

Andrew Marvell's ambivalence about justice

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Declaration of Authorship

I, Art Naoise Kavanagh, declare that the work presented in this thesis is entirely my own. Where I have consulted the work of others, this is always clearly stated.

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Abstract

This thesis examines the treatment of the theme of justice in the works, both poetry and prose, of Andrew Marvell and, in a final chapter, the justice of certain aspects of his behaviour. In order to do this, it seeks to locate particular works in the context of contemporary debates or discussions as to ancient rights, the ancient constitution (and competing theories as to the king's power) and the disagreement between Hugo Grotius and John Selden on the subject of the legal status of the sea and, more generally, the laws of nature and nations. The discussion of the justice of his behaviour offers a reinterpretation of the Chancery pleadings and other records in a cluster of cases arising after Marvell's death out of the collapse of a bank in which his friend, Edward Nelthorpe, was a partner. It is argued that these records have, up to now, been misunderstood.

The thesis concludes that Marvell's work evinces an ambiguity about justice, with the poetry tending to give voice to his scepticism, while the sense that justice might be at least partly achievable is more likely to appear in the prose works. The conclusion as to his actions is also a matter of some ambivalence: while the evidence does not show that he colluded in a fraud on the bank's creditors, the suspicion that he behaved badly towards his wife is complicated by a lingering uncertainty that he had, in fact, married.

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Note

Except where otherwise stated, Marvell's poetry is quoted from *Poems and Letters of Andrew Marvell*, ed. H. M. Margoliouth, 3rd edn. by Pierre Legouis with E. E. Duncan-Jones, (Oxford: Oxford University Press, 1971), vol. I (referred to as *Poems and Letters*).

In quotations, any emphasis which is not described as added is original.

Introduction

'A good Cause ...'

'There is some consensus,' Nicholas von Maltzahn tells us in the introduction to *An Andrew Marvell Chronology*, 'that Marvell is an enigma.'¹ Nigel Smith subtiles his biography 'The Chameleon,'² with the implication that our difficulty in discerning the poet's outline and features results from disguise rather than indeterminacy; a further implication may be that, though Marvell is probably glad of the concealment afforded by the disguise, its adoption is more instinctive than deliberate. An early and clear expression of the current consensus came with the publication of the lectures delivered at York on the tercentenary of Marvell's death. There, Balachandra Rajan talked about 'the aesthetics of inconclusiveness,' while Robert Ellrodt, noting that 'Marvell's poetic elusiveness is widely acknowledged,' added that he found the poet 'elusive in a very personal sense.'³ Reviewing this volume, William Empson, a critic who could be both surprisingly right and distressingly wrong about Marvell,⁴ recoiled from the idea 'that Marvell himself might be "not displeased" at finding that his poems caused exasperation'⁵ because of the difficulty of pinning them down. For Empson, the two outstanding lectures in the series were those given by Christopher Ricks and John Carey: 'both these authors evidently find Marvell transparent — they are not puzzled by him, let alone betrayed' (p. 39).

¹ Nicholas von Maltzahn, *An Andrew Marvell Chronology* (Basingstoke: Palgrave Macmillan, 2005), p. 1.

² Nigel Smith, *Andrew Marvell: The Chameleon* (New Haven: Yale University Press, 2010).

³ Balachandra Rajan, 'Andrew Marvell: The Aesthetics of Inconclusiveness,' in *Approaches to Marvell: The York Tercentenary Lectures*, ed. C. A. Patrides (London: Routledge & Kegan Paul, 1978), pp. 155–73; Robert Ellrodt, 'Marvell's Mind and Mystery' in *Approaches to Marvell*, ed. Patrides, pp. 216–33.

⁴ In chapter 5 below, it will be argued that he understood, as if by instinct, that Fred S. Tupper had misread the evidence as to whether Marvell had been married, yet he botched most of the details of the task of refuting Tupper.

⁵ William Empson, *Using Biography* (London: Chatto & Windus, 1984), p. 34.

The lectures by Ricks and Carey⁶ originally suggested the present enquiry, though it has now moved some distance from that starting point. Ricks concentrates on the use of reflexive imagery in Marvell's poetry, whereby something is compared to itself or to an aspect of itself. Carey, dealing with Marvell's 'situations in which an agent finds its actions shooting back upon itself' (*Approaches to Marvell*, p. 144), demonstrates that the reflexivity is not just a matter of imagery, but is characteristic of the way Marvell's mind works. Subject and object are sometimes identified, sometimes transposed or confused. Empson acknowledged that, while Ricks and Carey were able to overcome the sense of bewilderment or worse with which critics like Ellrodt met the poetry, they presumably would not be able to elucidate every puzzling point (*Using Biography*, p. 39). They indicated, in other words, the possibility of admitting the elusiveness while guarding against the danger of taking it for inconclusiveness.

One critic who made an attempt at achieving just this kind of balance is John Klause in *The Unfortunate Fall*.⁷ Klause takes the view that Marvell is the opposite of a paradoxical thinker (he uses the term 'categorical', which he borrows from Lionel Trilling's *Sincerity and Authenticity*⁸). Clearly, to claim that the author of the following lines from *The First Anniversary* dislikes and mistrusts paradox is itself to flirt with the surprising and unexpected:

For all delight of Life thou then didst lose,
When to Command, thou didst thy self Depose;
...
For to be *Cromwell* was a greater thing,
Then ought below, or yet above a King:
Therefore thou rather didst thy Self depress,
Yielding to Rule, because it made thee Less. (ll. 221–2, 225–8)

⁶ Christopher Ricks, 'Its Own Resemblance' in *Approaches to Marvell*, ed. Patrides, pp. 108–35; John Carey, 'Reversals Transposed: An Aspect of Marvell's Imagination' in *Approaches to Marvell*, ed. Patrides, pp. 136–54.

⁷ John Klause, *The Unfortunate Fall: Theodicy and the Moral Imagination of Andrew Marvell* (Hamden: Archon Books, 1983).

⁸ Klause, *The Unfortunate Fall*, p. 162, n. 87.

However, while the language is paradoxical, the force of the lines lies in surprise rather than in self-contradiction: to say that Cromwell was greater than a king but in assuming command he has diminished himself may confound our expectations but it does not present us with an apparent impossibility.⁹ There are, in short, two quite distinct kinds of paradox: one which alerts us to the possibility that things are unexpectedly not as they seem (in order to rule one must yield, and give up much) and another which claims that reality itself may be self-contradictory: that a social institution or a relationship (for example) is at once itself and its antithesis. According to Klause, however attractive Marvell may have found the first kind of paradox, he was disturbed by the second.

The context in which Klause explores the categorist's imagination is Marvell's approach to the question of divine justice. In fact, however, Marvell has relatively little to say directly on the subject of theodicy.¹⁰ On the other hand, the broader category of justice — not confined to that of the deity — provides many opportunities to look at both types of paradox, and it is a subject that recurs throughout Marvell's work, the prose as well as the poetry.

Justice seems to be important to human beings. Alan Ryan begins his introduction to a collection of writings on the subject, ranging from Plato and Aristotle to Rawls and Nozick, by saying that the issue they discuss is 'what justice is and *why it matters*'.¹¹ There seems little room for doubt that it does matter, though it may be difficult to reach firm conclusions as to how and why this is so. Ryan quickly goes on to say that '[t]he legitimacy of a state rests upon its claim to do justice' (p. 1). This is to say that people expect it to do justice and are liable to express outrage if it does not.

⁹ Another instance where Marvell's language is paradoxical but the situation which it describes is not can be found in 'The unfortunat Lover', where, as the cormorants 'famish him, and feast, / He both consumed, and increast: / And languished with doubtful Breath, / Th' *Amphibium* of Life and Death' (ll. 37–40).

¹⁰ See below, page 20.

¹¹ Alan Ryan, *Justice* (Oxford: Oxford University Press, 1993), p. 1 (emphasis added).

In large part, then, justice is a matter of expectation: people expect and demand that certain institutions and individuals exercising some degree of power should behave in a certain way: even-handed, impartial, taking account of legitimate claims and rights, and in accordance with law (where the law is not itself thought to be unjust).

The concept of justice gives rise to a number of difficulties or problems, three of which will be discussed in this introduction. In the first place, it is not easy to say what justice is, and when we try we may quickly find ourselves contemplating something of a paradox. It clearly has some relation to law. The machinery by which the courts apply the law and adjudicate on questions arising out of it is often called 'the administration of justice'. J. S. Mill tells us that the term itself is related to the terms for 'law' and 'right'.¹² When he lists the activities and actions which may typically be labelled 'just' or, conversely, 'unjust', it appears that, while law and rights make up perhaps more than half of the story, important aspects of justice may come into conflict with them:

1. It is generally unjust to deprive somebody of his or her rights, which typically include the rights to liberty and property. Rights for the most part are *legal* rights. Bentham, whose utilitarian principles Mill defended, ridiculed the idea that there could be rights antecedent to, or more fundamental than, positive law.
2. However, it may also be unjust for a person to hold rights which *ought* (according to some higher standard of justice, the law being imperfect) not to belong to him or her.
3. Each person should get what he or she deserves.
4. It is unjust to break faith, i.e. to fail to keep a promise or undertaking, or to induce someone to act to his or her detriment by raising false expectations by one's conduct.

¹² J. S. Mill, 'On the Connection between Justice and Utility' (chapter 5 of *Utilitarianism*), reprinted in *Justice*, ed. Alan Ryan (Oxford: Oxford University Press, 1993), p. 56.

5. Impartiality or even-handedness is just, but it is not required in all circumstances. It is most stringently required where somebody is exercising a judicial or quasi-judicial capacity, so again, the connection between law and justice is a strong one.¹³

That is not to say, of course, that everything that the law demands is also a requirement of justice. Justice may insist that there should be *some* rule prescribing how a will is to be validly executed or governing the formation of a contract, yet it may be indifferent as to which of various possible sets of rules on these topics is actually enacted. If the law invalidates a purported will signed by only one witness, or one with the signatures of two witnesses who did not sign in the presence of the testator, it is not because irregular attestation is inherently unjust but because it would be unjust not to apply the rules that have been promulgated (and which will presumably be enforced in comparable cases).

It may help us to deal with the conceptual problem posed by the idea of justice as being (a) analogous to law and in large part coinciding with it, and (b) potentially in conflict with the law, and being called upon to overrule it, if we consider justice as an ideal principle to which positive law attempts to approximate. Branding a particular law unjust would then be an attempt to correct and improve law by making it conform more closely with the ideal. The difficulty with this approach is that, for it to make sense, we must conceive of justice as a preexisting ideal, which might be said to manifest itself (with a greater or lesser degree of perfection) in particular laws, institutions and actions. If this were in fact the case, we might well ask what purpose is served by law, as distinct from justice? Why not appeal directly to the ideal, instead of to its fallible approximation? The obvious answer would be that we do not have direct access to the ideal, but can grasp its requirements only by means of its manifestation in the form of law. If we can

¹³ Mill, 'On the Connection between Justice and Utility', pp. 53–54.

understand justice only in terms of law, however, how can we use the higher category to 'correct' the mistakes of the lower?

The difficulty with conceptualizing justice as an ideal is well illustrated by Mill. On the one hand, there appears to exist something resembling an almost universal instinct for justice:

The powerful sentiment, and apparently clear perception, which that word [i.e. 'justice'] recalls with a rapidity and certainty resembling an instinct, have seemed to the majority of thinkers to point to an inherent quality in things; to show that the Just must have an existence in Nature as something absolute ...¹⁴

However, while it may be the case that everybody, or an overwhelming majority of people, experience this possibly instinctual *sense of justice*,¹⁵ at the level of particular norms of behaviour, the ideal seems to have a minimal amount of undisputed content. As Mill puts it:

Not only have different nations and individuals different notions of justice, but, in the mind of one and the same individual, justice is not some one rule, principle, or maxim, but many, which do not always coincide in their dictates, and in choosing between which, he is guided either by some extraneous standard, or by his own personal predilections.¹⁶

Mill goes on to show that perfectly reasonable and persuasive claims about setting the appropriate punishment for an offence, or the relative merits of a progressive and a flat-rate taxation system, can lead to directly opposing conclusions, the proponents of each of which are entitled to rely on the justice of their cause. So, while virtually everybody feels strongly that justice (in the abstract) is of the highest importance, there may be, and often is, fierce disagreement as to what the application of this principle requires in any particular case. For Mill, this conundrum is not so difficult

¹⁴ Mill, 'On the Connection between Justice and Utility', p. 51.

¹⁵ The existence of a general sense of justice is not easy to prove, and it is conceivable that there is a substantial body of people who do not share this 'powerful sentiment'. It has been suggested that '[p]erhaps the best evidence for the existence of a sense of justice is the persistent efforts of scholars in many traditions (in many times and many places) to put into words the intuitive notion of a sense of justice': Peter Strahlendorf, 'Traditional Legal Concepts from an Evolutionary Perspective', in *The Sense of Justice: Biological Foundations of Law*, eds. Roger Masters and Margaret Gruter (Newbury Park, CA: Sage Publications, 1992), pp. 128–60 (p. 128).

¹⁶ Mill, 'On the Connection between Justice and Utility', p. 64.

to resolve. Faced with conflicting requirements of justice, each of equal validity, one must choose the most expedient. To this, one may rejoin that the proposition that the conflicting rules of justice are of *equal* validity or force is necessarily an assumption. We do not seem to have the criterion by which we might make a reliable judgment. Since judgment is at the heart of justice, this absence is perplexing.

There are at least two further respects in which justice can appear a deceptive principle or category. The first of these is discussed by Wai Chee Dimock in *Residues of Justice*. In her introduction, writing about Aristophanes's play *The Frogs*, she says:

The conceit of the scales, I suggest, is central to our idea of justice, central to it in a rather fundamental sense, not only as a figure of speech but also as a figure of thought. For it is this conceit, with its attendant assumptions about the generalizability, proportionality and commensurability of the world, that underwrites the self-image of justice as a supreme instance of adequation, a 'fitness' at once immanent and without residue, one that perfectly matches burdens and benefits, action and reaction, resolving all conflicting terms into a weighable equivalence.¹⁷

Dimock implies that this assumption of commensurability requires that we treat particular cases as identical, though they may differ considerably in their individual and distinguishing details, in much the same way as (according to Marx) the specific characteristics of myriad different commodities become unimportant as compared with their exchangeability with the universal commodity, money. For her, justice's assumption of or insistence upon commensurability leaves 'residues' and, in disregarding those residues, 'the language of justice ... not infrequently dissolv[es] the world in the very act of describing it, converting it into a common measure, a common evaluative currency' (p. 2). It is that common currency that makes adjudication possible. Judgment is typically based on an assumption of equivalence. Alan Ryan twice refers to the example of a judge imposing on a series of 'identical' burglars sentences of different lengths.¹⁸ It hardly needs to be pointed out that the assumption

¹⁷ Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (Berkeley: University of California Press, 1996), pp. 1–2.

¹⁸ Ryan, *Justice*, pp. 2, 5.

of identical burglars is made for the purposes of simplifying the illustration and that the burglars encountered in an actual court are likely to exhibit quite a broad range of culpability, recidivism, family circumstances and value of property stolen.

The deposit of at least some of the 'residues of justice' results from friction. The machinery of justice is not perfectly efficient: being concerned in large part with commutative justice, it can be thought of as performing a kind of conversion and, as with all such machinery, not everything that goes into the process is incorporated without loss in the product that comes out at the other end. The most visible forms that friction takes are those of delay and cost.

In spite of these obstacles, the court lists are full of people suing negligent surgeons, dangerous drivers and employers who have failed to put in place a 'safe system of work'. Let us consider only those cases where the victim has died, and compensation is being sought accordingly. Such cases will often be pursued even though the cost to the bereaved family members is high: in time, anxiety, forgone opportunities (to 'get on with their lives') and even in money. This is so even though anybody who can afford to make provision for his or her dependants cannot be expected to take into account the mere possibility that his or her departure from the world, when it eventually comes, will be occasioned by actionable negligence. That is to say, a deceased person will either have been adequately insured or not, and in the latter case his or her dependants are likely to be *less* well able to afford to pursue an action for damages to the very end.

Why are people prepared to pay such a high price for just the possibility of justice? One possible answer might be found in evolutionary biology. In his book *The Language Instinct*, Steven Pinker argues, largely on the basis of Chomskyan linguistics, that humans are born with an amazing capacity for learning spoken language. Chomsky's Universal Grammar seems to be already wired in, while young

children have a remarkable ability to pick up the vocabulary of whatever language is spoken by those around them. Pinker (departing from Chomsky) argues that this instinct can only have evolved by natural selection. He describes it as a 'module' that equips humans for evolutionary success, and speculates as to what other modules might have evolved in similar ways. In his list of the kinds of module one might expect to have evolved, we find '13. Justice: sense of rights, obligations and deserts, including the emotions of anger and revenge'¹⁹.

In a later book, *The Blank Slate*, Pinker expands on this suggestion, offering an explanation of the evolutionary pressures that might have led to the development of such a module: 'People who are emotionally driven to retaliate against those who cross them, even at a cost to themselves, are more credible adversaries and less likely to be exploited',²⁰ and therefore better adapted to evolutionary success. On this view, we have an innate propensity to refuse to cut our losses when we feel we have been wronged but to ensure that the wrongdoer pays, even if he or she will never pay enough to compensate us for the additional effort on our part that this requires.

In his longest discussion of the topic, Pinker draws on the work of Robert Trivers on reciprocal altruism to argue that the sense of justice might more generally be called a sense of fairness and probably evolved as an important concomitant to human altruism. The evolution of altruism poses interesting questions for evolutionary biology, questions that have received a lot of attention since Trivers first published on the subject in 1971.²¹ Natural selection favours adaptations that benefit the replicator (that is, the gene), if necessary at the expense of the group or the species. An organism which took most of the food supply for itself, leaving its fellows without

¹⁹ Steven Pinker, *The Language Instinct: The New Science of Language and Mind* (London: Penguin, 1994), p. 420.

²⁰ Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (London: Penguin, 2002), p. 182.

²¹ Robert Trivers, 'The Evolution of Reciprocal Altruism', *Quarterly Review of Biology* 46 (1971), pp. 35–57.

adequate nutrition, could expect to outbreed the others, even though the species would be weakened as its overall numbers declined. This being so, the evolution of altruism needs to be explained. It is clear that, when it does evolve, it is vulnerable to cheaters: that is, to those who take out more than they put in. If cheaters are not curbed, they will gain a clear evolutionary advantage and overrun the entire population, so that altruism will be selected out. According to Pinker (again drawing on Trivers), ever more sophisticated mechanisms of cheating and cheater-detection leapfrog each other from generation to generation, in a kind of evolutionary arms race.²² More subtle means of cheating mean that the general population has to get better at identifying selfish behaviour, which leads to the cheaters' need to become yet more subtle. So, over the course of human evolution, people have become very good at spotting unfairness and have developed a propensity to feel strongly that it ought to be deterred and punished. Our acute sense of justice is, on Pinker's hypothesis, a result of this process.

Pinker's suggestion of an evolutionary 'module' for justice is an incidental hypothesis rather than fully formed theory and is mentioned here only as a demonstration that the human being's approach to justice can appear to an evolutionary psychologist as a problem requiring an explanation. The argument of this thesis is not dependent on the truth of Pinker's speculation. The hypothesis is, however, useful as showing one way in which an argument can be constructed which might account for the coexistence of a powerful 'sentiment' as to the fundamental importance of justice with an evident reluctance to define it except in wide, abstract terms (e.g. 'to give everybody his or her *due*') that leave plenty of room for dispute as to what is required in a particular case. If we can conceive (hypothetically) of 'justice' as something whose presence or absence we are innately equipped to recognize, then our lack of a detailed and comprehensive description of what it entails may come to seem less

²² Steven Pinker, *How the Mind Works* (London: Penguin, 1988), pp. 402–05.

puzzling.

