, only separating for religious instruction. That met with broad opposition and the proposal was rejected. Plunkett’s view did not much change, however, and a decade later he was again supporting the introduction of such a system, this time as proposed by Bourke’s successor, Sir George Gipps.

In 1839, when he was the only Catholic on the Legislative Council, Plunkett spoke in the face of the same objections. He argued that a single national schooling system was required, otherwise most of the young men would never be educated, and added that he could never object to such a system, since having ‘been partly educated at a Protestant school and graduated from a Protestant University [I know] the benefit of mixed education, an experience that subdues hostility and softens asperity’.³ He also found himself at odds with Polding and McEncroe over the establishment of the *Catholic Association*, a body named after a Catholic emancipationist organisation established in Ireland by O’Connell in 1823, the same year that Plunkett had graduated from Trinity, and of which he had once been a member. The New South Wales’s namesake, however, had the narrower purpose of promoting Catholic church schools in a manner which Plunkett regarded as inhibiting integration and advancement.

At the time of his arrival in Sydney in 1832 most Catholics were convicts, but assisted ‘free’ immigration had begun the previous year. By 1840, convict transportation had ceased, and in the following decade convicts constituted only

3. As reported in the *Sydney Herald*, 2 September 1839.

three per cent of the white population of around 30,000. The spirit of freedom, literal, and social and political, was fast developing, and Plunkett believed that Catholics would be best served by entering more fully into wider society neither defined nor confined by their denominational allegiance. Schooling could serve integration and advancement, but higher education was also on his mind.

THE UNIVERSITY OF SYDNEY

In 1849, Plunkett joined a committee for the establishment of a university in Sydney to which students would be admitted on the basis of proven academic merit and without regard to denominational identity or religious belief. With the foundation of the university a year later, he became a member of the Senate and remained such until his death, also serving as Vice-Chancellor between 1865 and 1867.

The Sydney scheme was an interesting middle way between the Anglican confessional character of Oxbridge, Trinity College Dublin, King's College London, and Durham, and the avowedly secular identity of University College London (UCL). The last of these was established in 1826 by the Scots Henry Brougham, Thomas Campbell, and James Mill, all admirers of the liberal utilitarian, Jeremy Bentham, who is thereby often, be it wrongly, named as its founder. Dubbed 'the Godless College of Gower Street', its creation triggered the establishment three years later of King's College, under the patronage of Wellington and George IV, as a confessing Anglican rival. UCL was founded in the same year as Plunkett began his service on the Connaught bench. He would have known of its purpose in admitting students without regard to religious affiliation or the lack of it, and the fact that among its founding supporters was the Duke of Norfolk, the most senior peer in the English Peerage, hereditary Earl Marshall, and the lay leader of Catholicism in England. While the University of Sydney was to be non-confessional, each of the then four principal denominations—Anglican, Catholic, Presbyterian and Methodist—would receive public moneys under the condition that they raised £10,000, the funds to match the individual sums raised up to £20,000 in each case. In addition, part of the university's grant of land would be available to each denomination for the building of a residential college. The private subscribers would also have to elect fellows, who would in turn appoint a rector. The Catholic college of the university, St John's, was established in 1858 with Plunkett among its founding fellows.

PROGRESS AND RESISTANCE

Shortly after the foundation of the university, Plunkett set himself the task of drafting two bills: one regulating marriages, the other requiring the registration of births, marriages and deaths. The marriage bill had two aims: first, to ensure that each branch of the Christian Church should partake equally in its provision; second, to allow civil marriages for those who sought them. He later chaired the Select Committee of the Council, which, in its report to the House, included the following clause (6):

That marriage being a civil as well as a religious institution, and at all events, involving important civil rights and duties, the state is bound so to regulate it as best to secure the public good, avoiding at the same time all unnecessary interference with it in its religious character.⁴