It may be, though, that this innate recognition will work better if our 'sense of justice' incorporates some degree of ambivalence. It is a truism that justice is imperfect. Various examples of the friction mentioned above, the varying ability of different actors to conceal either their actions or their motives, and the great variety of different circumstances in which a dispute as to justice may arise, all make it virtually inevitable that comparable cases will not always be dealt with similarly. Take the example of three motorists, racing their cars along a deserted road at night. Curly is lucky: he does not collide with anybody and does not cause any injury, to himself or anyone else. He has, however, been driving on the wrong side of the road, well above the speed limit. Larry and Moe each hit somebody, causing their victims serious injuries which happen to be very similar. Larry panics and does not stop. When the police come, Curly and Moe confirm that there was a third driver but they did not know his name or notice his registration number. Larry's car is never found.

Moe is charged with dangerous driving causing serious injury; he pleads guilty. He spends several months in jail and loses his licence for three years. Curly acknowledges that he was driving the undamaged car but does not admit that he was racing and is not prosecuted.

Each of the two injured pedestrians brings a claim. Jack, who was struck by Moe's car, issues proceedings in which Moe is the nominal defendant, but which are actually handled by solicitors appointed by Moe's insurance company. That Moe is liable is not in dispute but there is a lot of haggling about the amount of damages. Jack has suffered and will continue to suffer severe pain. He has lost earnings and will have continuing medical expenses. The amounts of damages under these heads are eventually agreed. However, Jack's solicitor is not satisfied. She points out that Moe was driving with a reckless disregard for life, and Jack, seeing the car hurtling towards

him at great speed, had been convinced that he was going to die immediately without having the chance to make up some minor quarrels with family members. Accordingly, she argues, this is an appropriate case for an award of aggravated damages for mental distress. The insurance company lawyers insist that, for several reasons,²³ a claim for aggravated damages could not succeed at trial; but they are prepared to be generous with general damages to avoid going to court. Jack's claim is settled.

In the meantime Jill, the other injured person, has had to bring her claim against the Motor Insurers' Bureau, since Larry was never identified or traced. Her losses are very similar to Jack's: pain and suffering, loss of earnings and medical expenses, all potentially continuing. She, like Jack, claims that she suffered mental distress because of the obvious recklessness of the unknown driver. The MIB, however, is not prepared to pay aggravated damages and Jill's solicitor has nothing to threaten it with to force it to reconsider. The net result is that Jill comes out of the case with £25,000 less in damages than Jack received. Justice has been done, but it is clearly not a very equal kind of justice.

In the first place, the behaviour of all three drivers was equally culpable, but only one has been punished. Curly has escaped punishment, legally and fairly, because he was fortunate enough not to hit anyone and he relied on his right to silence. Larry has escaped it by running away from the scene and hiding evidence. Neither of these circumstances makes the treatment of Moe any less just in the eyes of the law, but that is certainly not how Moe sees things. He feels that he has been left to take all the blame, which ought to have been shared more evenly. Worse still, having served his sentence and waited out his driving disqualification, he is *still* being punished, because he is not allowed to drive. He cannot get insurance at price he can

²³ The claim is in essence one of negligence, where aggravated damages are not available: Law Commission, *Aggravated, Exemplary and Restitutionary Damages* Law Com. 247 (1997), Part II, para. 1.10. Jack's lawyers have attempted to get around this by adding a claim of assault and by alleging recklessness as an alternative to simple negligence.

afford. If his punishment might have been expected to have some chastening effect, that has been completely undermined by the resentment that he feels at the unequal treatment of the three drivers.

It would obviously be unjust to deprive Jack of some of the damages to which he is entitled simply because somebody else, who suffered very similar injuries in the same circumstances, had no choice but to settle for less. Jill recognizes this, and her sense of resentment is nowhere near as sharp as Moe's, but she cannot help wishing that justice could be a bit more fair.

The purpose of this admittedly contrived example is to show that justice in individual cases (or the closest approximation of it that can be achieved) can seem less than even-handed when similar or connected cases are looked at as a group. Even if it were possible that the penalties imposed on Moe and the compensatory damages awarded against him could be precisely calculated to correspond exactly with the culpability of his actions and the degree of damage caused by them, the fact that Larry had escaped any punishment in identical circumstances must surely indicate that the justice achieved in the case is less than perfectly just. In the same way, even if the damages awarded to Jack could achieve the stated aim of damages — to restore, as far as possible, the injured person to the position he or she was in before the injury — the fact that Jill, with identical injuries, was 'restored' to a different position, must give us pause. Yet, there does not seem to be any more satisfactory approach than dealing with cases individually.

To summarize, we have on the one hand a strong, and apparently universal sense of justice which may conceivably be an instinct that has evolved because it provides an evolutionary advantage. On the other, it is clear that justice has its discontents: it relies on an assumption of commensurability that leaves residues, its machinery is not free of friction, in the way of costs and delays, and the more

comprehensive a view we take of it the less even-handed (or *fair*) it is likely to appear. This being the case, we should not be surprised to find that the prevailing human attitude to justice is one of ambivalence. Typically, it is suggested, this ambivalence takes the form of, on the one hand, scepticism about the possibility of justice and, on the other, indignation or outrage at some of its more egregious failures. The scepticism may be inevitable, given the evident imperfection of systems for the administration of justice, while the strength of the countervailing ‘sentiment’ or sense of justice may be an evolutionary necessity without which reciprocal altruism (and thus human society) would be impossible. If this is so, then *ambivalence* about justice would seem to be unavoidable. One moment, we knowingly opine that the central figures in a financial scandal will never be punished, that is simply how the world works; the next we vociferously insist that our neighbours should move their fence back to the boundary line and stop encroaching on our garden, otherwise we shall be happy to take them to court.

The principal argument of this thesis will be that an ambivalence similar to that posited in the previous paragraphs is evident in the work, both poetry and prose, of Andrew Marvell. In general, the poetry tends to give voice to his scepticism, while the sense that justice might be at least partly achievable is more likely to appear in the prose works, though this is not to say that the division is clear-cut. It is not the case that the poems are never hopeful about justice, still less so that the prose works are never doubtful about it. The method to be followed will vary somewhat, depending on the work, or category of work, under consideration.

Chapters 1 and 4 will attempt to locate two groups of works separated in time and by circumstances — the ‘political’ poetry of 1650, specifically ‘An Horatian Ode’ and ‘Tom May’s Death’, in chapter 1, and much of the prose of the 1670s, particularly *The Rehearsal Transpros’d* and *An Account of the Growth of Popery*, in chapter 4 — in

the context of contemporary arguments and discussions about ‘ancient rights’ and ‘ancient constitution.’ Chapter 2 will again take a contextual approach, discussing the writings dealing with Anglo-Dutch relations in the light of the works of Hugo Grotius and John Selden concerning the legal status of the sea and, more generally, the laws of nature and nations. Chapter 3 deals with the lyric poetry, which is less easy to put in context, in part because of the difficulty of confidently dating some of the poems but more fundamentally because, if their historical occasions were easily identifiable, we might be less likely to treat them as lyrics in the first place. Instead of direct contextualization of the lyrics, therefore, an attempt is made to relate the themes found in them with the questions discussed in the other chapters.

Finally, the fifth chapter tries to cast some light on the justice of Marvell’s behaviour by offering a reinterpretation of the Chancery pleadings and other records in a cluster of cases arising after Marvell’s death out of the collapse of a bank in which Marvell’s friend, Edward Nelthorpe had been a partner. It will be argued that Fred S. Tupper, who did Marvell scholarship a valuable service by discovering these records, partly undid his achievement by failing to understand their nature.

One significant omission from the thesis is any more sustained discussion of Marvell’s beliefs on the question of divine justice than can be found in chapter 3’s treatment of the Hastings elegy and ‘The Coronet.’ While John Klause describes *Remarks Upon a Late Disingenuous Discourse* (1678) as Marvell’s ‘brief, informal theodicy’,²⁴ Marvell is less concerned in that work to explore the question of God’s justice than to make the case (much as he had done earlier in *Mr. Smirke* and *A Short Historical Essay*) for a more tolerant and comprehensive national church. While he is scathing about Thomas Danson’s assertion of supralapsarian predetermination (that God determined ‘Innocent Adam’s Will to the choice of eating the fruit that was

²⁴ Klause, *The Unfortunate Fall*, p. 13.

forbidden him'²⁵), he does not otherwise argue against God's 'Predetermining Influence' (*Prose Works*, II, 469) over all our actions, but rather states that 'this matter has been left entire to every man's best Judgment' (*Prose Works*, II, 478), so there is no justification for requiring members of the Church to hold a belief one way or the other.

'... as well defended'

So far in this introduction, scepticism about justice has been taken to arise from the evident imperfectibility of its machinery. Perhaps more disturbingly, we may find that we have to deal with the scepticism with which Grotius engages in the 'Preliminary Discourse' (*Prolegomena*) to his great work *De iure belli ac pacis libri tres*. There, he appoints Carneades to act as representative of this scepticism:

... that we may not engage with a Multitude at once, let us assign them an Advocate. And who more proper for this Purpose than Carneades, who ... could argue for or against Truth, with the same Force of Eloquence? This Man having undertaken to dispute against Justice ... found no Argument stronger than this. Laws (says he) were instituted by Men for the sake of Interest; and hence it is that they are different, not only in different Countries, according to the Diversity of their Manners, but often in the same Country, according to the Times. As to that which is called NATURAL RIGHT, it is a mere Chimera. Nature prompts all Men, and in general all Animals, to seek their own particular Advantage: So that either there is any, it is extreme Folly, because it engages us to practice the Good of others, to our own Prejudice.²⁶

The ideas of Carneades have not come down to us at first — or indeed at second — hand.²⁷ This hardly matters for Grotius's purposes; the point for him is that the ideas are there to be refuted. Carneades's case seems to be twofold: (a) that justice is impossible because it is dependent on laws, which are made by human beings, who are motivated by self-interest; and (b) that so far as the individual actor is concerned this is not a bad thing because only a fool would prefer the rights of another to his or

²⁵ *The Prose Works of Andrew Marvell*, ed. Annabel Patterson and others (New Haven: Yale University Press, 2003), II, 469

²⁶ Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), p. 79.

²⁷ Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993), pp. 55–6.

her own interest. The example given by Carneades (according to Lactantius), and much cited since, is of the survivor of a shipwreck who fails to save his own life, which he might have done by taking a plank from a weaker survivor who got to it first (and therefore has a prior right). Such a person would be ‘just, but foolish, in not sparing his own life while he spares the life of another.’²⁸

The shipwrecked individuals fighting over a plank are in an approximation of the state of nature. It could be said, perhaps fancifully, that they get to write from scratch the rules governing ownership of property. Carneades’s point was that it would be an aberration if the rules made in such circumstances were to favour anybody other than the stronger party. Similarly, sovereign powers or ‘princes’ were in a state equivalent to that of nature. In particular, neither a sovereign prince nor a person in imminent danger of drowning at sea is answerable to any kind of higher — but still earthly — tribunal or arbitrator. Ultimately, they must judge their own conduct and that judgment will be tempered by interest.

Grotius’s answer to this bleak view is to say that there are rules or laws which govern human beings even in a state of nature. These laws are so self-evident that no reasonable being could in good faith deny them (and they include the obligation to hold to one’s agreements, which is the foundation on which all human-made law is built). Further, the laws of nature are enforceable, even without a tribunal to which the sovereign being (prince or shipwrecked sailor) is answerable. According to Grotius, war is the means of enforcement. A just war is always and only one whose objective is the redress of a wrong or the punishment of wrongdoing.²⁹ For Grotius, war, which has obviously the potential to be an instrument of aggression and subjugation, is a double-edged sword. In writing about *the law of war*, then, Grotius was not merely seeking a way to regulate armed conflict, but proposing that such

²⁸ Tuck, *Philosophy and Government 5172–1651* p. 56, citing Lactantius, *Works*, I, 329.

²⁹ For Grotius’s ideas about the law of war, and its foundation in the laws of nature and nations, see chapter 2 below.

conflict could itself be, in the last resort, an instrument of regulation. This goes some way to explaining why his major work has seemed, on the one hand, a conventional work on a well-worn theme³⁰ and, on the other, a radical attempt to deal with the problem of Carneadean scepticism and its early modern adherents.³¹

There is an obvious difficulty in treating war as the means of enforcing laws and rights: the outcome of a war is less likely to depend on the justice of the combatants' respective causes than on such matters as their strength, guile and strategic competence. Or, as Marvell wrote to Thomas Rolt, his friend in Persia: 'in this World, a good Cause signifys little, unless it be as well defended.'³² For this reason, Grotius cannot be regarded as having provided a completely satisfactory answer to the sceptics. He has, arguably at least, shown that there are rules of behaviour which are not determined by interest and which apply to all human beings, even where there are no courts or tribunals to hold them to account. These rules will sometimes be properly enforced but it is clear that this will not happen in every case. So, if Grotius has supplanted scepticism, he has replaced it not with assuredness but with ambivalence.

³⁰ Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires Françaises, 1983), p. 8; see below, chapter 2.

³¹ Tuck, *Philosophy and Government, 1572–1651*, p. 196: '... Grotius's primary targets were the contemporary sceptics, alluded to under the guise of their ancient precedessors.' Tuck's reading of Grotius has not proven universally persuasive: Johann P. Sommerville, 'Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory' in *Rhetoric and Law in Early Modern Europe*, ed. Victoria Kahn and Lorna Hutson (New Haven: Yale University Press, 2001), pp. 318–43, disputes both that the Grotian account of natural law was *minimalist* and that it was intended to refute the scepticism of such writers as Montaigne and Charron.

³² *Poems and Letters*, II, 324.

Chapter 1. 'Ancient rights': Cromwell's return from Ireland and the death of Thomas May

Ancient constitution, common law

Marvell uses the phrase 'ancient rights' in three poems, two of them dating from 1650 and the third from 1653. The use of the phrase suggests, initially at least, that a concern with questions of justice and right features in all three poems. This chapter and the following one will argue that, on closer examination, this impression is confirmed, but with qualifications. The two 1650 poems, 'An Horatian Ode upon Cromwell's Return from Ireland' and 'Tom May's Death', will be considered in this chapter, while that from 1653, 'The Character of Holland' is the subject of the first part of the next.¹ The phrase, while certainly one of approval, is imprecise and capable of being used in different senses. Nigel Smith points out that 'the concept had been used by nearly every political group during the Civil War', adding that 'it refers not to the theory of the divine right of monarchs, but to the place of the monarch in an ancient constitution.'² It will be argued here that, insofar as appeal was made to 'ancient constitution' in the earlier part of the seventeenth century, it was more as a potential source of *rights* — necessarily ancient ones — than as evoking the notion of a framework of government in which the king, as well as the houses of parliament, had a *place*.

Corinne C. Weston implicitly recognizes that 'ancient constitution' is concerned with rights rather than with frameworks of government when she seeks to

¹ The third poem is treated separately from the other two because it is concerned particularly with rights as against other countries and governments and because it more easily dealt with in the context of Marvell's other works touching upon the subject of Anglo-Dutch relations. The two earlier works deal with rights within the English polity.

² Nigel Smith, ed. *The Poems of Andrew Marvell*, Longman Annotated English Poets series (Harlow, Essex: Pearson, 2003), p. 275, n. to l. 38.

locate its basis in prescription. She cites *Coke upon Littleton* as ‘explain[ing] that customs attain force of law by title of prescription’,³ referring to Coke’s commentary on a passage in which Littleton has written ‘that no custome is to be allowed, but such custome, as hath bin used by title of prescription, that is to say, from time out of minde.’⁴ The doctrine of Coke and Littleton was subsequently adopted by Henry Rolle and Matthew Hale. Weston illustrates the operation of prescription in constitutional matters with the examples of declarations by parliament:

Two related declarations of the Jacobean House of Commons, the *Form of Apology and Satisfaction* (1604) and the *Protestation* (1621) reveal the role of prescription in early Stuart thought. The first dealt with the source of parliamentary privileges, the second, specifically, with the issue of freedom of speech in parliament; both reflected the view that parliamentary privileges were the ancient and undoubted birthright and inheritance of English subjects and implied that these were held by an ancient right independent of the King, contrary to James’ emphatic claim that he and his ancestors were the source of the privilege. (p. 377)

It will be apparent that prescription is a mechanism better suited to blocking a claim based on alleged ‘rights’ which have been allowed to lapse, or which have not been exercised for a considerable period, than to building a structure of any complexity. There is a further difficulty with seeing these parliamentary declarations as constituting a claim to rights acquired by prescription in that such rights would be useless against the king: *nullum tempus occurrit regi*. Weston’s sometime collaborator, Janelle Greenberg, attempts to answer this objection by relying on the distinction, originating with Bracton, between essentials and accidentals: time could not run against the king in matters that went to the essence of his power but in many matters characterized as ‘accidentals’ the king’s rights could be lost by prescription.⁵ It is, however, far from clear that a king’s power to legislate for and to raise money from his subjects can

³ Corinne C. Weston, ‘England: Ancient Constitution and Common Law’, in *The Cambridge History of Political Thought 1450–1700*, ed. J. H. Burns with the assistance of Mark Goldie (Cambridge: Cambridge University Press, 1991), pp. 374–411 (p. 376).

⁴ Sir Edward Coke *The Institutes of the Laws of England: The First Part*, p. 113b, commenting on Sir John Littleton, *Tenures*, Bk. 2 c. 10 §. 170.

⁵ Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward’s ‘Laws’*, in *Early Modern Political Thought* (Cambridge: Cambridge University Press, 2001), p. 31.

properly be regarded as ‘accidental’ to his function as a monarch.

There is another, more fundamental, objection to treating the passage from Coke cited by Weston as a basis for arguing that the English ancient constitution was grounded on prescription or customary rights. The passage occurs in a work where Coke explains and enlarges upon Littleton’s fifteenth-century treatise dealing with the technical subject of ‘tenures’ or the various ways in which land could be held. The particular tenure under discussion in the chapter in which the cited passage occurs is ‘burgage’, which Littleton defines in these terms: ‘Tenure in burgage is, where an ancient burrough is, of which the king is lord, and they, that have tenements within the burrough, hold of the king their tenements ...’⁶ It might be thought that, since the chapter deals with the operation of prescription in a context where there is a direct relationship of lord and tenant between the king and some of his subjects, it should be an easy matter to extrapolate this to relations between subject and king more generally. However, no indication is to be found in the examples given by Coke that he has the rights of the monarch in mind.

The discussion of prescription arises in this context because Littleton says (§. 165) that different boroughs have different sets of customary laws in place, governing such things as inheritance. Coke distinguishes between prescription and custom, saying that prescription is usually individual, whereas custom tends to be claimed where no individual can show a prescriptive right. So, a tenant relying on prescription would plead that he and his ancestors ‘and all those whose estate he hath in the sayd mannor, have time out of minde of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the sayd mannor’, whereas a claim to a customary right might be made by a copyholder ‘there is and hath beene such a custome time out of mind of man used, that all the copyholders of the said mannor have had and used to have common of all pasture,

⁶ Littleton, *Tenures*. Bk. 2 c. 10 §. 162; Coke, *Institutes* I, p. 108b

&c. in such a wast of the lord, parcell of the sayd mannor' (p. 113b). The 'some other' over whose land the prescriptive claim was made might conceivably be the king but it was rather more likely (unless the king had retained land in an ancient borough for his own use) that it would be another of the king's tenants, immediate or otherwise. In any case, there is nothing in the passage to suggest that Coke believed that his commentary had any implications for the structure of government of the realm.

Though the phrase had been used earlier, it is clear that Weston is correct in ascribing to J. G. A. Pocock a large share of responsibility for the fact that 'the doctrine of the ancient constitution is recognised as a distinctive component of Stuart political thought'.⁷ For Pocock, the ancient constitution was founded upon immemorial customary law:

... belief in the antiquity of the common law encouraged belief in the existence of an ancient constitution, reference to which was constantly made, precedents, maxims and principles from which were constantly alleged and which was constantly asserted to be in some way immune from the king's prerogative action; and discussion in these terms formed one of the century's chief modes of political argument.⁸

Glenn Burgess, who has modified considerably Pocock's ideas about an ancient constitution, continues to defend the proposition that the ancient constitution was a 'hegemonic doctrine',⁹ but denies that that doctrine was constitutionalist. In *Absolute Monarchy and the Stuart Constitution*,¹⁰ he suggests that it is in a reliance on the law rather than in an idea (whether established or emerging) of constitutionalism that we are more likely to find an answer to the question how relations between the monarch and the subject were understood to be regulated without recourse to absolutism on the one hand or to resistance theory on the other.

⁷ Weston, 'England: Ancient Constitution and Common Law', p. 375. See J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* reissue with retrospect (Cambridge: Cambridge University Press, 1987).

⁸ Pocock, *The Ancient Constitution and the Feudal Law*, p. 46.

⁹ Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 136.

¹⁰ His earlier work, Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (Basingstoke: Macmillan, 1992), is much closer to Pocock's ideas.

According to Burgess, the idea that Coke, Selden, Davies and their common lawyer contemporaries regarded themselves as being governed in accordance with a constitution owes much to the work of Charles H. McIlwain, whose ‘understanding of the seventeenth-century constitution must be judged flawed because it was too inclined to require an *antecedent* set of principles that *defined* the nature of authority. ... in truth English common lawyers were not as certain as McIlwain makes them sound that the laws were immutable.’¹¹ Burgess comments on the changing meaning of ‘constitution’:

... there is evidence of a sense in the seventeenth century that certain fundamental or ancient laws could not be transgressed by royal action (these laws might even be termed constitutions), but this usage also lacks the modern sense of a single, defining pattern of government. ... There was no clear and consistent subdivision of law into ordinary law and public, constitutional or even fundamental law. ... Hence early seventeenth-century understandings of the legally limited nature of kingship were different from the understandings later associated with ‘constitutionalism’, for they were not based on the view that there was a special category of laws and principles, not made by governments, but regulating governmental activity. For early Stuart Englishmen, the whole body of laws was simultaneously above government and yet administered on the authority of government.¹²

For several centuries, the dominant meaning of ‘constitution’ has been *OED* sense 7: ‘The system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed.’ In the earlier part of the seventeenth century, an Englishman was rather more likely to use ‘constitution’ to mean something closer to *OED* sense 3a: ‘A decree, ordinance, law, regulation; usually made by a superior authority, civil or ecclesiastical; *spec. in Rom. Law*, an enactment made by the emperor.’

So, while the phrase ‘ancient constitution’ was employed by English writers prior to the 1660s, it did not generally refer to what we should now think of as the constitution of the English state. Conversely, many writers who have been identified

¹¹ Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 135.

¹² Burgess, *Absolute Monarchy and the Stuart Constitution*, pp. 134–5.

by Pocock commenting on constitutional matters (or as regarding the common law as immemorial custom) do not employ the term. Coke's own use of 'constitution' is unambiguously *OED's* sense 3a:

hereby, as I think, it is sufficiently proved that the laws of England are of much greater antiquity than they are reported to be, and than any the constitutions or laws imperial of Roman Emperors.¹³

Wholly unambiguous uses of 'ancient constitution' are not easy to find in the earlier part of the seventeenth century. Milton's *The Tenure of Kings and Magistrates* uses it as follows:

If our Law judge all men to the lowest by their Peers, it should in all equity ascend also, and judge the highest. ... Whence doubtless our ancestors who were not ignorant with what rights either Nature or ancient Constitution had endowed them, when Oaths both at Coronation, and renewd in Parliament would not serve, thought it no way illegal to depose and put to death thir tyrannous Kings.¹⁴

Here, the absence of the definite article is consistent with (though not conclusive as to) the hypothesis that Milton uses the phrase in its early sense. An ancient constitution in the early sense would in effect be a lost statute (i.e. a statute so old that no direct record of it survived) but whose existence could be presumed because its effects were still visible — for example, the rights that it presumably had conferred were still enjoyed. To ground claims to particular rights — such as the right of both houses of parliament to participate in the legislative process, or the right of the subject not to be taxed except with the approval of the Commons — on ancient constitution would be an *alternative* to basing them on prescription; an alternative that would not be vulnerable to the objection that time does not run against the king.

According to Howell A. Lloyd, 'it entails no anachronism to describe as "constitutionalist" contemporary ideas to the effect that power ought to be exercised within

¹³ Sir Edward Coke, *La Tierce Part des Reportes* (1602), cited in Wootton, *Divine Right and Democracy*, p. 145; also in Burgess, *The Politics of the Ancient Constitution*, p. 74.

¹⁴ John Milton, *The Tenure of Kings and Magistrates*, in *Political Writings*, ed. Martin Dzelzainis, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1991), pp. 3–48 (p. 21).

institutionally determined limits,¹⁵ but it is possible significantly to qualify this statement. Writing about constitutional royalists (a category in which he includes the authors of the *Eikon Basilike*), David L. Smith remarks that '[s]ince the term was not used by contemporaries, there is the problem of projecting an anachronistic category back on to the evidence.'¹⁶ The term that Smith has in mind is the composite one, 'constitutional royalist' but it is also the case that 'constitutional' and 'constitutionalist' were not themselves widely used. Alan Cromartie makes it clear that he uses 'constitutionalism' to mean the 'claim that ordinary law defines the monarch's power'.¹⁷ There is no a priori requirement that this 'ordinary law' be fundamental, in the sense either of 'entrenched' or 'foundational'. It is useful to remind oneself that to speak of 'constitutionalism' can lead one to assume that writers such as Coke were consciously describing the institutionally determined limits on the exercise of power when in fact they were doing something different.¹⁸

In discussing the ancient constitution, it is harder to see clearly the distinction that has been suggested here between the earlier and later concepts of 'constitution' because, in the earlier sense, the rights that are being asserted or contested are often those of what we might now call the institutions of state: in particular, the king and the houses of parliament. Where the rights in question are those of the subject, until the 1640s, it is primarily against the king that they are likely to be claimed. Therefore, these may well appear to us as 'constitutional' questions, even if a 'constitution' in the later sense did not yet exist.

Already in the fifteenth century, however, Fortescue's statement that the king

¹⁵ Lloyd, 'Constitutionalism', p. 255.

¹⁶ David L. Smith, *Constitutional Royalism and the Search for Settlement, c. 1640–1649* (Cambridge: Cambridge University Press, 1994), p. 4.

¹⁷ Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge: Cambridge University Press, 2006), p. 9.

¹⁸ For a possible explanation of what Coke was actually doing, see William Klein, 'The Ancient Constitution Revisited', in *Political Discourse in Early Modern Britain*, ed. Nicholas Phillipson and Quentin Skinner (Cambridge: Cambridge University Press, 1993), pp. 23–44.

enjoyed a *dominium politicum et regale*¹⁹ had what we might term proto-constitutional implications. Such implications may well appear more obvious to us than they would have to a contemporary. Accustomed as we are to the idea that legal limitations on the power of government are constitutional in nature, we find it easy to deduce from the existence, or just from the assertion, of such limitations an implied or nascent constitution. Alan Cromartie has made a strong case for thinking that, while Fortescue repeatedly talks about the ‘assent’ of the people to the laws by which they are governed, for him the crucial question is whether the king takes counsel, and not whether the people are represented in the legislature.²⁰

It must be accepted, too, that the ideas of a framework of government and of a law that was fundamental and, at least in some respects, not alterable at the will of the monarch or parliament, were not unknown in the early part of the seventeenth century. The cleric Roger Maynwaring was accused before the Commons of a ‘Plot and Practice, to alter and subvert the Frame and Fabrick of this Estate and Commonwealth.’²¹ Clearly, John Pym, who presented the charge, had a concept of ‘the Frame ... of this ... Commonwealth’, though when he used the word ‘constitution’ he seems not to have meant that frame but rather the act of constituting the monarchy.²² It is worth noting that Pym is keen to assert that the ancient right of the subject not to be taxed without the consent of the House of Commons dated from the very foundation of the kingdom and he specifically denies that it was introduced by any subsequent

¹⁹ Sir John Fortescue, *De laudibus legum Angliae*, chs. IX–XIV; *The Governance of England* chs. 1–2. See *In Praise of the Laws of England* (c. 1470) in *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge: Cambridge University Press, 1977), pp. 17–24 and *The Governance of England* in *On the Laws and Governance of England*, pp. 83–87.

²⁰ Cromartie, *The Constitutionalist Revolution*, pp. 24–30.

²¹ Harry F. Snapp, ‘The Impeachment of Roger Maynwaring’, *Huntington Library Quarterly* 30, 3 (May 1967), pp. 217–32 (p. 221); also cited by Burgess, *The Politics of the Ancient Constitution*, p. 176.

²² Pym argued that ‘the law of England, whereby the subject was exempted from taxes and loans not granted by common consent of Parliament, was not introduced by any statute, or by any charter or sanction of princes, but was the ancient and fundamental law, issuing from the first frame and constitution of the kingdom’: J. P. Kenyon, ed., *The Stuart Constitution 1603–1688: Documents and Commentary* (Cambridge: Cambridge University Press, 1966), pp. 16–17.

statute or charter.²³

Before the civil war, rather than a coherent ‘constitutionalism’ one sees a variety of ad hoc responses to the problem of a king who was evidently set on expanding his role and power in ways that appeared innovative to his subjects. Clearly, there were some, such as Pym, who thought in terms of a frame of government and a fundamental law, both dating from the foundation of the English monarchy. These ideas, however, played little or no part in the thinking of leading common law writers, such as Coke and Davies,²⁴ and do not seem to have been very often grouped together under the heading ‘ancient constitution’.

The expression ‘ancient constitution’ was eventually used to refer to a constitution in the later sense, though this usage may not have become unambiguous until the Exclusion Crisis and the Glorious Revolution. It is clear from the works cited by Pocock that by the 1680s writers such as Petyt and Atwood were thinking in constitutionalist terms.²⁵

Invoking ancient rights

‘Ancient rights’, then, would refer primarily to rights whose origins were obscure, but which clearly had some origins (such as an ancient constitution or lost statute) because they continued to be enjoyed. Long and uninterrupted enjoyment of such rights was the key to establishing their existence, whether they were thought to date from the original institution of the kingdom, or to acquire their force from lost

²³ A statute could be repealed only in accordance with the legislative process, which would require the approval of the Commons, while a charter was capable of creating vested rights that could not easily be taken away. Pym’s point, therefore, is presumably that the right not to be taxed without ‘common consent of Parliament’ is entrenched — he uses the term ‘fundamental law’ — and not capable of being changed, *even by statute*.

²⁴ For Davies’s ideas on the foundation of the monarchy, see chapter 4 below.

²⁵ See William Petyt, *The Ancient Right of the Commons of England Asserted* (1680) and Petyt’s statement to the House of Lords on the question of the ‘original contract’ between king and people that James II was said to have broken, cited in Pocock, *The Ancient Constitution and the Feudal Law*, pp. 229–30. See also William Atwood, *The Fundamental Constitution of the English Government* (London, 1690).

statute or grant, or by prescription. If the king had ‘ancient rights’, these were a corollary to the rights asserted by parliament or people. Nobody doubted that the king had considerable *powers*, but there would be no need to speak of his *rights* unless others were relying on theirs.

This is not to argue that the claim to ‘ancient rights’ on behalf of the monarch was a relatively recent development. Sir John Davies, in his *The Question Concerning Impositions* (1656) twice refers to a statute of 11 Ric. 2, c. 9 (i.e. 1387–88), which provided ‘that no Imposition or Charge be layd upon Wooll, Wooll-fells, or Leather, other than the Custome or Subsidy granted in that Parliament’ but saving to the king his ancient rights.²⁶ According to Davies, what Parliament has saved is the king’s prerogative power to impose new charges or duties on imports or exports, without the need for parliamentary approval. Already, in the fourteenth century, Parliament acknowledges, as a participant in the legislative process (and therefore itself vested with certain rights and powers), that the king has the right to impose charges that would otherwise be contrary to the statute.

George Wither used of the expression (and its singular form) in poems as far apart in time and politics as *Britain’s Remembrancer* (1628) and *A Suddain Flash* (1657)²⁷ and in both instances he was engaging in what may appear to later readers as a balancing act. In Canto 7 of *Britain’s Remembrancer* we find him urging that the parliament should ‘their ancient rights maintain, / By all just meanes ...’ (ll. 2227–8), having immediately beforehand made clear that ‘just meanes’ excludes physical resistance:

²⁶ Sir John Davies, *The Question Concerning Impositions, Tonnage, Poundage, Prizage, Customs, &c.* (London: S. G., 1656), p. 138. See also p. 130. This work, which according to its title page was written in ‘the latter end of [the] Reign’ of James I, will be discussed in the context of the king’s prerogative powers in chapter 4 below.

²⁷ George Wither, *Britain’s Remembrancer*, Literature Online (Cambridge: Chadwyck-Healey, 1992) <<http://lion.chadwyck.co.uk>> [accessed 28 June 2012]; George Wither, *A Suddain Flash Made visible, the fourth day after his Highnesse the Lord Protector had first waved the Title of KING*, Literature Online (Cambridge: Chadwyck-Healey, 1992) <<http://lion.chadwyck.co.uk>> [accessed 28 June 2012].

What their forefathers unto them did leave,
 Let them not suffer any to bereave
 Their children of. For, they may that deny
 Ev'n to their King, provided, loyally
 They do it, in resisting his demands
 By legall *Pleadings*; not by force of hands. (ll. 2217–22)

Wither's remarks on 'ancient rights' suppose that one could have rights in a meaningful sense without a corollary right to defend those rights against the king by force. As we shall see in chapter 4, Glenn Burgess employs a similar idea — that the king could be regarded as bound by the laws even though he could not be constrained by force from breaking them — to support his argument that 'absolutism' was not a significant ideological force in early Stuart England.

Barely twenty lines after those quoted above, speaking of 'all just freedoms of the Land / That can be proved' (l. 2237), Wither writes:

Let us not whisper them, as men that feare
 The claiming of their due, high treason were.
 Nor let us (as we doe) in corners prate,
 As if the *Sov'raigne* power, or the *State*
 Encroacht injuriously; and so defame
 The government: disgrace the royall *Name*;
 And nourish, by degrees, an evill spirit,
 That us of all our peace will dis-inherit.
 But, let us, if we see our ancient right
 Infringed; bring our grievances to light,
 Speak loyally, and orderly, and plaine,
 Those things which for our owne we can maintaine:
 So, Kings the truth perceiving; and their ends
 Who did abuse their trust, will make amends
 For all our sufferings: give our foes their doome;
 And make us more secure for times to come. (ll. 2243–58)

This was published in the year of the Petition of Right. At that time, for Wither, ancient rights belonged to the people ('our': Wither was not a member of Parliament) and were to be claimed and asserted rather than allowed to be lost through inaction. The duty to assert these rights was, however, subject to two caveats. First, neither the people nor their representatives are entitled to resist the king; but this should not be necessary, since the king will perceive the truth and 'make amends / For all our

suffrings'. The second caveat explains why the king is sure to see the truth: the people are to claim only such rights as can be clearly shown to exist and not alleged rights based on 'bare conjecturings' (l. 2260). It is clear that Wither has in mind rights which — though 'ancient' and therefore presumably having their origins before 'the time of memory' — have an existence that is indisputable if the king is acting in good faith.

The idea that resistance is never justified, even in the defence of established rights, again surfaces in Canto 8:

For, altho
 We may dispose of what pertaines unto
 Our persons: yet, those dues which former ages
 Have left unto us for our heritages,
 ...
 Those dues we should preserve with all our might,
 By pleading of our just and ancient right,
 In humble wise; if so the Sov'raigne state
 Our Freedomes shall attempt to violate.
 But, when by peacefull meanes we cannot save it,
 We to the pleasure of the King must leave it,
 And unto God our Iudge: For all the pow'r
 In us, consists in saying, *This is our*. (ll. 1601–04, 1607–14)

These lines were republished in 1641, apparently in order to embarrass Wither, who had changed his mind about the permissibility of resisting the king.²⁸ However, he had not yet finished with 'ancient rights', which were to make a reappearance in his poem on the occasion of Cromwell's refusal to be crowned. In *A Suddain Flash* (1657), he wrote:

Conquest, is by our *Law*, the utmost *Trial*
 That can be had: and *He*, (without denial)
 And his *Adheres*, have right in that respect,
 To any *Title* which they will elect:
 Yea, and may *Change*, *Confirm*, or make the *Lawes*
 Such, as their *Safety*, and the *Common Cause*
 Shall now require: Provided, it accord
 With their *Trust*, for whose sake they drew the *Sword*;
 And with those ancient Rights, by *God* and *Nature*,
 Conferr'd upon the *Reasonable Creature*:

²⁸ Norbrook, *Writing the English Republic*, p. 163.

Which, if they shall invade, their *Swords* now worn,
 Upon *Themselves*, just vengeance will return:
 For, that *Pow'r*, was conferred to provide
 A form of *Government* so rectifide,
 That, neither *Prince*, nor *Peers*, nor *People* might
 Intrench, hereafter, on each others *Right*: (ll. 1225–40)

This is, among other things, an illustration that it was possible to appeal to conquest theory without necessarily embracing absolutism. In Wither's view, conquest had conferred on Cromwell the right to assume whatever title he thought appropriate and also the right to change or completely replace the laws (or, if he should think fit, to confirm the existing ones).²⁹ That right is, however, subject to a proviso: any changes to the law have to be compatible with 'those ancient Rights, by *God* and *Nature*, / Conferr'd upon the *Reasonable Creature*'. The rights in question arise from natural law and the divine law³⁰ and are not overridden by conquest.

Other uses of the language of ancient rights lead to similar conclusions. One work in which the phrase is used no fewer than three times is a pamphlet published in 1642, arguing 'that Kings are bound by those qualifications of compact and condition that were made with them by the people, and ought to discharge and execute their Royall functions answerable thereunto'.³¹ This is one of the works formerly attributed to Milton³² and the author's assertion of the monarch's accountability does indeed sound Miltonic. He argues that the need to protect their 'ancient Rights and Liberties' would have justified the Israelites in 'the taking up of Armes

²⁹ As in principle it had done on William, Duke of Normandy, nearly six centuries earlier. Pocock argues that many writers in the common law tradition felt compelled to deny that William had truly been a conqueror because '[t]o admit a conquest was to admit an indelible stain of sovereignty upon the English constitution': J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, reissue with retrospect (Cambridge: Cambridge University Press, 1987), p. 53. Wither's address to Cromwell shows that he found it possible to believe that a conqueror was subject to some constraints as to what laws he could introduce.

³⁰ Presumably Wither did not distinguish between the two. If he did not, as will be seen in chapter 2, he differed from Grotius but was in agreement with Selden.

³¹ J. M., *A reply to the Answer (printed by His Majesties command at Oxford) to a printed booke intituled Observations upon some of His Maiesties late answers and expresses* (London: Matthew Walbanke, 1642), p. 1. The Thomason copy, E.245(35), is dated 3 February.

³² Martin Dzelzainis, 'Milton's Politics', in *The Cambridge Companion to Milton*, 2nd ed., ed. Dennis Danielson (Cambridge: Cambridge University Press, 1999), pp. 70–83 (pp. 70–1).

against these Malignant Counsellors' of Rehoboam (p. 5). The English people, likewise, enjoy 'ancient rights and priviledges' which they should 'labour to maintaine'. They should not be prepared to give them up merely because 'other Nations are not so happy as wee' (p. 8). Thirdly, he asserts that Parliament, too, exercises ancient rights and hopes 'that the King may not usurpe upon liberty' (p. 34).

Lest the impression be given that the the king was always and necessarily a party to any controversy concerning ancient rights, it should be pointed out that William Prynne made use of the concept in his attack on the army's proposal, in its *Remonstrance* of 20 November 1648, for the dissolution of the (as yet unpurged) parliament and its replacement by 'a selected company of *politick Mechanicks, pragmaticall Levellers, and Statesmen of the General Council of the Army*'. According to Prynne, this would amount to:

... engrossing all mens ancient *Rights, Liberties, priviledges of election* without consent or title, into the hands of those who never *had a right* unto them, the *people*; who are *no Free-holders, no Free-Burgesses, free-Citizens*, or men capable of Votes by Law: and these people no other then the *Army themselves* and some of their *levelling Confederates*:³³

Though the rights may be 'all mens', they belong to the specific categories people listed and emphatically not to the army and its 'levelling Confederates'. This suggests that, while the right to elect Members to the House of Commons may be exercised only by those exercising the limited franchise, yet that right exists for the benefit of the people in general.