Twenty years prior to that, Bishop Polding had written to Mother Mary Aikenhead, founder of the *Irish Religious Sisters of Charity*, to ask if she might send some of her congregation to support women convicts in New South Wales. Five volunteered, and on 31 December 1838, after four months at sea, they arrived in Sydney, the first women religious in Australia. In the following year they settled in Parramatta, providing religious instruction and care to unassigned women convicts working in the Female Factory there, and later extended their educational work across Sydney. Plunkett was supportive of the sisters from the outset and in 1857 he intensified his commitment through the founding, under their management, of St Vincent's Hospital, at 'Woolloomooloo Heights'. He also served as the hospital treasurer and, as with his efforts in relation to education, clashed with Polding over the issue of religious impartiality, insisting that the hospital be non-denominational in its service. More generally the archbishop's desire to control the operations of the hospital was a factor in the resignation of Sr Mary John Baptist De Lacy, one of those who had come to Australia twenty years previously, and Plunkett was forthright in his criticism especially of Henry Gregory, Polding's severe and hapless vicar-general.

Around the same time, he was involved in a dispute with the state Premier, Charles Cowper, which led to Plunkett being dismissed from his role as President of the National School Board. The political and public response was supportive of Plunkett, and the *Sydney Morning Herald* wrote of him that:

4. *Sydney Morning Herald*, 25 August 1853.

He exercised important influence on general legislation, and we believe that every measure tending to equalise the social conditions and promote civil and religious liberty amidst the various, and often hostile, elements of this Colony has either been framed or supported by him.⁵

LEGAL PRAGMATISM

Apart from administrative and legal documents, and correspondence, Plunkett was not much of a writer in the way that legal figures with strong religious and ethical commitments often have been. At the outset of his account of Plunkett's prosecution of the Myall Creek murderers, Mark Tedeschi describes him as 'eloquent when he needed to be, but stolid on most social occasions, and above all else in possession of an immutable belief in the potency of the law as an instrument of justice and social change'.⁶ In his earlier study of Plunkett, *An Architect of Freedom*, John Molony writes that 'He was not a legal theorist, political reformer or social idealist, but the traditions and spirit of Bentham and Burke were part of his mental framework'.⁷ Certainly, in what he wrote there is no evidence of a philosophical or otherwise theoretical mind. Beside suggesting something about his temperament, this is also attributable I suggest to his training in and understanding of the law. He published four works: *The Australian Magistrate: A Guide to the Duties of a Justice of the Peace* (1835), which was one of the first law texts to be published in Australia, then *A Brief Summary of the Law on Landlord and Tenant* (1845), *The Magistrate's Pocket Book* (1859) and *On the Evidence of Accomplices* (1863), the last appearing six years before his death in 1869, aged sixty-six. As their titles suggest, these are essentially legal handbooks intended in most cases for JPs who had no legal training or experience, and their value is educational rather than jurisprudential.

Looking through these and reports of his speeches I have found no references to the 'common good' and only two regarding something seemingly resembling it, namely the 'public good'. One is in his 1835 guide to JPs (*The Australian Magistrate*), where he is discussing the question of judicial discretion and quotes Lord Mansfield from a 1770 precedent-setting case (*Rex v Wilkes*), and then applies the point to the role of JPs. He writes: 'In most cases a Justice is *imperatively* called

5. *Sydney Morning Herald*, 10 February 1858.

6. Tedeschi, *Murder at Myall Creek*, preface.

7. Molony, *Architect of Freedom*, 102.

on to act: and generally when a statute directs the doing of a thing for the sake of Justice or the Public Good the word *may* is the same as the word *shall* and is imperative on the justices to proceed'.⁸ The second occurrence is that which I have previously quoted from the Select Committee report on the marriage bill, where he says, 'the state is bound so to regulate it as best to secure the *public good*, avoiding at the same time all unnecessary interference with it [marriage] in its religious character'.

One might ask whether there is any distinction between the 'public good' and the 'common good', and if there is, whether it is not likely to be a distinction without a difference—a case of philosophical pedantry. There is a difference, and it is a conceptual one, but it is significant both in respect of historical usage and in ethical import. So far as the first is concerned, it is relevant that the law which Plunkett had studied at King's Inns then practised in Ireland and again in New South Wales was English Law, which belongs to the Common Law tradition. Historically, Ireland had a form of codified customary 'Brehon' Law, but by stages of English conquest and rule this was replaced by English Common Law. By contrast, Scots Law, which is in the lineage of Civil Law, was among the protected provisions of the 1707 Union of the Scots and English parliaments. The central, and for present purposes especially salient, point of difference between these is that Common Law proceeds inductively by reference to precedent established in prior judicial determinations, as in the Mansfield case, whereas Civil Law proceeds deductively, referring to a body of legal statutes covering matters of substance, procedure and penalty, these being taken to express principles of natural justice.⁹

TO STAND BY THINGS DECIDED

Common Law originated in England in the later twelfth century with the development of three forms of Royal Court: Court of King's Bench (of Justices), Court of Exchequer, and Court of Common Bench (later of 'Common Pleas').¹⁰

8. Plunkett, *Guide to Justices of the Peace* (Sydney: Gazette Office, 1835), 235.

9. On account of this fundamental difference in legal systems, Scottish lawyers seeking to practice in Australia had to retrain in English Law. The best-known Scots lawyers in Australia had not been trained in Scotland but in England, or in Australia, in the Common Law tradition. The most prominent example in the period when Plunkett arrived was Sir Francis Forbes, first Chief Justice of the Supreme Court of New South Wales (1823-1837), who, notwithstanding his distinguished Scottish ancestry, had been born and educated in Bermuda, trained in law at Lincoln's Inn, London, then called to the English Bar.

10. For a detailed account see Paul Brand, 'The Beginnings of the English Common Law (to 1350)'

Although justices of the King's Bench were appointed by the Sovereign, they still required specific authorisation to hear individual cases. This was given by Royal Writs specifying the nature of the issue and authorising the court to judge between claimant and defendant. By stages this process became more systematic: enumerating specific actions and prescribing remedies for violations. This proved insufficient, however, in two respects. First, it was *ad hoc* and piecemeal, producing a discontinuous patchwork of laws. Second, it was often uncertain whether situations fell within a given writ, and cases arose which, though by the letter lay outwith it, seemed sufficiently alike to be treated in the same way. Litigants then sought redress against apparently inconsistent or seemingly inequitable judgements by petitioning the King. These appeals were received and managed by the King's Council, but increasingly it delegated the work to the Lord Chancellor. Thus developed the Court of Chancery, which applied what came to be known as the principles of equity.¹¹ For many centuries, the courts of law and the Court of Chancery existed independently of each other. By the time of James I, Chancery had established the ascendancy of equity: it could issue a decree restraining the enforcement of a judgement issued in the law courts. Chancery itself followed the practice of the law courts in establishing normative precedents applying the doctrine of *stare decisis*: things to be decided in the future should be decided as they have been in the past. (The separate administration of law and equity ended with the Judicature Acts in the 1870s.)

By the seventeenth century, Common Law had taken priority over other sources and in the following century it provided the substance for the first treatise on the subject: Sir William Blackstone's *Commentaries on the Laws of England* (1765–1769). In the first of its four books, Blackstone uses the expression 'common good' only once, to refer to the good of the community in contrast to that of the individual, but 'public good' six times, its main occurrence being where he writes that 'public good is in nothing more essentially interested, than in the protection of every individual's private rights'.¹² Thereafter in English Law the expression is generally taken to mean the collective benefit of the community as a whole,

in *The Oxford Handbook of European Legal History*, ed. H. Pihlajamäki et al. (Oxford: Oxford University Press, 2018).

11. Its first non-clerical Chancellor was Thomas More, who served from 1529 until his resignation in 1532, following his refusal to sign the oath acknowledging Henry VIII as Supreme Head of the Church of England.

12. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1765), bk I, ch. 1, iii.

as contrasted with that of individuals, corporations and minorities taken singly or severally, and is often used interchangeably with ‘public interest’.¹³

TO REASON FROM FIRST PRINCIPLES

The Civil Law tradition, however, derives ultimately from Roman Law via the codification of its principal elements in a framework of rules and statutes together with commentaries by major Roman jurists, commissioned in the sixth century by the Byzantine Emperor Justinian. This was recovered in the Middle Ages and collectively titled the ‘Body of Civil Law’ (*Corpus Juris Civilis*), and later became the basis of various national legal systems which also reconciled and integrated elements of customary law. Two such are Hugo Grotius’s *Introduction to Dutch Jurisprudence* of 1631, and James Dalrymple, Viscount Stair’s *Institutions of the Laws of Scotland* published half a century later.¹⁴ In his work *The Republic (De re publica)* the Roman statesman-philosopher Cicero famously declared:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting ... And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.¹⁵

This combines two ideas central to the natural law theory that permeates the *Juris Civilis* and is to be found in systems deriving from it: first, that there are objective principles of morality and specifically of justice; and second, that these can be recognised and understood by the exercise of natural reason. One consequence of these essentially philosophical ideas is that the study and application of these principles calls for philosophical analysis and reasoning. Hence the place of *jurisprudence* in Scottish legal education, and in other Civil Law systems. Correspondingly, given its different conception of legal determination as deriving from precedent, the focus in Common Law is on the study of cases, not of principles. In his *Commentaries*, Blackstone refers appreciatingly to the former:

13. See A. Paterson, *Lawyers and the Public Good* (Cambridge: Cambridge University Press, 2012), 2.

14. James, Viscount of Stair, *The Institutions of the Law of Scotland deduced from its originals, and collated with the civil, and feudal laws, and with the customs of neighbouring nations* (Edinburgh: Anderson, 1681).

15. Cicero, *On the Republic and On the Laws*, trans. C.W. Keyes (Cambridge, MA: Harvard University Press, 1928), III, xxxiii.

In most of the nations of the continent, where the civil or imperial law, under different modifications, is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science [jurisprudence] which is to be the guardian of his natural rights and the rule of his civil conduct.¹⁶

An indication of the contrast between the two ways of conceiving the justification of specific laws is that, whereas Plunkett writes of the law's interest in the civil institution of marriage in broadly utilitarian terms, Stair describes it as part of the natural law:

That Marriage ariseth even from the *Primitive Law* of Nature, and that as it is the Conjunction of two single Persons; is evident not only from that natural Affection, which all sorts of Men in all places of the World ... have unto a married Estate. But as the Lawers say, that it is founded in the common nature of Man, with other Creatures, who have a resemblance of it in themselves, and it is given for the very Example of the *Natural Law*.¹⁷

THE COMMON GOOD

What Blackstone does not observe in his remarks about Civil Law is that the concept of the 'common good' is prominent and arguably central to it. An indicator of its long-established presence in Scots Law, in particular, is that the expression features in the title of the 1491 *Commoune Gude* Act (still in force), which accords legal status to community assets and requires that they be managed for the common good of the citizens of the burgh. The *common good* is also listed along with the *dignity of the human person*, *subsidiarity* and *solidarity* as the foundational principles of Catholic social teaching.¹⁸ It is relevant that this body

16. Blackstone, *Commentaries*, introduction, sec. I, 'Of the Study of the Law'.

17. Stair, *Institutions*, III, iv, 'Conjugal Obligations'.

18. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Vatican: Libreria Editrice Vaticana, 2005), ch. 4, 'Principles of the Church's Social Doctrine'.

of teaching originated in the encyclicals of Pope Leo XIII, who also inaugurated the nineteenth-century Thomistic revival with his letter *Aeterni Patris*, in which Aquinas is enthusiastically and authoritatively commended:

Among the Scholastic Doctors, the chief and master of all towers [was] Thomas Aquinas ... We exhort you, in all earnestness to restore the golden wisdom of St Thomas, and to spread it far and wide for the defence and beauty of the Catholic faith, for the good of society, and for the advantage of all the sciences.¹⁹