These uses of the phrase are consistent with the argument that, while Nigel Smith is right to say that 'the concept had been used by nearly every political group during the Civil War', the terms of that debate were set by those who sought to assert

³³ William Prynne, *The Substance of a Speech made in the House of Commons by Wil. Prynne of Lincolns-Inn, Esquire; on Munday the Fourth of December, 1648. Touching the Kings Answer to the Propositions of both Houses upon the whole Treaty* (London: Mich. Spark, 1649), pp. 98–9 (Wing P4093).

the rights of the subject or those of parliament. The usefulness of the concept to the different sides in the war can be seen in the fact that appeal is made to it (just once in each case) in both the *Eikon Basilike* and *Eikonoklastes*. In the later work, the passage containing the phrase is not a direct answer to that in the earlier, indicating that Milton's use of the term was not prompted by, or an immediate echoing of, that ascribed to the king. In the *Eikon Basilike*, the phrase appears in the context of a prayer that is put in the mouth of the king:

If thou wilt restore me and mine to the Ancient rights and glory of my Predecessours. ...

Then will I rule my People with Justice, and my kingdomes with Equity.³⁴

We see, therefore, that when a claim to 'rights' is ascribed to Charles, they are already in need of vindication or restoration. When Milton employs the term, it is in the context of an answer to the assertion in the *Eikon* that, under the rule of the king, the people had been governed by those laws to which they had themselves consented.

Milton objects:

when the Parliament, and in them the people, have consented to divers Laws, and, according to our ancient Rights, demanded them, he took upon him to have a negative will, as the transcendent and ultimat Law above all our Laws; and to rule us forcibly by Laws to which we our selves did not consent, but complain'd of.³⁵

The authors of the *Eikon Basilike*, and others who invoked 'ancient rights' in defence of the king, were implicitly responding to others who relied on 'ancient rights' as a defence against him — and tacitly recognizing that those others had at least some legitimate claims. When, in 'An Horatian Ode', Marvell uses the expression 'antient Rights' in a context that makes it clear that the rights at stake are those of the king, he is, on the one hand, using a phrase whose primary significance is to suggest parliamentary or popular rights, but in such a way as to remind his readers that these are

³⁴ *Eikon Basilike* (1648), p. 221 (Wing E268).

³⁵ John Milton, *Eikonoklastes* (London: Thomas Newcomb, 1650), p. 204 (Wing M2113).

not the only rights in issue. One might say that such an approach is by its very nature ‘balanced’, in that it suggests that conflicting rights may have to be reconciled.

‘Fit for highest Trust’: Cromwell, the Commonwealth and legitimacy

‘An Horatian Ode’ raises and explores questions of legitimacy and right on the one hand, and usurpation and might on the other. Since the sympathetic figure of Charles I on the scaffold occupies a central place in the poem, which also offers apparently unequivocal, if not necessarily unmixed,³⁶ praise to Cromwell, it is not surprising that it has often been seen as attempting to reach a judgment as to the legality of the Commonwealth that has supplanted Charles, or at least its right to command obedience from his former subjects. Those who wished to assert the legitimacy of the new regime had formidable obstacles to overcome, particularly if they wished to argue from within the framework of the existing law.³⁷

A number of different approaches to the problem of legitimacy were adopted. Two contrasting ones were those of Marchamont Nedham, in *The Case of the Commonwealth of England Stated* and John Milton, in *The Tenure of Kings and Magistrates* and *Eikonoklastes*. Nedham argued that all regimes rested ultimately on conquest — the title of his second chapter is ‘That the power of the sword is, and ever hath been, the foundation of all titles to government’³⁸ — and saw legality as of subsidiary importance in the replacement of one regime by another. Milton’s argument was quite different: according to him, a king was entrusted with governmental power by his people, who retained the right to withdraw that power even if he had not abused it:

³⁶ This distinction will be elaborated upon below, pp. 54–5.

³⁷ As Norbrook puts it, the ‘execution was an extreme measure which involved overriding the law, and it thus provoked opposition not only from the king’s supporters but Levellers and other civilian politicians who feared the power of the army’: David Norbrook, *Writing the English Republic: Poetry, Rhetoric and Politics, 1627–1660* (Cambridge: Cambridge University Press, 1999), p. 194.

³⁸ Marchamont Nedham, *The Case of the Commonwealth of England, Stated*, ed. Philip A. Knachel (Charlottesville: University Press of Virginia for the Folger Shakespeare Library, 1969), p. 15.

It follows lastly, that since the King or Magistrate holds his autoritie of the people, both originally and naturally for their good in the first place, and not his own, then may the people as oft as they shall judge it for the best, either choose him or reject him, retaine him or depose him, though no Tyrant, merely by the liberty and right of free born Men, to be govern'd as seems to them best.³⁹

A third approach was that of the writers, typified by Anthony Ascham, John Dury and Francis Rous, who argued in favour of the Engagement to the new regime.⁴⁰ John Wallace has claimed that these writers were not attempting to establish the legitimacy of parliament's rule, but only to make the case for the lawfulness of submitting to it.⁴¹ Royalists maintained that the subjects of the late king now owed a duty of allegiance to his son and heir, and therefore had no right to offer obedience to usurpers. Whether people could legitimately take the Engagement was a question of enormous and immediate importance but, according to Wallace, it had no direct implications for the lawfulness of the government. Arguably, Wallace's concept of legitimacy is too absolute, in that it assumes that, unless a governing power has a clear entitlement against all the world, its claims are worth little. On the other hand, it could just as well be argued that, if people submitted to the government and engaged themselves not to oppose it, they would lose the right to withhold obedience. As a result, it would become a lawful government *as against them*, whatever claims Charles II might have against it and whether or not other sovereign powers recognized it. Indeed, Wallace acknowledges that some presbyterians and some Levellers had grounds for their suspicions that this was the aim of the oath:

the presbyterians, whose ministers were to offer the sole vocal resistance, had much justification for regarding the oath as an attempt to make an illegal government lawful. Lilburne regarded it as a trick ... If this was the purpose

³⁹ Milton, *Tenure of Kings and Magistrates*, p. 13.

⁴⁰ The Engagers are discussed by Quentin Skinner, 'History and Ideology in the English Revolution', *Historical Journal* 8 (1965), pp. 151–78, esp. at pp. 162–71 and by John M. Wallace, *Destiny his Choice: the Loyallism of Andrew Marvell* (Cambridge: Cambridge University Press, 1968), pp. 30–68.

⁴¹ He argues that 'critics who have held that Ascham ... confused might with right have not seen that Ascham, like Rous, rigorously confined himself to a right of obeying, and that the right to rule (supposedly confused with might) was no part of his argument': Wallace, *Destiny his Choice*, p. 56.

which the presbyterians attributed to the Engagement, it was not realized in practice, and the House appears to have been happy to settle for a much less positive and affirmative reading of its oath of allegiance.⁴²

What Wallace sees as Ascham's calculated avoidance of the question of the government's right to command obedience, as distinct from the individual's right to offer it, is not an aspect of the latter's thought that is emphasized by Skinner, who treats him as a conquest theorist.⁴³ Whether or not Wallace is right, Ascham's position exemplifies the difficulties involved in defending the lawfulness of the government.

It is clear from the foregoing that defence of the Commonwealth required one to step outside the ordinary law of the land and to appeal to principles which, their proponents claimed, had their basis in the law of nations (conquest theory) or in natural or divine law (a fiduciary relationship between ruler and ruled). Those alleged principles were disputed, and the activity of defending the Commonwealth and/or the regicide was of its very nature contentious.

Its focus on 'ancient rights'⁴⁴ may make it seem unlikely that Marvell's 'Horatian Ode' is concerned only tangentially with the legitimacy of the Commonwealth government. Yet, it may be the case that Marvell (like Ascham as interpreted by Wallace) found this a difficult or inopportune question to address head-on. An attempt will be made in this chapter to show that, though it is a question on which the poem touches, the the legitimacy of the government is not the central concern of the 'Horatian Ode', and that Marvell may have had reason, so as to further what *was* his central concern, to leave the question undetermined.

At least since the controversy between Cleanth Brooks and Douglas Bush in the 1940s and 50s, scholars and critics have disagreed strongly as to the degree of

⁴² Wallace, *Destiny his Choice*, pp. 48–9.

⁴³ 'It was frequently claimed, for example, by Anthony Ascham — who has been regarded as the most significant of these theorists — that the right to rule was "a thing always doubtful", and that it "would be ever disputable in all Kingdoms, if those Governours who are in possession should freely permit all men to examine their Titles": Skinner, 'History and Ideology in the English Revolution', p. 163, citing Ascham's *A Discourse: Wherein is Examined, What is Particularly Lawfull during the Confusions and Revolutions of Governments* (1648) pp. 1–12.

⁴⁴ See the discussion of lines 37–40, beginning at p. 45 below.

irony to be found in the Ode's praise of Cromwell and the extent to which the irony negates the praise. The quality that has been found in the poem perhaps more than any other is 'balance'. John M. Wallace, who sees the poem as arguing, however conditionally, for the acceptance of Cromwell as a legitimate ruler, says that 'a tentative suspension of final judgment would better describe the tone of the ode than the customary "impartiality"', while Barbara Everett says that 'Horace several times uses a phrase which defines Marvell's style almost more aptly than his own: *animus aequus*, "a mind well-balanced"'. Blair Worden argues that the 'poem does not merely resist a straightforward Royalist reading. It resists any partisan reading,' adding that 'elusiveness appears to be at its heart'.⁴⁵ The reading of the poem as balanced has more recently provoked some strong dissent, particularly from David Norbrook,⁴⁶ but it is easy to see why it has persisted.

The Ode's elusiveness is probably best exemplified in the treatment of Julius Cæsar, as portrayed in Lucan's *Pharsalia* and in May's translation and continuation of that work. John S. Coolidge has pointed out that Cæsar's is 'the most ambivalent name in history'⁴⁷ and the ambivalence is fully exploited by Marvell. The poem's opening lines echo Lucan's description of the response of the youth of Ariminum on hearing that Cæsar was about to cross the Rubicon. In a poem on the occasion of Cromwell's return from a victory abroad, this at least implies that there is reason to be wary of his intentions. On the other hand, the first explicit reference to Cæsar is not specifically to Julius Cæsar but to the generic figure of an emperor, and sees him as a

⁴⁵ Wallace, *Destiny his Choice*, p. 103, Barbara Everett, 'The Shooting of the Bears: Poetry and Politics in Andrew Marvell', in *Poets in their Time: Essays on English Poetry from Donne to Larkin* (Oxford: Oxford University Press, 1991), pp. 32–71 (p. 48), Blair Worden, 'Andrew Marvell, Oliver Cromwell, and the Horatian Ode', in *Politics of Discourse: The Literature and History of Seventeenth-Century England*, ed. Kevin Sharpe and Steven N. Zwicker (Berkeley, Los Angeles and London: University of California Press, 1987), pp. 147–80 (p. 172).

⁴⁶ See David Norbrook, 'Marvell's "Horatian Ode" and the Politics of Genre', *Literature and the English Civil War*, eds. Thomas Healy and Jonathan Sawday (Cambridge: Cambridge University Press, 1990) 147–69 and Norbrook, *Writing the English Republic*, especially chapter 6, pp. 242–98.

⁴⁷ John S. Coolidge, 'Marvell and Horace', *Modern Philology* 63 (1965), pp. 111–20 (p. 116).

figure, not of Cromwell, but of Charles:

Then burning through the Air he went,
And Pallaces and Temples rent:
And *Cæsars* head at last
Did through his laurels blast. (ll. 21–4)

The Roman emperor was entitled to wear the laurel crown, and laurels were believed to be immune from lightning's strike,⁴⁸ so the dominant idea here is that the laurel has failed to protect Cæsar (Charles) from Cromwell, who has gone 'burning through the Air', like lightning. However, Marvell also makes use of a device that recurs in his poetry,⁴⁹ the confusion of subject and object, to add an additional layer of meaning to the primary sense of the lines. As Barbara Everett puts it:

It has often been noted that Marvell leaves *cruces*, like that of the double Cæsar. Charles is, and Cromwell becomes, Cæsar. But whose head, precisely, here bursts through whose laurels? The crux is in fact syntactical, and depends on the fact that *blast* in this last line may be either transitive or intransitive (as 'Cæsar's head' is either subject or object) ...⁵⁰

In the primary meaning, *blast* is transitive, with 'he' (l. 21) as its subject and Cæsar's (Charles's) head as its object. However, Everett is right to point out that it is also possible to read the verb as intransitive, with Cæsar's (Cromwell's) head as its subject, blasting through the laurels and replacing the head of the king under them. Marvell's employment of ambiguity at this point underlines what Coolidge has identified as the ambivalence of the name Cæsar. In line 101, the double character of Cæsar is made explicit, when we are told that Cromwell will 'ere long' be a Cæsar to Gaul. Coolidge points out, too, that Julius is not the only Cæsar present in the Ode. In particular, Cromwell's ungirding of his 'Sword and Spoyls' (l. 89) resembles Octavian's resignation of his offices and powers to the Senate, who promptly restored them to him, with the new title Cæsar Augustus.⁵¹ Cromwell's submission, it is implied, may be in a

⁴⁸ *Poems and Letters*, I, 298, note to l. 24 and *Poems of Andrew Marvell*, ed. Smith, p. 274, note to l. 24.

⁴⁹ See Introduction, above.

⁵⁰ Barbara Everett, 'The Shooting of the Bears: Poetry and Politics in Andrew Marvell', p. 46.

⁵¹ Coolidge, 'Marvell and Horace', p. 115.

similar way temporary and tactical.

The various elements in the Ode whose reconciliation in different ways leads to various readings of the poem include:

(a) Unequivocal praise of Cromwell as a general and soldier, particularly in the later part of the poem, starting at line 73;

(b) Equivocal meditation on Cromwell's 'legitimacy' and his suitability as a ruler;

(c) Sympathy for the king and, possibly, admiration for his conduct on the scaffold;

(d) Apparent regret for the overthrow of 'ancient rights' and, presumably, therefore a belief that the supplanting of the monarchy was an unjust usurpation;

(e) Allusions both to Lucan's (and May's) Julius Cæsar and to Horace's Augustus;

(f) Other indications of irony at Cromwell's expense, such as the reference to the Bergamot pear in line 32.⁵²

Some of these elements appear to pull strongly in different directions. For example, Blair Worden insists that the irony directed at Cromwell cannot be allowed to undermine the praise, otherwise the poem is rendered incoherent. According to him:

The objection to that [Royalist] reading is not a contextual but a literary one. The Royalist interpretation alerts us to the sharpness of individual lines, but deprives the ode of momentum and of any intelligible sequence of thought, not to say its gravity and depth. What is described as irony is mere sarcasm ... Nothing reverberates.⁵³

Christopher Wortham makes a similar point when, having cited three passages, starting with lines 79–80, he comments that '[i]t takes a lot of contortion to read all

⁵² William R. Orwen, 'Marvell's "Bergamot"', *Notes & Queries* 200 (1955), pp. 340–1 points out the association of the pear with royalty, and hence to the implication that Cromwell was already cultivating his ambition before he left his 'private Gardens'.

⁵³ Worden, 'Andrew Marvell, Oliver Cromwell and the Horatian Ode', p. 172. See also, Blair Worden, 'The Politics of Marvell's Horatian Ode', *Historical Journal* 27, 3 (1984), pp. 525–47 (p. 540).

of these instances of praise as being ironically directed.⁵⁴ Yet irony there is: in the reference to the Bergamot pear, in the implicit comparison at the beginning of the poem between the returning Cromwell and Julius Cæsar crossing the Rubicon,⁵⁵ in the suggestion that Cromwell tricked Charles into making his escape attempt from Carisbrooke Castle and in the ambiguities of ‘yet’ and ‘still’ in lines 81–2, to take a few examples. Perhaps more fundamentally, the apparent attempt to legitimize Cromwell, which will be explored in detail below, is not easily reconciled with the suggestion that ‘Justice’ is wholly on the side of the ancient rights and the monarchy.

Lines 37–40, which contain both the poem’s first explicit reference to justice and its invocation of ancient rights, might be said both to encapsulate the argument of the poem as a whole and to represent the historical process with which the poem is attempting to deal.

Though Justice against Fate complain,
And plead the antient Rights in vain:
But those do hold or break
As Men are strong or weak.

Barbara Everett has commented that the ‘syntax of the stanza concerning justice and fate is interestingly broken and involute, as though the thinking of the poem checked there in a knot before moving on again.’⁵⁶ The breach in the sentence stands for the catastrophic disruption that has occurred in the government of the country. The part of the sentence that comes before the breach is calm, measured and, in its concern with ancient matters, suggestive of a prolonged period of stability. The second part, though metrically regular, contrives to suggest the breaking up of the former stability and continuity, through the use of heavily stressed monosyllables. It is notable that the syntactic disruption is effected with such economy. All that is needed to render

⁵⁴ Christopher Wortham, ‘Marvell’s Cromwell Poems: An Accidental Triptych’, in *The Political Identity of Andrew Marvell*, ed. Conal Condren and A. D. Cousins (Aldershot: Scolar Press, 1990), pp. 16–52 (p. 21).

⁵⁵ On the Ode’s use of Cæsar, and of Lucan’s *Pharsalia*, see in particular, R. H. Syfret, ‘Marvell’s “Horatian Ode”’, *RES* n.s. 12 (1961), pp. 160–72 and John S. Coolidge, ‘Marvell and Horace’.

⁵⁶ Barbara Everett, ‘The Shooting of the Bears: Poetry and Politics in Andrew Marvell’, p. 51.

the sentence syntactically unexceptionable is the simple excision of the word 'But'. The rupture is not just a matter of syntax, however: even without 'But', the two halves of the statement do not fit easily together. The words of the first half are unmistakably juridical: 'Justice', 'complain', 'plead', and 'Rights', together with the reminder that these last derive a considerable part of their force from their survival from 'antient' times. In the second part, the considered 'Though' is replaced by 'But' and the blunt, forceful words that follow it have less to do with law than with might: 'hold', 'break', 'strong' and, of course, 'Men', implying that human justice is neither infallible nor perfectible.

The poem might be taken as depicting the defeat of justice and, indeed, has been so interpreted. Blair Worden, who finds in it suggestions of both Machiavelli and Hobbes, comments:

Although Marvell's treatment of Cromwell's constitutional intentions raises a live issue in the summer of 1650, the vision of the poem is hardly a constitutional one. By 1650 the constitution was dead. It had been put to the sword in the winter of 1648–49 by Pride's Purge and the regicide. Like Hobbes, whose *Leviathan* appeared in 1651, Marvell had moved beyond arguments about legality ...⁵⁷

If, however, Marvell has moved beyond arguments about legality, he does not seem to have found it possible to move beyond arguments about the related question of *legitimacy*. It will be argued here that the Ode describes a process of legitimation which Cromwell undergoes, but it is striking that the Ode's account of Cromwell's growing into legitimacy is couched in metaphorical terms whose correspondence to actual events is imprecise and elusive. In the early part of the poem, he has come from his *private* gardens from which, by industrious valour, he *climbs*. That would suggest that he is, at the very least, an unsuitable person to supplant and replace a king. If, by the end of the poem, he has become 'fit for highest Trust' (l. 80) and the right person 'to sway' (l. 83), he must in the meantime have acquired a legitimacy

⁵⁷ Blair Worden, 'The Politics of Marvell's Horatian Ode', p. 532.

that he lacked to begin with.