Cicero, following Aristotle, had distinguished between individual good and the common good, saying that the latter is the primary purpose of the ruler and of the law, *salus populi suprema lex*,²⁰ but also that where the interests in question are virtuous they cannot conflict in principle, since man being a social animal his good consists in part in shared life, whether in the family or in the community. This theme is carried forward by Aquinas in his *Treatise on Law*. He writes:

[S]ince every part is ordered to the whole, as the imperfect to the perfect; and one man is a part of the perfect community [society], the law must properly regard the relationship to the happiness of society ... Consequently, since the law is chiefly ordered to the common good [*bonum commune*], any other precept in regard to some particular matter, must lack the nature of a law, save in so far as it regards the common good. Therefore, every law is ordained to the common good.²¹

VARIETIES OF GOOD

Thus far I have been indicating a historical contrast between the philosophical and systematised character of Civil Law, on the one hand, and the more pragmatic and unsystematic style of Common Law, on the other, and the seeming importance to the former of the idea of the *common good* versus the latter's preference for talk of the *public good*. I said, however, that there are significant conceptual matters at issue, to which I now turn.

19. Leo XIII, *Aeterni Patris* (Rome: Libreria Editrice Vaticana), nn. 7, 17.

20. Cicero, *On the Laws*, III, iii.

21. Aquinas, *Summa Theologiae*, trans. English Dominicans (London: Eyre and Spottiswode, 1913), 1a 2ae, q. 90, a. 2.

Mentions of the 'public good' in Common Law tend to characterise it in terms of the *collective* good, and this reflects an underlying emphasis on the individual as conceptually independent of and prior to society. In such a view political society itself appears as a contingent and, in the thought of later thinkers such as Thomas Hobbes and John Locke, an implicitly voluntary form of association; and with that comes an emphasis on the rights of individuals. By contrast, Civil Law focuses on social organisms, ranging from the household (*familia*) to the community (*communitas*) to the city/state (*civitas*). Hereabouts gather a range of notions, some of which are often overlooked while others are confused. For example, the difference between *a* and *the* public good, or *a* and *the* common good, is sometimes but not always that between a constituent element and a totality. In other uses of these terms, 'a' or 'an' serves to designate a logical category, while 'the' points to a *kind* of good and in other contexts to some particular *specification* of that kind. For sake of clarity, I proceed from the more to the less abstract.

An *individual good* in this context is the good of or for an individual, typically a single human being, but by extension that of a corporate entity such as a business or organisation. A *collective good* is an aggregation of such individual goods. A *private good* is one the possession or use of which excludes its possession or use by others. The chair I am sitting on as I write this is an example of a private good. Ownership or right of use may in cases be transferred temporarily or permanently, but the good is continually private in the sense specified. A *positional good* is a private good whose value is in part a function of the relative restrictedness of the specific kind of good it is, such as owning a medieval chair or winning a race. A *public good*, by contrast, is one the use of which cannot be restricted even by its owner, if there is one. If I am troubled by the fact that the roadway to my house is unlit and choose to pay for a high, bright streetlight to be erected, the lamppost may be mine but the light it casts is a public good in that it is available to others whether or not I wish it to be, and its multiple uses do not diminish the quantity or quality of the good.

PARTICIPATORY AND INDIVISIBLE GOODS

A *common good* in this analysis is distinguishable from a *collective good* in that it is not a mere aggregation of *individual goods* and is also essentially participatory. The Irish philosopher George Berkeley argued that to be is to be perceived (*esse est percipi*); one might adapt his formulation to the case of the common good to say that for it to exist is for people to be contributing to or sharing in it (*esse est participi*). The good of active companionship, or of an interactive musical performance,

is not a combination of individual goods and is constituted socially. Individuals may derive consequential as well as immediate benefits from participation, but unlike a share in a collective, the primary good is non-extractable. In the case of an aggregation, such as the collective wealth of a group, the totality can in principle be returned to or divided among the members. A *public good* need not be shared: the fact that others can access it does not mean that others are using it. A *common good* cannot be divided and only exists so far as it is participated in.