In 1977, Jim Swan pointed out that, rather unexpectedly, the Ode contains imagery associated with *cæsarean* section. Swan interprets this imagery psychologically, saying that the poem views power ‘from an ambivalent perspective of desire to be enclosed within a nourishing body politic and, at the same time, to escape or smash all such enclosures as confining and dangerous.’⁵⁸ According to Swan:

Cromwell divides his fiery way ‘through his own side’ (15), like lightning, ‘Breaking the clouds where it was nursed’ (14). The figures, oddly enough, suggest a birth by *cæsarean* section, though the oddness diminishes when we remember that Marvell is alluding to Lucan’s portrait of Julius Cæsar, whose aggressive and ambitious energies are blamed for the destruction of the Roman republic, energies which Lucan compares to lightning:

qualiter expressum ventis nubila fulmen
 aetheris impulsu sonitu mundique fragore
 emicuit ... (i. 151–3)
 As lightning by the wind forc’d from a cloud
 Breakes through the wounded aire with thunder loud.
 (Thomas May’s 1635 translation)

Of course, politically speaking, Cromwell’s ‘side’ is his own party, but the simile — which Marvell has clearly adapted to his own purpose — suggests that Cromwell, like lightning, breaks out of an enclosing body where he has been *nursed* ... (p. 3)

Swan goes on to point out that the term ‘*cæsarean* section’ does not derive from anyone named Cæsar, but from the *lex cæsarea* which provided that the procedure should be performed on a dying mother in order to save her child. Pliny’s *Natural History* associated the term with Julius Cæsar, and Philemon Holland, in his translation of Pliny, added the idea that men who had been born in this manner were fortunate and particularly active. Given the presence in the Ode, as has already been noted, of the first two Cæsars, and Pliny’s association of the surgical procedure with Julius Cæsar, it is (as Swan points out) rather less surprising than it might at first appear, that such imagery should be found in the poem.

⁵⁸ Jim Swan, “‘Cæsarean Section’: The Destruction of Enclosing Bodies in Marvell’s “Horatian Ode””, *Psychocultural Review* 1 (1977) pp. 1–8, p. 1.

However, while Swan presents a persuasive argument for recognizing the imagery of cæsarean section, he misses an important part of its significance. Specifically, he pays little attention to the fact that it is through Cromwell's *own* side that he divides his fiery way. If this is an image of cæsarean section, then perhaps the most noteworthy thing about it is that, according to it, Cromwell is self-delivered or self-generating: his own sole parent. The contrast with the king, whose right to govern depends on his descent from a line of ancestors, could hardly be clearer. What Cromwell lacks, and Charles has, is a right that can be traced back, if not to 'antient' times, then at least several hundred years.

It is clear, too, that if Cromwell is to acquire a legitimacy, Charles's right must also be brought to an end. If Swan is persuasive in pointing out the cæsarean imagery of the Ode, a somewhat more tentative argument may be made that there is also imagery that associates Charles, too, with difficult, obstructed birth. There have been two pieces in *Notes & Queries*, twenty-six years apart, arguing that there is a play on the word 'case' in '*Caresbrooks narrow case*'.⁵⁹ It is clear that in its context, the primary meaning of the word is situation or predicament and that the case is narrow, or straitened, because it leaves Charles with no room to move. However, both Orwen and Dingley suggest that there is also an allusion to Charles's reported attempt to escape through a window at the castle, and that 'case' therefore also means casement. This argument is persuasive, though Orwen's reading dismayed the reviewer in the *Year's Work in English Studies*, who felt that such an interpretation entailed the royal actor's participation in a broad farce.⁶⁰ It seems strange, however, that someone should recognize a play on 'case' without at the same time acknowledging that, in the earlier part of the seventeenth century, puns on this word were very often indecent.

⁵⁹ William R. Orwen, 'Marvell's "Narrow Case"', *Notes & Queries*, 200 (1955), p. 201 and R. J. Dingley, "'Caresbrooks Narrow Case': A possible allusion in Marvell", *Notes & Queries*, 28 (1981), pp. 49–51.

⁶⁰ Arnold Davenport, 'Earlier Stuart and the Commonwealth Period, excluding Drama', *Year's Work in English Studies*, 36 (1955), pp. 149–65 (p. 156).

(Examples abound, and two should be enough to illustrate the point: in *The Shoemakers' Holiday*, Sc. X [III.iv], 100–03, Margery says of the missing Jane that 'If she has wanted, she might have opened her case to me or my husband, or to any of my men; I am sure, there's not one of them, perdie, but would have done her good to his power', while in *The Changeling*, I.ii.37, Lollio affects to soothe Alibius's worries about Isabella's fidelity with an ostensibly sympathetic "'Tis every man's case'.)⁶¹ If we accept that Marvell might have had in mind such a secondary meaning — or tertiary, remembering 'casement' — we have the picture of the king trapped in a narrow 'case', through which he cannot be delivered, while the man who will replace him has delivered himself, by means of a restless, violent act of division or cutting, through his own side.

This interpretation of 'case' may receive some support from the fact that, if it is correct, there appears to be a play on a word in the following line amounting, one might say, to a near-pun. The word is 'born', and I use the term 'near-pun' because both it and 'borne' are forms of the past participle of the same verb, 'to bear'. According to the *Oxford English Dictionary*, since about 1775 'born' has been used only in the passive voice and in the specific and limited sense of the verb related to parturition. Between 1660 and 1775, though, 'borne ... was generally abandoned, and born ... retained in all senses' (*OED* 'bear', sense 44). The Royal Actor, we are told, is born 'thence' (l. 53) — that is, from 'Caresbrooks narrow case' — to the scaffold. There is little room for doubt that both senses of the word are present to some degree: 'thence' implies movement, and therefore the carrying of the king, but, on the other hand, the idea that he is 'the Royal Actor' *by birth* is difficult to ignore. If the interpretation suggested here is right, as well as showing Charles's being carried from Carisbrooke to the scaffold, Marvell also has the king undergoing a figurative, troublesome birth,

⁶¹ Thomas Dekker, *The Shoemaker's Holiday*, ed. R. L. Smallwood and Stanley Wells, *The Revels Plays* (Manchester: Manchester University Press, 1979); Thomas Middleton and William Rowley, *The Changeling*, ed. Joost Daalder, *New Mermaids series*, 2nd edition, (A. & C. Black, 1990).

followed in very short order by a death which is both calm and bloody, violent and stage-managed. During this short life, Charles can accomplish nothing more than to be born(e). He is passive, whereas Cromwell is indefatigably active. The latter can permit nothing to be done for or to him: he 'Urged his active Star' (l. 12) even before he came to deliver himself of himself.

Near the end of the poem, though, Cromwell has become 'the Wars and Fortunes Son' (l. 113): in its course, he has managed to acquire *two* parents. A case can therefore be made for the claim that the Ode shows Cromwell, through the coincidence of war and fortune, growing into a legitimacy as a ruler that he could not otherwise have hoped to enjoy. This interpretation is consistent with the arguments of those, like Worden, who have argued that Marvell in the Ode is adopting a position very close to Marchamont Nedham's when he described Cromwell in Machiavellian terms as 'the only *Novus Princeps* that ever I met with in all the confines of history'.⁶² The moment may have been right for such an argument. Nedham's *The Case of the Commonwealth of England Stated* (May 1650), which was published just a month earlier and also makes a Machiavellian case, does not mention Cromwell.⁶³

There is, however, at least one possible objection to the alignment of Marvell with Nedham. Unlike Nedham, Marvell seems to feel that the passing of the *ancien régime*, or at any rate of the ancient rights, is not an occasion for unmixed rejoicing. So, while the references to 'industrious valour' and to the parenthood of war and fortune are undoubtedly present in Marvell's poem, they appear to be balanced by a recognition that the claims of the monarchy cannot be dismissed just by bestowing a Machiavellian title on Cromwell.

It might also be argued that, while War and Fortune are certainly *impressive* parents, they cannot be regarded as entirely reputable ones, particularly in a poem

⁶² *Mercurius Politicus* (13 June 1650), cited in Worden, 'Andrew Marvell, Oliver Cromwell, and the Horatian Ode', p. 163.

⁶³ As Norbrook points out: *Writing the English Republic*, p. 251.

that makes so much of its allusions to Lucan's *Pharsalia*. As Coolidge says:

The determining fact about the wretched world that Lucan portrays is that the laws have been silenced by war ('leges bello siluere coactae'), leaving the poem to be dominated by Fortune, particularly, of course, by the notorious Fortune of Julius Cæsar. It is the condition, almost the definition, of war in Lucan that Fortune replaces Justice. Cæsar figures in the poem as the agent and beneficiary of that force in the world which is incompatible with law and to which the world is given over in time of war. He is "the Wars and Fortunes Son." Lucan's response to these conditions is a shrill, recurrent cry of pain.⁶⁴

The possibility should therefore be acknowledged that, by providing Cromwell with such a parentage, Marvell indicates that such legitimacy as he might enjoy is, at best, that of a Julius Cæsar.

There is yet another difficulty with reading the poem as an argument for the legitimacy of Cromwell's government. While he had been the leading figure in orchestrating the regicide, he had, at the time of his return from Ireland, no official governmental function. Blair Worden expresses the ambiguity of his position in these terms:

Oliver Cromwell was the leading personality of the regime which emerged after the execution of Charles I in January 1649. To the surprise of his contemporaries, his pre-eminence received no formal recognition. He was second-in-command of the army, but the army was the servant of the purged house of commons, the rump, of which he was one among many equal members and which was to hold power till he forcibly dissolved it in 1653.⁶⁵

He had been the first president '*pro tempore*' of the Council of State following the execution but had quickly relinquished that role. He was widely suspected of ambition but, since it was not clear exactly how that ambition would be fulfilled, a discussion of the legitimacy of his rule would have been premature. It is — solely, except for the two reference to his fitness for a more exalted office — in his capacity as a military leader and a soldier that the Ode praises him.⁶⁶ He 'could not cease / In

⁶⁴ Coolidge, 'Marvell and Horace', p. 113.

⁶⁵ Worden, 'The Politics of Marvell's Horatian Ode', pp. 526–7.

⁶⁶ Nicholas McDowell remarks that Cromwell 'embodies the arts *only* of war and Machiavellian cunning from the beginning to the end of the "Ode": Nicholas McDowell, *Poetry and Allegiance in the English Civil Wars: Marvell and the Cause of Wit* (Oxford: Oxford University Press, 2008) p. 11 (emphasis added).

the inglorious Arts of Peace' (ll. 9–10), and it does not seem likely that he will learn how to do so in the future. What the Ode foretells for him is more war and more victory. Lines 105–12 predict, with an accuracy that may have come as a surprise to the author, Cromwell's suppression of the Scottish threat; lines 101–04, less accurately, successful invasions of France, Italy and other 'states not free'. On the other hand, the poem does *not* predict political or statesmanlike activity at home, of the kind that will be described in *The First Anniversary*. Instead, Cromwell is exhorted to 'keep thy Sword erect' (l. 116).

Some of the more persuasive readings of the later Cromwell poems and of 'Upon Appleton House' have focused on Marvell's attempt to adopt the role of a tactful adviser, gently and discreetly indicating to powerful men the way they ought to act. In 1968, M. J. K. O'Loughlin suggested an interpretation of 'Upon Appleton House' in which he saw Marvell as demonstrating the inadequacy of either a solely active or a solely contemplative life, creating 'a rich metaphoric texture which transforms this deliberative structure into a vision of historical process in which the opposed possibilities of retirement and involvement can be imaginatively "married".⁶⁷ Since Fairfax's circumstances at the time included rather more of retirement than of involvement, O'Loughlin detects in the section of the poem dealing with Fairfax's garden, a 'delicate accent of reproof which hovers over the hyperbolic language of celebration' (p. 127), adding however:

the very tact of such a summons to involvement seems to manifest on the poet's part what might be called the rhetorical equivalent of Fairfax's political withdrawal. (p. 129)

In a similar vein, John Creaser writes that 'the sweating and burdened hall at Apple-

⁶⁷ M. J. K. O'Loughlin, "This Sober Frame: A Reading of "Upon Appleton House", in *Andrew Marvell: A Collection of Critical Essays*, ed. George de F. Lord (Englewood Cliffs, NJ: Prentice-Hall, 1968), pp. 120–42 (p. 124).

ton implies not only that Fairfax is great but that he simply does not belong there.⁶⁸ Derek Hirst and Steven Zwicker, too, suggest an interpretation of ‘Upon Appleton House’ that has Marvell assuming a didactic role though not, in their case, one that seeks to steer Fairfax back towards active involvement in public life. We shall return to their reading of the poem in chapter 3; for present purposes, it is sufficient to note that they show the poet, on the one hand, ‘attenuating’ or ‘extenuating’ Fairfax’s crises by presenting him as being impervious to the ‘excesses and misuses of retreat’ while, on the other, warning the retired general of the dangerous attractions of hermeticism: ‘To school the patron under the eaves of his own house demanded both daring and unusual subtlety.’⁶⁹

In the meantime, Hirst had arrived at a similar approach to *The First Anniversary*, arguing that Marvell’s uncharacteristic adoption of millenarian language was part of an attempt to compete with the Fifth Monarchists for influence over Cromwell.⁷⁰ Though they are not in agreement as to the content of the instruction, O’Loughlin and Creaser on the one hand, and Hirst and Zwicker on the other, are at one in seeing Marvell as seeking to influence a powerful man, while employing the tact and discretion that are necessary when a client undertakes the task of instructing a patron. Similarly — and evidently taking his cue from Hirst and Zwicker — Charles Larson argues that the third Cromwell poem should be seen not so much as an elegy for the deceased Lord Protector as a hortatory poem directed at his son Richard, with the aim of persuading him and the poem’s other readers that he could be an effective

⁶⁸ John Creaser, ‘“As one scap’t strangely from Captivity”: Marvell and Existential Liberty’, in *Marvell and Liberty*, ed. Warren Chernaik and Martin Dzelzainis (Basingstoke: Macmillan, 1999), pp. 145–72 (p. 153).

⁶⁹ Derek Hirst and Steven Zwicker, ‘High Summer at Nun Appleton, 1651: Andrew Marvell and Lord Fairfax’s Occasions’, *Historical Journal* 36, 2 (1993), pp. 247–69, especially at pp. 257–60.

⁷⁰ Derek Hirst, ‘“That Sober Liberty”: Marvell’s Cromwell in 1654’, in *The Golden & the Brazen World: Papers in Literature and History, 1650–1800*, ed. John M. Wallace, Publications from Clark Library Professorship, UCLA, 10 (Berkeley, Los Angeles and London: University of California Press, 1985), pp. 17–53.

successor to his father.⁷¹

The 'Horatian Ode' too has been seen as a hortatory poem, though of a different kind: John S. Coolidge sees its encomium of Cromwell as conditional praise, urging the leader towards the virtues that it ascribes to him: 'If the ruler addressed falls off from the terms in which — and on which — the poet praises him, the praise will come to read, as Marvell's "Ode" does to readers who dislike Cromwell, as cruel, quiet irony.'⁷² The difficulty with reading the Ode, like the later Cromwell poems, as an appropriately deferential attempt to influence its subject, is that in 1650, so far as we know, Marvell did not have any reason to suppose that his advice would be heard, still less that it would be listened to. When he wrote 'Upon Appleton House' he was living in Fairfax's household and entrusted with the tuition of his daughter. By the time he came to write *The First Anniversary*, he had been in direct correspondence with Cromwell himself.⁷³ In 1650, he was not in a position of such proximity to power, so it is less likely that he then saw himself as occupying the role of tactful adviser. It is possible, though, that as an ambitious and well-educated young man, without much in the way of material wealth and with a distinct liking for privacy, he was already aiming at the performance of such a function. If so, he might, to borrow James Loxley's phrase, have been 'trying the mode on for size,'⁷⁴ or simply practising.

At any rate, if we attempt to read the Ode as the utterance of a (would-be) client, exploring the possibilities open to his (prospective) patron, while tactfully and unobtrusively suggesting which course he considers it would be wiser to adopt, it becomes easier to resolve at least some of its apparent contradictions. As I have already suggested, the poem's praise of Cromwell as a soldier and as a military leader is unequivocal. Furthermore, what might seem to be at best equivocal praise of a

⁷¹ Charles Larson, 'Marvell's Richard Cromwell: "He, Vertue Dead, Revives"', *Mosaic* 19.2 (1986), pp. 57–67.

⁷² Coolidge, 'Marvell and Horace', p. 119.

⁷³ See *Poems and Letters*, II, 304–5.

⁷⁴ See below, p. 62.

statesman comes to seem more straightforward if it is applied to a general with no governmental role. This is clearly true of the restlessness and arguably true also of the 'wiser Art' (l. 48) with which, Marvell alleges or assumes, Cromwell induced the king to chase himself into a trap. The difference could be said to be that between an admirable grasp of military tactics and an unfortunate command of duplicitous policy. As has also been noted, Cromwell's predicted future holds further wars and new victories rather than legislative programmes and public administration. This is particularly noticeable at the poem's end, when the general is urged:

... for the last effect
 Still keep thy Sword erect:
 Besides the force it has to fright
 The Spirits of the shady Night,
 The same Arts that did gain
 A *Pow'r* must it *maintain*. (ll. 115–20)

For John Carey, at least, the poem's close is another example of 'the self-defeating reversibility of our actions': 'Force does not establish power; it establishes, simply, the need to use force.'⁷⁵ However, such a pessimistic interpretation of the couplet is difficult to reconcile with the hortatory tone of the poem's ending. One can see Marvell's admonition as suggesting that the overthrow of Charles I has been an example of self-defeating reversibility only if one reads the poem's final lines as implying that the new regime will expend so much of its efforts on self-defence that it will be able to accomplish little else. If, however, we take the poem to be addressed to the present commander of the army, rather than to the presumptive future governor of the country, the advice hardly seems pessimistic at all. Clearly, the country will continue to need defence; what else should the successful soldier do but continue to provide it?

The possibility should therefore be considered that the Ode is calculated to encourage the victorious general to remain in his present role and to refrain from

⁷⁵ John Carey, 'Reversals Transposed: an Aspect of Marvell's Imagination', in *Approaches to Marvell*, ed. Patrides, pp. 136–54 (p. 147).

assuming a new one. A government cannot be wholly concerned with warlike activities. Since, previously, Cromwell's restlessness made him unsuitable for 'the inglorious Arts of Peace', it may be a mistake for him now to return to them, even in a capacity much more exalted than that which he formerly filled. He should indeed be a Cæsar, but 'to *Gaul*' (l. 101), not to Rome: the conquering general Julius Cæsar, not the would-be emperor who crossed the Rubicon or, arguably, the formally and temporarily submissive Augustus, laying his 'Sword and Spoils ... at the *Publick's* skirt' (ll. 89–90). In support of this interpretation of the poem one might also adduce the fact that the first of the two explicit assertions of Cromwell's fitness for government (l. 80) is ascribed to the Irish, who might be qualified to judge his goodness and justice but who — particularly in defeat — are not in a position to pronounce upon the suitability of a potential ruler of England.⁷⁶

The advantage of this interpretation is that it exempts Cromwell from much of what might be taken as the poem's submerged condemnation, which attaches largely to the Commonwealth or the Parliament. It is quite possible that a poem may praise a conquering general — particularly one who does not intend to rise above that role — without arriving at any conclusion as to the legitimacy of the regime that he serves. A country governed by a usurper still needs, and is entitled to, defence against external enemies. On this view, when Cromwell was 'the force of angry Heavens flame' (l. 26), scourging his own country, and dividing his fiery way 'thorough his own Side' (l. 15), his actions may have been unjustified, but (external) war and fortune have ensured that he found a role where his talents and abilities could be utilized for his country's benefit rather than to its detriment. Worden has pointed out the apparent contradic-

⁷⁶ Marvell's lines about the defeat of the Irish have occasioned some puzzlement among critics. Jim Swan, whose remarks about cæsarean section were discussed above, summarized the reaction of many readers by commenting: 'It is difficult, but apparently necessary, to believe that Marvell wrote these lines without scathing irony': Swan, "'Cæsarean Section': The Destruction of Enclosing Bodies in Marvell's 'Horatian Ode'", p. 6. Norbrook, *Writing the English Republic*, pp. 246–7, identifies 'some wholly non-ironic praise of Cromwell ... in an Irish Catholic source roughly contemporary with the 'Ode''.

tion between line 37, in which ‘justice has vainly protested against the fate that has advanced him’, and line 79, which ‘calls him “just”’.⁷⁷ While this discrepancy might be accounted for on the hypothesis that the poem shows Cromwell growing into a legitimacy that he lacked at the outset, perhaps a more satisfactory explanation is that so long as he directs his warlike abilities against the threat of a foreign enemy, he acts justly; when he fights at home — even against ‘the Emulous’ (l. 18) — he is less entitled to claim that justice is on his side.