The common good of a subcommunity or of society as a whole is a good of the common type—that is, one that is participatory and not reducible to individual goods; but to specify it more fully one needs to say something about the kinds of agents involved and the nature of their activities. In the history of social and political philosophy the focus has usually been on society as a whole, leading to two broad kinds of disagreements. One concerns the nature of the human good itself, another the place of the state in relation to the realisation of that good. The former is obviously a large issue, but in the present context the assumption is that human beings are rational and social animals with common physical, psychological, and moral needs, and that sociality is not just a practical means of satisfying those but a form that they take, and through which they are met.²²

RESTRICTED AND COMPREHENSIVE VERSIONS OF THE COMMON GOOD

With that broad idea in place there are two relevant conceptions of the general character of the common good. One is that it consists in a set of social arrangements including education, health services, security, law and political institutions that enable individuals and groups to pursue their good, but which do not themselves prescribe or even necessarily assume (nor presume to exclude) that there is an ultimate shared form of human fulfilment constituting the common good for all. The second possibility is some version of the latter comprehensive view, such as that the ultimate good is shared participation in a moral community, or in the political life of the republic, or in some fuller transcendent society, as in the Catholic idea of the communion of saints. The first, restricted view is compatible with various familiar kinds of liberalism; the second, unrestricted one with certain forms of totalising, though not necessarily totalitarian, political and religious positions. The

22. For further elaboration, exploration and application of this account of the common good, see J. Haldane, 'The Individual, the State and the Common Good', *Social Philosophy and Policy* 13, no. 1 (1996), reprinted in Haldane, *Practical Philosophy: Ethics, Society and Culture* (Exeter: Imprint Academic, 2009).

general western consensus shared by the Catholic Church since the Second Vatican Council is that insofar as politics should be concerned with the common good (and most agree it *should*, while Catholicism teaches that it *must* be), it is in respect of the restricted form confined to social arrangements that enable people, individually and jointly, to pursue their own good as they conceive it. These arrangements need not be conceived of as minimal and non-moral, but they are seen as enabling good lives rather than as constituting the ultimate good. This and the characterisation of the common good as essentially participatory (rather merely aggregative) are summarised in the following extract from the Vatican's *Compendium of the Social Doctrine of the Church*:

164. ... The common good does not consist in the simple sum of the particular goods of each subject of a social entity. Belonging to everyone and to each person, it is and remains 'common', because it is indivisible and because only together is it possible to attain it, increase it and safeguard its effectiveness, with regard also to the future. ...

166. The demands of the common good are dependent on the social conditions of each historical period and are strictly connected to respect for and the integral promotion of the person and his fundamental rights. These demands concern above all the commitment to peace, the organization of the State's powers, a sound juridical system, the protection of the environment, and the provision of essential services to all, some of which are at the same time human rights: food, housing, work, education and access to culture, transportation, basic health care, the freedom of communication and expression, and the protection of religious freedom.

HUMAN DIGNITY

Earlier I quoted Molony writing that '[Plunkett] was not a legal theorist, political reformer or social idealist'. Shortly prior to that he writes:

He shunned all that was divisive whether social, religious or political. To him the common sharing of human dignity and a Christian tradition, overflowing in civic values of decency, honesty and above all respect for the concept of law, was enough to unite all classes and build a mutual framework for the future.²³

23. Molony, *Architect of Freedom*, 100.

In an interesting recent lecture on ‘Human Dignity in the Time of John Henry Plunkett’,²⁴ the Australian High Court Justice, Jacqueline Gleeson, picks out Molony’s reference to ‘human dignity’ and his suggestion that this is something Plunkett recognised as common to all, regardless of class. Earlier I noted that the expression, the ‘common good’, appears along with others as designating foundational principles of Catholic social teaching, a second of those being the ‘dignity of the human person’. This conjunction, along with the fact of Plunkett’s adherence to Catholicism, might give one reason to wonder whether his thinking was, after all, philosophical-cum-theological—and perhaps also reason to query what I said about his use of the term ‘public good’ suggesting a different conception with a different heritage. But this thought would involve misapprehension and anachronism.

Gleeson observes that Molony gives no citation of where Plunkett discusses human dignity nor identifies what aspects of ‘his values and conduct’ might be taken to imply recognition of a ‘shared human dignity’. So far as I have been able to determine from Plunkett’s published writings, he never uses the phrase or any synonym of it. The word ‘dignity’ occurs only once when, in discussing ‘Libels on Individuals’, he writes that ‘publications tending to degrade and defame persons in considerable stations of power or dignity in foreign countries, may be treated as libels’.²⁵ Evidently this use refers not to an inherent and inalienable moral value common to all human beings, but to an extrinsic, social status attaching to certain special roles. Moreover, the moral notion, though something of the sort features in Catholic social teaching, is a relatively late arrival and even within that its precise meaning and ground have not been agreed. The phrase ‘Catholic social teaching’ refers to a body of papal encyclicals, beginning with Leo XIII’s *Rerum Novarum*, and other authoritative statements, and while it draws on scripture, tradition and theology, this set of principles only dates from the late nineteenth century. In her text, Jacqueline Gleeson suggests that ‘human dignity’ as Molony conceives of it, and attributes such a conception to Plunkett, is part of this recent teaching and that it differs from earlier understandings, including religious ideas which tend to view it as a conferred and alienable status. This is correct as indicated by the strained efforts of scholars to show that the contemporary conception, which has

24. J. Gleeson, ‘Human Dignity in the Time of John Henry Plunkett’, 10th Annual J.H. Plunkett Lecture, Francis Forbes Society for Australian Legal History, <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gleesonj/>.

25. Plunkett, *Australian Magistrate*, 271.

entered into secular ethical thought more through the influence of Kant than of Catholicism, is also to be found in Aquinas.²⁶

Had Plunkett's legal education and practice been in the Civil Law, and had he been a jurispudent of that tradition, he might have invoked the concept of the *bonum commune*, and had he lived a hundred years later he might have introduced the idea of universal human dignity (*dignitatis humanae*); but, as it was, what he adverted to was the public good, understood as the collective benefit of individuals in respect of their common rights and interests, and equal standing before the law, as witnessed in his unpopular prosecutions of white stockmen who carried out the massacre of First Nations people at Myall Creek, New South Wales, in 1838.²⁷

TO THE PRESENT DAY

In Plunkett's time, and notwithstanding differences between Catholics and Protestants, Ireland and the Australia of the colonists shared a common culture of Christianity and familiar moral values. Present-day Ireland and Australia, along with the United Kingdom and the United States of America, are now multicultural, secular, and divided over a range of moral, social and political values and policies. The mission of the *Plunkett Centre for Ethics* has as its primary focus the realisation of the values of compassion, fairness and justice in the provision and allocation of healthcare. Several questions now suggest themselves. First, how might we think of healthcare (or other analogous services) in relation to the notions of the public or of the common good? Second, in relation to the common good, should we think in terms of a comprehensive or a restricted version of common good ethics and social philosophy? Third, what if anything can be learned from John Plunkett in considering these issues under the conditions of a pluralism more extensive and deeper than he had to deal with, and which from the perspective of the middle of the nineteenth century might have been unimaginable?