If it is correct, then, that the Ode seeks — however tentatively — to persuade Cromwell to continue in his military role and eschew a governmental one, part of the argument might be that, in the former capacity, he serves not merely the regime but the country, and so avoids the taint of illegitimacy that affects the former. At the same time, though, the legitimation from which Cromwell benefits in the course of the poem seems to attach to the Commonwealth also. In the early part of the poem, we are told that Justice has cause for complaint against Fate, and that ancient rights ‘do hold or break / As Men are strong or weak’ (ll. 39–40). This at least implies that the Commonwealth is a usurpation, with justice clearly ranged against it. On the other hand, by the end of the poem, it is suggested that Cromwell’s submission to this usurped authority is a cause for rejoicing:

Nor yet grown stiffer with Command,
But still in the *Republick’s* hand:
...
He to the *Commons Feet* presents
A *Kingdome*, for his first years rents:
 And, what he may, forbears
 His Fame to make it theirs:
And has his Sword and Spoils ungirt,
To lay them at the *Publick’s* skirt. (ll. 81–2, 85–90)

The momentary uncertainty as to what, exactly, is forborne by Cromwell reflects the uncertainty, in which the poet seems to have shared, about his intentions. Until the

⁷⁷ Worden, ‘Andrew Marvell, Oliver Cromwell, and the Horatian Ode’, p. 155.

reader gets past the end of line 87, it seems that the object of 'forbears' might be the preceding 'what'. That would mean that Cromwell forbears to do what he might have done, either by right or by force. However, it immediately becomes clear that the object of the verb can only be his 'Fame' and that 'what he may' is an adverbial clause, meaning (as Nigel Smith explains) 'in so far as he can'.⁷⁸ For an instant, the picture of a supremely powerful, though forbearing, Cromwell is placed before us, only to resolve itself into that of a man who has as much control over his reputation as the average human has over his or hers.

The passage on Cromwell's forbearance is immediately followed by the metaphor of the falcon which 'The Falckner has ... sure' (l. 96). A continuous passage of 15 lines, then, more than a tenth of the poem, is devoted to Cromwell's obedience to and control by the Parliament. This makes it difficult to argue that the thrust of the Ode is to praise Cromwell as a highly successful — as well as 'good' and 'just' (l. 79) — soldier and general, while carefully withholding such praise, and any recognition, from the government to which he was so obedient. It might be closer to the truth to say that Marvell hints at the regime's illegitimacy, because to do so tends to urge Cromwell in the direction in which the poet wishes him to go, while refraining from explicit condemnation, in case Cromwell should in the event decide to take a different course.⁷⁹

If it is recognized that the poem treats Cromwell's praiseworthiness and the regime's legitimacy as separate questions whose answers are independent of each other, it begins to seem more likely that what the Ode says as to the second question is not so much equivocal or ambivalent as mutedly critical. Charles's restraint while on the scaffold is noteworthy in this context. It is presented as an occasion for praise,

⁷⁸ *The Poems of Andrew Marvell*, ed. Smith, p. 277, note to l. 87.

⁷⁹ A later poem, George Wither's 'A Suddain Flash' (see above, p. 35) makes great play of the poet's uncertainty about Cromwell's actual intentions, while making clear his approval of the Protector's refusal of the crown. Wither, too, seems to be engaging in what Coolidge terms 'conditional praise'.

though there is initially a suspicion that that praise is partly grounded upon the king's relinquishing of his entitlement:

He nothing common did or mean
 Upon that memorable Scene:
 But with his keener Eye
 The Axe's edge did try:
 Nor call'd the *Gods* with vulgar spight
 To vindicate his helpless Right;
 But bow'd his comely Head,
 Down, as upon a Bed. (57–64)

However, to say that Charles did not call on heaven to *vindicate* his right is not the same thing as to say that he did not *assert* it, still less that he surrendered or renounced it. Marvell does not therefore go as far as the pro-Engagement writers cited by John Wallace. They had argued that Charles's behaviour constituted an implied abdication, or perhaps a release of his subjects from their oath of allegiance, and from their corresponding duty to withhold obedience from the new regime.⁸⁰ Nevertheless, it is Charles's restraint that Marvell chooses to stress and his reasons for doing so are worth examining. It is possible that he considers Charles's silence praiseworthy merely because it is dignified: since it is unthinkable that it should have escaped the notice of an omniscient deity that the ancient rights of the English monarchy are about to be violated, Charles is not under a *duty* to say anything; if God wishes to intervene to prevent that violation, he will do so, irrespective of any plea that the king might make. At most, then, silence implies acquiescence, not in the regicide or in the destruction of the monarchy, but simply in the doing of God's will.

The reference to the *assurance* of the 'forced Pow'r' (l. 66) similarly presents the appearance of ambiguity, but this resolves itself on closer examination into a withholding of approval from the regime. To 'assure' means, among other things, to assign or transfer a property right, particularly a leasehold interest. On the face of it, to describe the power as having at first been 'forced' or usurped, but as subsequently

⁸⁰ Wallace, *Destiny His Choice*, pp. 79–84.

having become 'assured', is to imply that a process of legitimation, analogous to that apparently undergone by Cromwell, has taken place. However, to draw this conclusion would be to overlook the fact that it is the anonymous, if memorable, 'Hour' (l. 65), not the king, that effects the assurance. Indeed, these lines, taken in combination with the king's refusal to call for vindication of his right, rather tend to make it clearer that his silence is not to be taken for acquiescence: the assurance, such as it is, did not proceed from him. Marvell is indeed presenting an ambiguous picture but that is not to say that the ambiguity is incapable of resolution.

It should, at any rate, now be clear that the Ode's equivocations (to put it at its weakest) and ironies tend to undermine the government, not the general, though this distinction is blurred by the obvious possibility that the general and the government might soon become closely identified. In this respect, the emphasis on Cromwell's obedience is itself one of the most ambivalent elements in the poem. On the one hand, he is under the control and direction of a regime that is or may be unjust and lacking any lawful authority. On the other, precisely because he is under its control, he is not controlling *it*, and so cannot be held responsible for its illegal acts. He is, at worst, doing his duty and doing it well.

Whether Marvell expected or intended his poem to be read by Cromwell it is not possible to say. The Ode evidently enjoyed some manuscript circulation, though perhaps not until several years after the occasion of its writing.⁸¹ What can be said is that the Ode is couched in terms which assume (perhaps fictitiously) that it *will* be read by its subject. It is — explicitly so, in the case of the final eight lines — addressed to Cromwell. It either seeks to influence him or is framed as a poem would be if it sought to influence its subject.

⁸¹ Paul Hammond, 'Dryden's Use of Marvell's *Horatian Ode* in *Absalom and Achitophel*, *Notes & Queries* 35 (1988), pp. 173–4. McDowell, *Poetry and Allegiance in the English Civil Wars*, pp. 254–8, finds evidence that Abraham Cowley, like Dryden, had read Marvell's 'Ode'. Like Dryden, Cowley read it as panegyric to Cromwell.

'Irrevocable Sentence': Justice and the poet's role

The second of the poems in which Marvell uses the expression 'ancient rights' is 'Tom May's Death' which is, if anything, more clearly concerned than even the Ode with the questions of justice. The poem proposes, in the first place, that the poet has a role — in effect a role of last resort — in upholding justice when the judge and the churchman have been deterred from doing so by the threat or the actuality of violence. In the second, it considers the question of a fitting punishment for a poet who has refused to fulfil this role. It describes a parody of a kind of judicial process, presided over by the ghost of Ben Jonson, that ends with the imposition of sentence on May. A trial conducted by poets is a feature of Lucianic satire, and one that had been used by Jonson in *Poetaster* (1601).⁸² While the poem is evidently a satire, identifying its tone — in particular the extent to which the vituperation directed at May is leavened with humour — has presented some difficulty for critics. The passage in which the phrase 'ancient rights' is used (lines 63–70) is probably the most frequently quoted and discussed, and has been described by John Carey as 'wonderfully public'. Carey adds, however, that, since the poem was not printed at the time, and we have no evidence of manuscript circulation, for all we know the poet was 'haranguing an empty room'.⁸³

The question of the passage's already ambivalent tone is further complicated by the fact that these 'wonderfully public' and hortatory lines are spoken by the persona of Jonson's ghost, whose judgment might be thought to be less than infallible in that he places Lucan — of whom Marvell has made use with apparent approval in the Ode — in the company of '*Polydore, ... Allan, Vandale, Goth*' (l. 41) and presumes to correct Virgil and Horace (ll. 35–6). The poem contains a number of

⁸² *Poems of Andrew Marvell*, ed. Smith, p. 118, citing Benne Klaas Faber, 'The Poetics of Subversion and Conservatism: Popular Satire, c. 1640–c.1649' unpublished DPhil thesis, University of Oxford (1992).

⁸³ John Carey, ed., *Andrew Marvell: A Critical Anthology* (Harmondsworth: Penguin, 1969), pp. 21–2.

antirepublican utterances, most of them ascribed either directly or indirectly to Jonson. He is, in the first place, heard to sing of

... how a double headed Vulture Eats,
Brutus and *Cassius* the Peoples cheats. (ll. 17–18)

He berates the historian of the Parliament as ‘Malignant Poet and Historian both’ (l. 42) on account of his drawing ‘similitude[s]’ (l. 44) between Roman history and English, failing to see ‘How ill the measures of these States agree’ (l. 52). As has been pointed out,⁸⁴ it is unfair to May to accuse him of drawing spurious parallels between ancient Rome and early modern England. Again, ‘Jonson’ accuses May of

Apostatizing from our Arts and us,
 To turn the Chronicler to *Spartacus*. (ll. 73–4)

The reference to Spartacus, the leader of a revolt of slaves against Rome between 73 and 71 B.C. (and very far from being a figure of universal contempt, as the pronouncement of ‘Jonson’ seems to imply) is presumably intended to correspond with the generic figure of a parliamentary leader rather than to an identifiable individual.⁸⁵

This evidence of hostility to republicanism has been regarded as being difficult to reconcile with the Cromwellianism of the Ode. James Loxley found ‘stark and irreconcilable political differences’ between the two poems and concluded that Marvell produced such mutually contradictory pronouncements only because he was not yet committed to either to royalist or antiroyalist politics: ‘a convincingly Royalist poem,’ he wrote, ‘can be produced by ... someone who is simply trying the mode on for size.’⁸⁶ David Norbrook also judged that the poems could not be interpreted univocally, arguing ‘that on the level of speech-acts, his poems of this period simply

⁸⁴ See, for example, Gerard Reedy, “An Horatian Ode” and “Tom May’s Death”, *SEL* 20 (1980), pp. 137–151 (p. 141): ‘Thus May explicitly avoids, in his 1627 preface, the kind of Roman analogizing to English affairs that Marvell takes him to task for later.

⁸⁵ Though Gerard Reedy, “An Horatian Ode” and “Tom May’s Death”, p. 147, suggests that the person meant is Robert Devereux, Earl of Essex, who died in 1646 having attempted, with Denzil Holles, to impeach Cromwell in 1644.

⁸⁶ James Loxley, ‘Prepar’d at Last to Strike in with the Tyde?: Andrew Marvell and Royalist Verse’, *The Seventeenth Century* 10 (1995), pp. 39–62 (pp. 58, 57).

do not show consistency: with great force, they make incompatible utterances.’ His conclusion is similar to Loxley’s: he suggests that the two poems might be seen as ‘rival experiments.’⁸⁷

Previously, some scholars and critics had attempted to remove the inconsistency by denying that ‘Tom May’s Death’ is Marvell’s. Such a rejection seems to be implicit in what, in 1990, Annabel Patterson called her ‘compromise position,’ that ‘Tom May’s Death’ had been included in the posthumous *Miscellaneous Poems* (1681) to disguise from the casual reader the Cromwellian character of that volume.⁸⁸ Opponents of the inclusion in Marvell’s *oeuvre* of the satire on May have been able to point to its removal from the so-called Popple manuscript. It was one of three poems to have been so deleted, and it now looks doubtful that the other two can have been Marvell’s. Although John Klause has suggested that Marvell may have added lines 40–8 to another poet’s work, it is probable that most of ‘Thyrsis and Dorinda’ was extant about 1635–1637, which would make it very early for Marvell.⁸⁹ Elsie Duncan-Jones discovered that slightly different manuscript versions of ‘Blake’s Victory’ had simultaneously been attributed to Marvell and to Roger Boyle, Earl of Orrery. She concluded that it was the work of a young poet who had given copies to Marvell, Boyle and Samuel Hartlib, in the hope that one of them would show the poem to Cromwell.⁹⁰ She further speculated, on the basis of their odd positioning in

⁸⁷ David Norbrook, *Writing the English Republic*, pp. 244, 280.

⁸⁸ Annabel Patterson, ‘Miscellaneous Marvell?’, in *The Political Identity of Andrew Marvell*, ed. Condren and Cousins, pp. 188–212 (p. 203).

⁸⁹ Klause, *The Unfortunate Fall*, p. 185, n. 28; Hilton Kelliher, *Andrew Marvell: Poet & Politician 1621–78* (London: British Library, 1978), pp. 48–9. Nicholas von Maltzahn finds possible support for Marvell’s authorship of the additional lines in his liking for wine, as reported by Aubrey, and his association of drinking with death by drowning: Nicholas von Maltzahn, ‘Death by Drowning: Marvell’s *Lycidas*’, *Milton Studies* 48 (2008), pp. 38–52 (p. 41). Nigel Smith concludes that the hypothesis of Marvell’s reworking of an existing poem is ‘neither proven nor disproven with certainty, but the hints of M.’s presence are sufficient to keep the poem within the canon’: *Poems of Andrew Marvell*, p. 243.

⁹⁰ Elsie Duncan-Jones, ‘Marvell, R. F. And the Authorship of “Blake’s Victory”’, *English Manuscript Studies 1100–1700* 5 (1995), pp. 107–26; see also Margarita Stocker and Timothy Raylor, ‘A New Marvell Manuscript: Cromwellian Patronage and Politics’, *English Literary Renaissance* 20.1 (1990) 106–62.

Miscellaneous Poems that ‘Blake’s Victory’ and ‘Thyrsis and Dorinda’ had been included in that volume to cover the removal of something that was deemed unpublishable in 1681. Similar considerations would not explain the inclusion of an inauthentic ‘Tom May’s Death’ between ‘The Picture of Little T. C.’ and ‘The Match’, though it remains to be answered why the May satire is to be found in such company. In any case, since Nicholas von Maltzahn persuasively argued that the removal of the poem from ‘Popple’ was the work of a Whig editor engaged in the posthumous repositioning of Marvell as an impeccable proto-Whig, the ‘Popple’ exclusion of that poem has largely ceased to be seen as a good argument against its attribution to Marvell.⁹¹

It is not the aim of this chapter to attempt either to reconcile ‘An Horatian Ode upon Cromwel’s Return from Ireland’ and ‘Tom May’s Death’ — though it is worth commenting that the reading of the Ode that has been suggested in this chapter is compatible with opposition to a republic — or to explain their irreconcilability, but rather to examine the part played in each of them by the related themes of justice and ‘ancient rights’. In the case of the May satire, that involves an attempt to tease out the nature of the offences with which May is charged and, finally, the nature of the prescribed punishment.

It is notable how little agreement there has been among critics and scholars as to the essence of the case being made against May. For Elsie Duncan-Jones, the most serious charge against him is that he has fomented civil war, turning the English, unwittingly, into Guelphs and Ghibellines.⁹² In contrast, others, such as Annabel

⁹¹ Nicholas von Maltzahn, ‘Marvell’s Ghost’, in *Marvell and Liberty* ed. Chernaik and Dzelzainis, pp. 50–74 (p. 65). On the reliability of the Popple manuscript for the purposes of attribution, see Warren Chernaik, ‘Appendix. Manuscript Evidence for the Canon of Marvell’s Poems’, in *The Poet’s Time: Politics and Religion in the Work of Andrew Marvell* (Cambridge: Cambridge University Press, 1983), pp. 206–14. Chernaik questions whether the apparent attribution marks in ‘Popple’ are really to be taken as such (pp. 208–9).

⁹² Elsie Duncan-Jones, ‘Marvell: A Great Master of Words’, Warton Lecture on English Poetry, 1975, *Proceedings of the British Academy* 61 (1975), pp. 267–90, p. 285. For an alternative gloss on the expression ‘as for the basket’, which Duncan-Jones interprets as ‘without our knowledge’, see Andrew

Patterson and John Coolidge, see him as someone who has been led, by his misplaced reliance on ‘Romane cast similitude’, to write bad history.⁹³ A case can also be made that the targets of the attack in the poem are not so much May’s actions (including his writings) as his supposed motives. This is the charge preferred by Jonson’s ghost, when he says:

But the[e] nor Ignorance nor seeming good
Mised, but malice fixt and understood. (ll. 55–6)

May, according to his accuser, *knows* his behaviour is wrong, but Jonson implicitly acknowledges that others on the parliamentary side were more honestly ‘mised’, by inadequate knowledge of the facts or — a significant admission — by the apparent goodness of the parliamentary cause. As David Norbrook points out, some critics who wish to minimize the ideological incompatibility between the Ode and ‘Tom May’s Death’ have stressed the extent to which both poems are ‘concerned with moral or personal rather than political issues.’⁹⁴ In the case of the May satire, that would mean placing greater emphasis on the alleged ‘malice’ and dishonesty of May’s motives, than on his republicanism or his support for one faction or other in the parliament. In this way the evident Cromwellianism and possible republicanism of the Ode appears to be less starkly at odds with the attack on the republican historian — and, incidentally, Marvell may avoid the suspicion that his attack rebounds on his own head.⁹⁵ On this view, Marvell excoriates May, not because of his political alignment, but rather because he made a choice analogous to that made by Marvell himself but, whereas Marvell made the choice scrupulously and with difficulty, he

Marvell, *The Complete Poems*, revised, ed. Elizabeth Story Donno (Harmondsworth: Penguin, 1996), pp. 242–3, note to ll. 61–2. Donno suggests that the phrase may be related to ‘basket justices’ and thus to the idea of justice for sale.

⁹³ Patterson, ‘Miscellaneous Marvell?’, p. 201; Coolidge, ‘Marvell and Horace’, pp. 112–13.

⁹⁴ Norbrook, *Writing the English Republic*, p. 272.

⁹⁵ Anne E. Berthoff, *The Resolved Soul: A Study of Marvell’s Major Poems* (Princeton: Princeton University Press, 1970), p. 210, suggested that Marvell is so fierce in ‘Tom May’s Death’ because he recognizes that ‘a hit is close’. David Norbrook, *Writing the English Republic*, p. 272 points out that ‘May becomes the whipping-boy for faults which critics are uneasily aware might otherwise be imputed to Marvell. The latter displayed a transcendence of narrow partisanship ... the former was a despicable traitor.’

believes that May made it much too easily and without reference to his conscience.

This reading is at worst (and, as we shall see, probably at best) half-right. Marvell does indeed place great emphasis on the badness of May's motives, suggesting that the world has been 'set on flame' merely 'Because a Gazet writer mist his aim' at the laureateship (ll. 59–60). By using Jonson as his spokesman, Marvell is able to criticize the hypocritical timeserver without thereby endorsing the attack that Jonson must necessarily make on the parliamentary cause. When 'Jonson' charges May with having turned 'the Chronicler to *Spartacus*' (l. 74), the point is not that Marvell believes that Cromwell or Fairfax or any of the parliamentary leaders can be so characterized, or even that 'Jonson' believes it — though he must do if the charge is to have any force. The real point is that this is what *May* is supposed to believe. The substance of the charge against May is not that he adhered to the wrong cause, or betrayed the right one, but that he betrayed his own conscience.

The difficulty with this approach is that, while there is no shortage of textual evidence to support it, there is further textual evidence, of which it does not take account, that the satire in 'Tom May's Death' is directed against republicanism as a political principle as well as against this particular 'base' republican. In James Loxley's terminology, 'this is the work which is most deeply structured by the isotopy of Royalism.'⁹⁶ While the use of Jonson as spokesman, as has been suggested, may protect the poet from having to voice the poem's antirepublican sentiments in his own persona, the choice of Jonson is not itself a neutral one. Loxley describes Jonson as 'an iconic figure' (p. 56) for royalists.⁹⁷ Norbrook, having noted the distancing

⁹⁶ Loxley, 'Andrew Marvell and Royalist Verse', p. 56.

⁹⁷ But see Andrew Shifflett's comment that 'in spite of [Jonson's] services to James I and Charles I, he could be readily interpreted in what Annabel Patterson has termed the "vocabulary" of the Good Old Cause', a conclusion that Shifflett grounds on Jonson's admiration for, and use of, Lucan: Andrew Shifflett, *Stoicism, Politics, and Literature in the Age of Milton: War and Peace Reconciled* (Cambridge: Cambridge University Press, 1968), p. 125. Shifflett also writes that Marvell follows 'one special route among many others within the capacious Jonson tradition ... [a] quiet protest against the vices of arbitrary rule': *Stoicism, Politics, and Literature*, p. 118.

effect that the use of this persona allows the poet, and the mild satire at the former laureate's expense, adds:

The fact that Jonson is chosen at all, however, is heavily weighted in ideological terms, for he had been the poet laureate, and charges of May's infidelity and ingratitude centred on the idea that he had supported Parliament in bitterness because he had been turned down in favour of Sir William Davenant as Jonson's successor.⁹⁸

Indeed, Christine Rees argues that, in 'Tom May's Death', 'Marvell wants to discredit classical republicanism in principle,'⁹⁹ on much the same grounds as Hobbes sought to do when he blamed the study of Greek and Roman history for the propensity to rebellion, complaining that classical writers 'make it lawfull, and laudable, for any man' to kill his king, 'provided, before he do it, he call him Tyrant.'¹⁰⁰ It is for this reason, according to Rees, that Marvell has Jonson describe Brutus and Cassius as 'the Peoples cheats' (l. 18), notwithstanding the fact that Jonson's *Sejanus* suggests that the author did *not* dissent from the 'Republican myth' that sees Brutus in particular as a principled patriot.

In short, if Loxley, Norbrook and Rees, and the majority of critics who have seen 'Tom May's Death' as broadly royalist or antirepublican in sympathy, are right, the idea has to be abandoned that the principal charge against May is that he espoused a good cause for very bad reasons. Those very bad reasons are indeed the main focus of the satire but, according to the poem, the cause that they led him to adhere to was also bad.

If there remains some doubt as to the nature of May's offence, a certain degree of ambiguity also attaches to the penalty. The poem ends with the pronouncement and apparent execution of the 'irrevocable Sentence' (l. 97) that is passed on May:

⁹⁸ Norbrook, *Writing the English Republic*, p. 274.

⁹⁹ Christine Rees, "'Tom May's Death' and Ben Jonson's Ghost: A Study of Marvell's Satiric Method', *Modern Language Review* 71 (1976), pp. 481–8, p. 483.

¹⁰⁰ Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), p. 226.

Nor here thy shade must dwell, Return, Return,
 Where Sulphrey *Phlegeton* does ever burn.
 The[e] *Cerberus* with all his Jaws shall gnash,
Megæra thee with all her Serpents lash.
 Thou rivited unto *Ixion's* wheel
 Shalt break, and the perpetual Vulture feel.
 'Tis just what Torments Poets ere did feign,
 Thou first Historically shouldst sustain. (ll. 89–96)

On the passing of this sentence, May promptly vanishes 'in a Cloud of pitch' (l. 99). Empson noticed the surprisingly playful tone of these lines: 'Jolly enough in itself; he seems not to believe in any Hell at all.'¹⁰¹ He is right about the tone, though by introducing the possibility of hell, he appears to confound the Christian heaven in Elysium: it is 'Jonson', not God, who condemns May. The poem's conclusion indeed expresses scepticism, not as to the possibility of eternal punishment, but rather as to that of temporal justice. 'Tis just' that May should be the first person historically (that is to say, in reality) to undergo the punishments that have previously been the subject of poets' fictions. The listing of those torments, followed by the assertion of their justice, has the air of a straightforward and exactly calculated retribution. It is, however, a retribution that is less than perfect in one respect: it can never be carried out. Not only is May's punishment imposed by the shade of one poet, but the entire episode occurs within the lines of a fiction composed by another. However fitting these punishments might be, they cannot be removed from the pages of fiction to those of history. The 'just' redress of wrongs, in this case at least, remains in the realm of the ideal, not the actual.

The scepticism about the possibility of attaining human justice that is implicit in the recognition that, while the poet may be able to fix the 'just' and appropriate sentence for the wrongdoer, this does nothing to make the execution of that sentence more likely, may lead us to view in a slightly different light the poem's best known and most often quoted passage, lines 63–70. There, it is asserted that 'the poet's time'

¹⁰¹ William Empson, *Using Biography* (Chatto & Windus, 1984), p. 38.

— when the poet can best perform his or her function and do most good — is when the judge is threatened with violence and the churchman has been intimidated into silence. It is the judge's role to adjudicate impartially on questions of right and entitlement, so the sword that glitters over his head threatens the very existence of justice. The churchman should be able to speak the truth and, in particular, to distinguish good from evil; if he is 'silenced' (l. 64) then the truth is not being spoken and the distinction not being made. In these circumstances, it is left to the poet to fight 'forsaken Vertues cause', but with the important qualification that he is expected to do so 'single' (l. 66) and unaided. In such a fight, the only victories that may reasonably be expected are moral ones.

So, while the passage may be 'wonderfully public' and a ringing call to the performance of a duty, it is emphatically not one that predicts that the poet's actions will be effective to remedy the injustice that is castigated. The 'successful Crimes' (l. 70) may be *arraigned* but that is not to say that they will be undone, or the offender punished. If good remains 'wretched', in spite of having been sought out and identified by the poet, then the poet may well see his or her task as a thankless one. That is not necessarily to say that what the poem has to say about the poet's role in relation to justice is a counsel of despair. Marvell is far from suggesting that the poet should be deterred by the unlikelihood of success from the arraignment of 'successful Crimes' but it is clear that the poet who would fill the role that Marvell prescribes must be willing to persist in the defence of 'forsaken Vertues cause' without the reward of seeing his or her efforts come to fruition. The poet may, and ought to, give things their proper names — say that this act, though successful, is a crime or that here good is wretched. He or she may, or ought to, go further than this and say that 'Tis just' that the crime should be punished in one way or that the condition of good should be alleviated in another. He or she cannot go further still, however, and see

that what is just is actually carried out.

Judgment and balance

If the interpretation of the 'Horatian Ode' that has been advanced earlier is correct, it becomes possible to see the two poems not as 'incompatible utterances' which exhibit 'stark and irreconcilable political differences', but rather as companion pieces. If the Ode makes use of Lucan's and May's unflattering portrayal of Julius Cæsar in order to dissuade Cromwell from crossing an English or Welsh Rubicon, then the possibility arises that the grounds for objection to an Emperor Cromwell are republican. Cæsar, after all, would have replaced a republic with an empire, and it was for this reason that Lucan so objected to him. For Marvell, however, if 'every Similitude must have, though not all, yet some likeness',¹⁰² the converse is also true: the Roman and the English situations, though exhibiting certain resemblances, were not identical, and it would be a mistake to draw more parallels between them than were warranted. The most likely explanation of the May poem, then, is that it was written in order to make it clear (perhaps, in the first place, to the poet himself) that it was possible to employ Lucan in order to make a case against imperial government by Cromwell, without necessarily embracing the republicanism of Lucan and his translator. The preferable alternative to an autocratic Cromwell was not, according to these poems taken together, an English republic, but rather a country in which the 'ancient rights' of king and subject alike were respected and vindicated.

However, one point remains to be dealt with: if, as 'Tom May's Death' seems to indicate, Marvell was opposed to republicanism, then his use of the republican discourse of Lucan and May in the 'Horatian Ode' surely requires some explanation. One possibility is that he chose to use this language because he expected it to carry

¹⁰² Andrew Marvell, *The Rehearsal Transpos'd*, ed. Martin Dzelzainis and Annabel Patterson, *The Prose Works of Andrew Marvell*, ed. Annabel Patterson and others (New Haven: Yale University Press, 2003) I, 117.

some weight with his intended readership. It has been suggested above that the Ode demonstrates to Cromwell that a government under his leadership could enjoy only so much legitimacy as a Julius Cæsar. At the same time, the allusions to Lucan serve to remind the reader that that is not a legitimacy that would be recognized by republicans, hence reinforcing the poem's argument against the assumption of power by Cromwell.¹⁰³ It will be remembered that Derek Hirst has suggested that, in *The First Anniversary*, Marvell was to adopt the language of millenarians because it was a language that Cromwell had shown himself to be prepared to listen to, and 'Oliver was notoriously vulnerable to voices sounding on his conscience.'¹⁰⁴ A reading of 'An Horatian Ode' in the light of 'Tom May's Death' may suggest that Marvell had employed a similar tactic some four years previously, and with the aim of influencing the same powerful man. If, in 1650, Cromwell really had been contemplating a march on London, as many suspected, a republican voice would indeed have been an appropriate one to sound on his conscience.

On this reading, the Ode finally does appear to be 'balanced' after all, though not in the sense of tentatively suspending judgment, or being indecisively poised between several conflicting principles, proclaiming *Quo me uertam nescio*. It is balanced between different claims, different sets of 'ancient rights', which may come into conflict with each other but which ultimately need to be reconciled: those of the king on the one hand and of the people on the other.

¹⁰³ For the importance of Lucan to English republicans, see Norbrook, *Writing the English Republic*, especially chapter 1.

¹⁰⁴ Hirst, 'Marvell's Cromwell in 1654', p. 45.

*Chapter 2. Grotian concepts of justice in ‘The
Character of Holland’ and The last Instructions to a
Painter*

Natural law, ius gentium and the ownership of the sea

Although it was not printed until 1665 and, as is quite usual with Marvell’s poems, there is no record of scribal publication, it is evident that ‘The Character of Holland’ was written early in the first Anglo-Dutch war. The Oxford edition puts it ‘probably ... after the English victory over the Dutch fleet off Portland, 18–20 February 1653’ while, consistently with that, David Norbrook says that it was ‘probably written to commemorate a day of thanksgiving on April 12, 1653.’¹ Lines 107–17 make reference to the incident that opened hostilities, the refusal of the Dutch Admiral Van Tromp to lower his flag by way of salute to the English Admiral Blake, while ll. 143–4 make it clear that peace has not yet been concluded. In other words, this is a satire directed against a hostile power during wartime, a fact that requires emphasis for three reasons. First, many critics have found in the poem a jingoistic or xenophobic tone which they think unworthy of Marvell. A very clear expression of this view can be found in the work of Annabel Patterson, who has described the poem’s mood as one of ‘unabashed jingoism,’ adding that ‘it exhibits the lowest forms of the kind of insult that is based on stereotypes of national character.’²

The second reason for stressing the fact that this poem was written during a war is that a case can be made that, notwithstanding the demeaning references and the bad puns, the primary and apparently serious purpose of the poem is to advance

¹ *Poems and Letters*, I, 309; David Norbrook, *Writing the English Republic: Poetry, Rhetoric and Politics, 1627–1660* (Cambridge: Cambridge University Press, 1999), p. 296.

² Annabel Patterson, *Marvell: The Writer in Public Life* (Harlow, Essex: Longman, 2000), pp. 73–4.

the argument that England has just cause for prosecuting the war against the United Provinces. Third and finally, Marvell wrote at least one poem during the second Anglo-Dutch war in which he appears to adopt quite a different view of the relative justice of the belligerents' causes. The better our understanding of the earlier poem the more likely we are to see what Marvell was doing in the poem or poems of 1666 and 1667, and how his views, both on the justice of war and on the rights of England, may have changed between the beginning of the first war and the end of the second. This first part of this chapter will be mainly concerned with the second of these reasons; *The last Instructions to a Painter* will be discussed in the second part.

While much of the poem's language is riddling and in need of considerable explication,³ it contains two references that could hardly be clearer, in lines 26 and 113 respectively. They are to two works by the Dutch author Hugo Grotius (Huig de Groot): *Mare liberum* (1609) and *De iure belli ac pacis* (1625). In the context of the war between England and the United Provinces, to mention the first of these works was implicitly to refer to the most comprehensive response to it, *Mare clausum* (1635) by the English jurist, John Selden. The conflict between the doctrines of the free or open sea and of the enclosed or appropriated one had been a cause of dispute between the two countries since the reign of James I of England. Marchamont Nedham's English translation of Selden's work had been published the previous year, under the title *Of the Dominion, Or, Ownership of the Sea* (1652),⁴ so the conflict between the two terms was a topical one at the time of Marvell's writing the poem. Similarities of theme and argument indicate that this satire was participating in the same controversy as was Nedham's translation of Selden's treatise.

³ In a number of places, Marvell plays on Dutch terms. Richard Todd, for example, argues that the most significant sense of the pun on 'Half-anders' (l. 53) has been missed: Richard Todd, 'Equilibrium and National Stereotyping in "The Character of Holland"', in *On the Celebrated and Neglected Poems of Andrew Marvell*, ed. Claude J. Summers and Ted-Larry Pebworth (Columbia and London: University of Missouri Press, 1992), pp. 169–191, at 190–91.

⁴ John Selden, *Of the Dominion, Or, Ownership of the Sea*, trans. Marchamont Nedham, (London: William Dugard, 1652).

In both of the works that Marvell specifically mentions, Grotius had argued that, with some very limited exceptions, it was not possible for individuals or peoples to own part of the sea.⁵ Selden's response takes the form of two books, whose respective purposes are summarized with admirable clarity in the work's subtitle:

In the First is shew'd, that the Sea, by the Law of Nature, or Nations is not common to all men, but capable of Private Dominion or Proprietie, as well as the Land

In the Second is proved, that the Dominion of the British Sea, or that which incompasseth the Isle of Great Britain, is, and ever hath been, a Part, or Appendant, of the Empire of that Island.⁶

The difference between Grotius and Selden is founded on their different conceptions of the *ius gentium* or law of nations.

The discussion presented here is tangential to, and avoids dealing directly with, recent controversies as to Grotius's and Selden's roles in the development of, in the first place, international law and, in the second, radical and 'minimalist' seventeenth-century theories of natural law and natural rights. As for the first of these controversies, Grotius used to be known as 'the father of international law' but his paternity of that discipline has been doubted at least since 1874, when Thomas E. Holland delivered his lecture on Grotius's debt to Alberico Gentili, the author of *De iure belli* (1598).⁷ Peter Haggemacher, in his *Grotius et la doctrine de la guerre juste*, argues that Grotius did not wish to produce a general survey of natural law, still less a work on international law, but in essence a treatise, comparable to that of Gentili, on the law of war or *ius belli*, a topic with its origins in the twelfth century.⁸

⁵ Hugo Grotius, *De iure belli ac pacis libri tres* (Paris: Nicolaus Buon, 1625) II.III.IX–XII; Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005) pp. 460–6. The latter is based on the 1738 translation into English, largely by John Morrice, of Barbeyrac's French edition, Hugo Grotius, *Le droit de la guerre et de la paix*, trans. Jean Barbeyrac (Amsterdam: Pierre de Coup, 1729).

⁶ Selden, *Of the Dominion, Or, Ownership of the Sea*, title page.

⁷ On Holland's lecture, see Peter Haggemacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in *Hugo Grotius and International Relations*, Hedley Bull, Benedict Kingsbury and Adam Roberts (Oxford: Oxford University Press, 1990), pp. 133–176.

⁸ Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires Françaises, 1983), p. 8.

In Haggemacher's view, *De iure belli ac pacis libri tres* consists of three books on the law of war (the *ius pacis* indicating, not the law of peace in general, but only the law relating to the *making* of peace). In the first book Grotius asks whether war can ever be lawful and answers that it can; in the second, he discusses the just causes of war; and in the third, he examines the kinds of action that are permissible during war.

Richard Tuck, in contrast to Haggemacher, is particularly interested in Grotius's role in the development of political theories of natural rights, a story, as he later puts it, which had Thomas Hobbes as its central character.⁹ Although Tuck pays particular attention to natural *rights*, he sees them as a feature — for him, the central feature — of Grotius's theory of natural *law*.¹⁰ In *Natural Rights Theories*, he discusses Hobbes's objection to the equation of *ius* with *lex*. For Hobbes, *ius* means 'right', whereas *lex* or 'law' signifies a restraint on what people would otherwise be entitled to do.¹¹ Rights, in this view, are not given by law but are circumscribed by it. The same distinction was made by Dudley Digges, and Tuck ascribes similar views to Selden.¹²

Grotius has a different view from Hobbes's and Digges's on the relationship of *ius* to *lex*. In *De iure belli ac pacis*, he says that *ius* has three distinct — though related — senses: first, '*that which may be done without Injustice*', second, '*a moral Quality annexed to the Person, enabling him to have, or to do, something justly*' and, third, equivalent to *lex* 'taken in its largest Extent, as being *a Rule of Moral Actions, obliging*

⁹ Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), p. 12. His history of natural rights theories is in Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979).

¹⁰ 'Rights have come to usurp the whole of natural law theory, for the law of nature is simply, respect one another's rights': Tuck, *Natural Rights Theories*, p. 67, describing Grotius, *Introduction to the Jurisprudence of Holland*.

¹¹ Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), p. 200, discussed in Tuck, *Natural Rights Theories*, p. 120.

¹² Dudley Digges, *The Unlawfulness of Subjects, Taking up Armes against their Sovereigne* (1644) sig. B3v, cited in Tuck, *Natural Rights Theories*, pp. 102–03. For the ascription to Selden of the theory that there was a time of complete freedom before the divine law became known to humankind see *Natural Rights Theories*, p. 93. According to Sommerville, Selden's ideas on this point were much more conventional than Tuck takes them to be: J. P. Sommerville, 'John Selden, the Law of Nature, and the Origins of Government' *Historical Journal* 27 (1984) 437–47.

us to that which is good and commendable.’¹³ Haggemacher explains that, in the third meaning, Grotius equates *ius* with *lex* in the widest sense of the latter term, encompassing all rules that impose obligations, not only in relation to justice but to other virtues as well.¹⁴ It is clear that, in expressions such as *ius gentium*, *ius naturale* and *ius belli*, Grotius is using the term in this third sense, as the next paragraph begins by stating that *ius naturale* ‘is the Rule and Dictate of Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature.’¹⁵

In his *Philosophy and Government, 1572–1651*, Tuck summarizes Grotius’s general theory of natural law, which he describes as ‘minimalist’.¹⁶ On this view, for Grotius, the natural law consists only of those fundamental precepts which are evident to all human beings by virtue of our rational nature (‘Preliminary Discourse’, VIII, *Rights*, pp. 86–7).¹⁷ Such precepts are binding on all people, including those who have a wholly erroneous, or no, idea of God (‘Preliminary Discourse’, XI, *Rights*, pp. 89–90). Grotius, in line with the third of his stated methodological aims, that of distinguishing plainly between things which might seem to be the same but are not (‘Preliminary Discourse’, LVII; *Rights*, p. 131), posited a sharp distinction between the natural law (*ius naturale*) and the law of nations (*ius gentium*).

The former has no human-made content, but was already in existence when

¹³ Grotius, *De iure belli ac pacis*, I.I.III–IX (*Rights*, pp. 136–48). The second sense is ‘a right’ as the term is now generally used, as in rights of property ownership, for example. Grotius’s discussion of the second sense is longer and more complex than that of either of the other two.