JUSTICE AND HEALTH

It is a familiar question whether something is good in itself or only as a means: intrinsically or only instrumentally good. So framed, the question presupposes that it cannot be both. In Plato's *Republic* we find Socrates aiming to establish the good of

26. B. Brady, 'The Evolution of Human Dignity in Catholic Morality', *Journal of Moral Theology* 10, no. 1 (2021): 1–25.

27. This was the subject of Tedeschi's *Murder at Myall Creek*.

political justice, and to work towards that by drawing an analogy with psychological well-being, both involving right ordering of parts and their activities. To get there, however, he also has to identify the kind of good at issue. He agrees with his interlocutor (Glaucón) that there are goods sought both for their own sake and for their consequences, and the examples given are understanding, sight, and *health* (257c). Socrates is then able to argue that justice, being analogous to health, has this double value. This insight is compounded with the recognition that health pertains to the mind as well as to the body. Acknowledging this, however, is not the same as medicalising every sore and strain of the psyche, which is a tendency in contemporary talk of ‘mental health issues’. Further, contemplating the psychological-political analogy we might then reverse the direction of juxtaposition and consider the extent to which personal health not only compares to political health (justice) but depends upon it. If the relations between members of a community are politically disordered, is that not likely to induce psychological disorder, and that in turn induce somatic pathologies? Healthcare is obviously a political issue in respect of funding and other resources, but politics may also be a healthcare issue on account of the potential of disagreement and discord to induce illness.

The idea that it should be thought of as a mere public good seems insufficient for what is at issue is the way in which participation in the social order bears on well-being and is a matter of a common good, and again the way in which the health of citizens contributes constitutively and instrumentally to the quality of the society. Public good considerations need pay no attention to how individuals feel about how other individuals are treated, save that unhappiness is likely to diminish willing co-operation.²⁸ But it is a mark of our recognising a common good that we feel diminished if others in the community are ill served, just as we feel a loss to the group and thereby to ourselves if some in a social activity are unable to share in its benefit. Here a line of reasoning leads to the conclusion that healthcare should be seen as a common good and not merely in the restricted sense of being an element of social arrangements that enable people, individually and jointly, to pursue their own good as they conceive it, but in the larger sense of being part of a shared constitutive good.

28. A similar utilitarian consideration provides one justification for systems of victim compensation as a supplement to Criminal Law, but there are also non-consequentialist common good arguments for such policies based on the idea of social solidarity; see J. Haldane and A. Harvey, ‘The Philosophy of State Compensation’, *Journal of Applied Philosophy* 12, no. 3 (1995), revised as ‘Crime, Compensation and Social Solidarity’, in Haldane, *Practical Philosophy*.

PLUNKETT AND PLURALISM

My third question was what, if anything, we can learn from John Plunkett in considering these issues, and it may now seem that the answer is 'nothing'. But that response would be too hasty. The reason to think again relates to the issue of pluralism, and more importantly to the fact of deep and seemingly intractable disagreement on fundamental ethical issues, such as abortion, assisted suicide, gene editing and embryo selection, gender reassignment surgery and the provision of puberty blockers. I leave to one side the question of whether all of these are indeed healthcare issues, for the point is that there is extensive reasoned and reasonable disagreement concerning the ethics of them. Here, there is an analogy with the situation faced by Plunkett with regard to schooling. There were, as there are today in Australia, those who favoured exclusively secular education and those who favoured confessional denominational schooling. In his desire to weave different groups into some form of inclusive society Plunkett proposed a mixed economy: a common base with elective options.

Applied to the context of healthcare this might suggest public funding of a range of services up to the point where these reach into areas of substantial and reasonable disagreement. At that stage it may be judged that it would not be in the interest of the common good for government to enter further, but would only undermine such extensive consensus as attaches to core provision. The question of the legality of procedures again being set to one side, and assuming that they are not prohibited, then it would be for those who seek to provide controversial services to do so out of other resources than from public funds. Here the issues of common good and public good meet, for it cannot be in the interest of the latter to require all citizens to treat matters of contention to which they are conscientiously opposed as if they were constituents of a participatory general good.

I leave it as an exercise to think about where the line between core and contentious might be drawn (and evidently it might shifting and at any time be more boldly drawn in some parts than in others) and to wonder how John Plunkett might have addressed this issue, though I suspect that being a Common rather than a Civil Law man he would favour a *modus vivendi* based on precedent rather than a solution derived from first principles of right reason.