¹⁴ Haggemacher, *Grotius et la doctrine de la guerre juste*, p. 465: ‘Dans sa troisième acception, *ius* devient synonyme de *lex*, ce mot étant pris ici dans un sens large, non technique, incluant toute règle obligatoire au point de vue non seulement de la justice, mais également d’autres vertus: raison pour laquelle Grotius préfère désigner l’objet de ces normes comme *rectum* plutôt que simplement comme *iustum*, terminologie cicéronienne rappelant en même temps l’idée aristotélicienne de la justice en tant que vertu générale.’

¹⁵ Grotius, *De iure belli ac pacis*, I.I.X (*Rights*, pp. 150–1).

¹⁶ See, in particular, Richard Tuck, *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993), pp. 196–99, where he outlines Grotius’s ‘general theory of natural law’. For his characterization of the theory as ‘minimalist’, see Tuck, *The Rights of War and Peace*, pp. 5–6.

¹⁷ See also ‘Preliminary Discourse’, XL (*Rights*, pp. 110–11) on how the content of the natural law is to be determined.

humans entered the world. Whether its binding force as a law results from God's command (this was Selden's view¹⁸), or from the fact that, in the nature of things, it could not be otherwise, is not a question to which he gives a clear answer.¹⁹ In *De iure belli ac pacis*, Grotius scrutinizes the relationship between these two different categories of law and argues that the law of war results from their interaction. In doing so, he touches on the origins and sources of the law of nations as something distinct from natural law. It is from this that the old idea of Grotius as 'the father of international law' developed. In contrast, Gentili, according to Haggenmacher, 'deliberately identifies *jus gentium* with *jus naturale*, both being in turn an expression of divine will.'²⁰

The idea that Grotius was advancing a radically new and minimalist conception of natural law has been dismissed by Johann P. Sommerville, who points out that what Grotius has to say on the subject of natural rights is substantially the same as what had already been said by scholastic thinkers such as Suarez and, indeed, by Aquinas himself. According to Sommerville:

Suárez, for example, talked of natural law as obvious first principles of nature and reason, and precepts drawn from them by 'evident necessity.' Like Suárez and others, Grotius held that the laws of nature were deducible from a few principles, but he did not argue that the conclusions which could be drawn from those principles were minimal in number ...²¹

¹⁸ See Sommerville, 'John Selden, the Law of Nature, and the Origins of Government', pp. 442–3, and below, p. 80.

¹⁹ As Tuck points out, in the early work which was finally published as *De iure praedae* (1864), Grotius treated all laws as arising from the will of an agent: Richard Tuck, 'Grotius and Selden', in *The Cambridge History of Political Thought 1450–1700*, pp. 499–529 (pp. 505–6). On the other hand, in *De iure belli* I.I.XVI, Grotius wrote: '... all Obligation *beyond that, arising from the Law of Nature*, is derived from the Will of the Lawgiver ...' (*Rights*, p. 174; emphasis added). We may conclude that the opinions of Grotius and Selden slightly diverged on this point. Whereas Grotius's believed it was clearly the divine will that humans should be bound by the natural law, he did not think it a condition of the law's efficacy that that will should be manifested by a command.

²⁰ Haggenmacher, 'Grotius and Gentili', p. 170.

²¹ Johann P. Sommerville, 'Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory', in *Rhetoric and Law in Early Modern Europe* ed. Victoria Kahn and Lorna Hutson (New Haven: Yale University Press, 2001), pp. 318–43, at p. 333. By separating the law of nations from that of nature, Grotius necessarily reduced the number of precepts contained in the latter, while in no way diminishing its importance. He made it clear that the law of nations depends on the law of nature: see below, n. 31.

Whether Sommerville's criticisms of the view that Grotius was putting forward a minimalist theory of natural law are justified is a question beyond the scope of this thesis. It is enough for present purposes to comment that it is not surprising that Grotius has rightly or wrongly been taken to be restricting the ambit of natural law, since the thrust of his argument is often that particular aspects of the law belong, not to the law of nature (as had previously been claimed), but to the law of nations.²² The principal example of this procedure is his discussion of the institution of private property, about which more is said below. Sommerville, following his opponents' lead, treats Grotius's theory of the law of nature in isolation, without paying attention to its relationship to the law of nations.

Before Grotius, this relationship had generally received little attention, perhaps because its two elements tended to be of interest to two different kinds of thinker. The law of nature was primarily the province of scholastics and theologians, while for the most part the *ius gentium* had the attention of lawyers and jurists. According to Richard Tuck:

By virtue of their intellectual origins, humanist lawyers found it virtually impossible to talk about natural rights, and extremely difficult to talk about rights *tout court*. What was important to them was not natural law but humanly constructed law; not natural rights but civil remedies.²³

Grotius approaches a description of the law of nations more systematically than any of his predecessors and most of his contemporaries. In at least one respect, however, his definition of the law of nations is ambiguous, and it is with this aspect of his thought that Selden's *Mare clausum* is most clearly at odds.

Grotius describes the law of nations as deriving its authority and force from

²² It might be added that his enumeration of the principles of natural law, while clearly not exhaustive, has every appearance of minimalism: 'the Fountain of Right, properly so called; to which belongs the Abstaining from that which is another's, and the Restitution of what we have of another's, or of the profit we have made by it, the Obligation of fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men': 'Preliminary Discourse', VIII (*Rights*, p. 86).

²³ Tuck, *Natural Rights Theories*, p. 33.

the will of all, or at least of many nations. He added the qualification 'of many', he says, because, apart from the natural law (which, he admits, is sometimes called the law of nations) there is hardly any law which is common to all nations (I.I.XIV, *Rights*, p. 163). He acknowledges that what is accepted as being the law of nations differs from one part of the world to another. In spite of this acknowledgment, Grotius continues to speak in general of the law of nations as if it were a coherent and unitary body of universally binding law.²⁴ Selden's treatment of the law of nations in *Mare clausum* is formally very different from this, however similar the two approaches may be in substance. Where Grotius admits that there is 'scarcely any' human-made law which is common to all nations, Selden is quite sure that there is none. For him, there are two different categories of law which go by the description 'the law of nations'. First, there is the *Ius Gentium Primaevum*, a phrase that Nedham translates as 'the Primitive Law of Nations' (I.III; p. 16). This is binding on all nations, but it has no human-made content, and consists exclusively of those precepts which 'are manifested by the light of nature or the use of right reason' and those 'declared and set down in those Divine Oracles that have been committed to writing' (I.III p. 13).²⁵ For Grotius, this category of law is not part of the law of nations at all but consists of the natural law, probably with some elements of divine positive law included. Selden, on the other hand, does not find it necessary to distinguish between natural law and divine positive law. This is unsurprising, given that he believes that all such law is 'law' only because of God's command and not because of any rational necessity. For

²⁴ It was because of Grotius's insistence that the law of nations consisted of human-made positive law that he was to become so important to practitioners of public international law. Laws that came into existence by agreement between nations could be amended or augmented by the same means.

²⁵ Selden's classification of the various kinds of law that create obligations and rights in peoples and individuals (I.III, pp. 12–16) is much more complex (and less ostensibly systematic) than that of Grotius. For present purposes, it is unnecessary to provide a full account of Selden's 'system' in all its complexity and the discussion here has been restricted to those elements that give rise to property rights. In the case of Grotius, it is arguable that the fundamental distinction is between the natural law and law that derives its force from the will of a human or divine lawmaker. For Selden, the fundamental distinction, as regards the law of nations, is between law that is universally binding and law that is not, the first of these categories containing both the natural law and other laws resulting equally from the divine will, but nothing else.

Selden, ‘the light of nature [and] the use of right reason’ enable us to determine what the law is; but they do not give it its force as law. In short, Selden sees all law as voluntary law, that is, law based on the will of a lawmaker; this is why the system outlined in *Mare clausum*, unlike that of Grotius, does not make a distinction between natural law and law of nations.²⁶

According to that system, in addition to the primary law of nations, there is also a secondary law of nations, which Selden prefers to call ‘intervenient’, because it arises from ‘Compact or Custom’, which, he says, intervene between nations, and its subject-matter includes ‘*proclaiming War, Ambassie, Prisoners of War, Hostages, Right, Remitter upon return from Captivitie, Leagues and Covenants, Commerce ...*’ (I.III p. 15).²⁷ The basic difference between Grotius and Selden on this point is that the former appears to see the law of nations (which by his definition is human positive law) as universally binding, whereas the latter places the human positive law of nations (in his terms, the intervenient or secondary law of nations) in the category of laws which are binding only locally and contingently. This difference between them has important consequences for their views on the origin and nature of private property rights, and in particular the question whether it is possible for such rights to subsist in the sea.

The second of Grotius’s three books on the law of war has received more attention than the other two, probably because of its relative length — it takes up about half of the work as a whole — and its central position. It deals with the just

²⁶ Selden adhered to this categorization in his later work, *De iure naturali et gentium iuxta disciplinam Ebraeorum* (1640), about which Tuck writes: ‘the strong distinction between natural law and divine voluntary law, upon which Grotius set such store, was, of course, utterly obliterated and divine voluntary law reinstated as the source of natural law, though with the important proviso that only when God spoke *universally* to men did he lay down laws of nature’: Tuck, ‘Grotius and Selden’, p. 527. See also the paraphrase of Selden’s views on natural law in *De iure naturali et gentium* provided by Jason P. Rosenblatt, *Renaissance England’s Chief Rabbi: John Selden* (Oxford: Oxford University Press, 2006), p. 161: ‘Natural law consists not of innate rational principles that are intuitively obvious but rather of specific divine pronouncements uttered by God at a point in historical time.’

²⁷ From this it will be seen that, as well as the divine or natural law binding on all nations, Selden also recognizes a divine law binding only on part or parts of humankind.

causes of war. In Grotius's scheme, a just cause is always either the punishment or the redress of a legal wrong (*iniuria*), though it is not always the case that the party waging the war must necessarily be the one whose rights have been infringed.²⁸ He says that three causes of war are generally cited: first, defence against the threat of injury; second, recovery of property or of a debt (which can arise from an injury already suffered); and, third, punishment (II.I.II, *Rights*, pp. 393–6) It is clear that rights of property figure prominently in at least the first two of these categories of just cause, and Grotius immediately goes on to consider the nature and origin of property rights. According to him, private ownership has its origins, not in natural law, but in the law of nations.

By the natural law, the first humans shared a common dominion over all things of an inferior nature, by which each could take or consume whatever he or she wished, so long as nobody else had taken it first. In time, they came to regard this common ownership as an inconvenience. At this point, according to Grotius, it must be supposed that there was either an express agreement that there should be a division of property or a tacit understanding that what each had already taken possession of should in future be treated as that person's exclusive property (II.II.II, *Rights*, pp. 426–7). He straight away excludes the sea from the ambit of this agreement or understanding (II.II.III, *Rights*, pp. 428–32), repeating in a modified form the main arguments that he had used in *Mare liberum*. It is his second argument that is most relevant for present purposes. According to him, the seas, which are unbounded and incapable of being divided, cannot therefore be appropriated or taken into possession. Once the original division of the land had occurred, he argues, the only way that previously unoccupied land could be appropriated was by right of first occupation. He assumes that, at the time of that first division, most of the sea was still

²⁸ '*Causa iusta belli suscipiendi nulla esse alia potest, nisi iniuria*'; 'There is no other reasonable [i.e. just] Cause of making War, but an *Injury* received': Grotius, *De iure belli ac pacis*, II.I.I (*Rights*, p. 393).

unknown, and therefore could not have been included in it (II.II.III, *Rights*, pp. 431–2). No one could subsequently establish a title to the sea, or to any unenclosed part of it, by right of first occupation, for the simple reason that no one was capable of occupying it (II.II.III, *Rights*, p. 430). Therefore, it was impossible that the sea could have been appropriated.

Selden is prepared to presume the existence of some such compact or agreement as Grotius posits. He proceeds from his classification of the various types of law which might govern the dominion or *dominium* of the sea to a discussion of the idea of *dominium* itself, which he defines as the right of use, enjoyment, alienation and free disposing. He states that dominion is ‘either Common to all men as Possessors without Distinction, or *Private* and peculiar onely to som’ (I.IV, p. 16). Of the two kinds of ownership, common and private, he says that neither is forbidden or prescribed by the law of nature or by the divine law of nations, but both are permitted (p. 20); and he concludes that, if it is so that the world was the common property of humankind in the beginning, then there must have been some kind of general compact to introduce private ownership:

Nor can it otherwise bee conceived in the case of Partners or Co-heirs (such as all men seem to have been in the State of Communitie) how those things which com not under division, should not continue common as before. Therefore (I suppose) it must be yielded, that som such Compact or Covenant was passed in the very first beginnings of private Dominion or possession, and that it was in full force and virtue transmitted to posteritie by the Fathers, who had the power of distributing possessions after the flood, So that wee may conclude no less concerning distribution by Assignment, then touching Seisure by occupation of things relinquisht at pleasure, that a general compact or Agreement was made or ratified, either expressly in words, or implicitly by custom.²⁹

In support of this proposition, he cites *De iure belli ac pacis*, II.II.II, apparently with approval. However, he adds that even if it is accepted that the sea was excluded from the original distribution of territories, title to it could nevertheless be acquired

²⁹ Selden, *Of the Dominion, Or, Ownership of the Sea* I.IV, p. 23.

afterwards by occupation and possession, in the same way as it is acquired to vacant or abandoned lands. There is nothing in either the divine or the permissive natural law to forbid this (Book I, chapters VI to VIII).

Although the two authors were at odds over the universality of the law of nations, they were largely in agreement as to how its content was to be ascertained: Grotius had said that this was to be done by an examination of custom or long use, and the testimony of legal experts (*De iure belli ac pacis*, I.I.XIV, *Rights*, p. 163). Using just such a method, Selden proceeds to a detailed examination of claims to sea-dominion throughout history, from the Greeks and other ancient peoples, to the modern Venetians, Genoese, Spaniards and Portuguese and Baltic countries, and he concludes:

... nothing now, I suppose, hinders why we may not determine, that the Sea is capable of Dominion as well as the Land, not only by the *Law Natural-Permissive*, but also by the Law both *Civil* and *Common of divers Nations*, and in many places almost according to the *Intervient Law* (which in cases of this nature is the surest demonstration of the *Natural-Permissive*) ...³⁰

The differences between Grotius and Selden on the ownership of the sea are symptomatic of their different approaches to the nature and origins of law. Grotius sees the natural law and the law of nations as entirely different, though complementary, categories. Specifically, without the natural law requirement that people should be bound by their agreements, the law of nations, which has its origins precisely in the agreement of peoples, could not have become binding.³¹ Selden, who is much less concerned to show that the law of nations can be traced back to a solid foundation, treats the natural law as part of the law of nations. In this, he shows something of the unease with the idea of natural law that Tuck ascribes to the humanist lawyers. As

³⁰ Selden, *Of the Dominion, Or, Ownership of the Sea* I.XIX p. 122.

³¹ Grotius, 'Preliminary Discourse', XVI (*Rights*, p. 93): 'since the fulfilling of Covenants belongs to the Law of Nature ... from this very Foundation Civil Laws were derived.' But not only civil laws in the sense of municipal laws: 'amongst all or most States there might be, and in Fact there are, some Laws agreed on by common Consent, which respect the advantage not of one Body in particular, but of all in general. And this is what is called the Nations ...', 'Preliminary Discourse', XVIII (*Rights*, p. 94).

well as being an antiquarian researcher and parliamentarian,³² Selden was a practising lawyer and successful advocate; Grotius, though he too practised at the bar and was appointed as *Advocaat Fiscaal* of the States of Holland, was primarily a political theorist. It has even been doubted that his formal education had a legal character,³³ though the likelihood is that, while his studies were predominantly humanist, he also studied law.³⁴

Although Grotius considers historical examples, he is essentially an *a priori* thinker.³⁵ He is happy to discuss a state of nature of which there is obviously no historical record, and to deduce the existence of a primitive (but universal) agreement as to the institution of private property. His concession that there is ‘hardly any’ universal law reveals a certain amount of discomfort: for the *ius gentium* to be truly a law, giving rise to rights that are good against all the world, and not just against the other parties to particular treaties, it would need the assent of the ancestors of all of modern humanity: hence Grotius’s unwillingness to extend his concession and admit that there is *no* law whose existence is recognized by all peoples. If there are modern countries who do not observe the *ius gentium* as it is generally understood, this may be the result of degeneration over time, rather than evidence that there never was a

³² For the extraordinary breadth and depth of Selden’s interests, see generally David Sandler Berkowitz, *John Selden’s Formative Years: Politics and Society in Early Seventeenth-Century England* (Washington D.C.: Folger, 1988), Paul Christianson, *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635*, (Toronto: University of Toronto Press, 1996) and Rosenblatt, *Renaissance England’s Chief Rabbi: John Selden*.

³³ C. G. Roelofsen, ‘Grotius and the International Politics of the Seventeenth Century’, in *Hugo Grotius and International Relations*, ed. Bull, Kingsbury and Roberts, pp. 95–131 (p. 100). Roelofsen suggests (n. 23) that he might have been ‘a self-taught lawyer’.

³⁴ According to Waszink’s edition, he graduated in law at Orleans, France: Hugo Grotius, *The Antiquity of the Batavian Republic*, ed. and trans. Jan Waszink and others (Assen: Van Gorcum, 2000) p. 11.

³⁵ Grotius, *De iure belli ac pacis* I.I.XII (*Rights*, p. 159): ‘Now that any Thing is or is not by the Law of Nature, is generally proved either *a priori*, that is, by Arguments drawn from the very Nature of the Thing; or *a posteriori*, that is, by Reasons taken from something external. The former Way of Reasoning is more subtle and abstracted; the latter more popular. The Proof by the former is by shewing the necessary Fitness or Unfitness of any Thing, with a reasonable and sociable Nature. But the Proof by the latter is, when we cannot with absolute Certainty, yet with great Probability, conclude that to be by the Law of Nature, which is generally believed to be so by all, or at least, the most civilized, Nations. For, an universal Effect requires an universal Cause.’

universal agreement in the first place.

Selden's discomfort, in contrast, is with the idea of inferring the existence of this primitive agreement for which there is no direct historical evidence. So, he accepts only grudgingly Grotius's argument that the existence of such an agreement must be presumed. Because he is sceptical of the existence of universal agreements he appears happy to treat merely bilateral or trilateral agreements as evidence of *ownership* (that is to say, of rights good against all the world) though in principle such agreements are incapable of imposing obligations on those who are not parties to them. So, he argues that 'both the *Phoenicians* and *Cilicians* had dominion over the *Romanes* Sea, as appear's by the League made betwixt them and *Antiochus* King of *Syria ...*'³⁶

'Just Propriety'

Selden's book was published in Latin in 1635. Charles I ordered that it should be enrolled in both the Exchequer and Admiralty Courts.³⁷ It was cited, though not extensively, by counsel and some of the judges in the ship-money case, *Rex v. Hampden* (1637), in which most of the majority judges found it possible to decide the issues without explicit reference to it.³⁸ The book was made accessible to a wider readership in 1652, with the publication of Marchamont Nedham's English translation, dedicated to the Parliament of England. Sir John Borroughs' *The Sovereignty of the British Seas*, which had been completed in 1633, and had been helpful to Charles I in the drafting of the ship-money writs, had received its first publication in the

³⁶ Selden, *Of the Dominion, Or, Ownership of the Sea* I.XIV p. 77. Selden is apparently treating this 'League' as *evidence* of dominion rather than as constitutive of it but, in that case, the origin of the dominion remains unexplained.

³⁷ Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: with special reference to the Rights of Fishing and the Naval Salute* (Edinburgh and London: William Blackwood and Sons, 1911), p. 369.

³⁸ At least one of the judges who cited *Mare clausum* with approval (the case contains no disapproving references to the work) gave his opinion against the king. See chapter 4 below for a brief discussion of the judgment of Chief Baron Davenport.

previous year.³⁹ Clearly, the parliament did not wish to leave any room for doubt that claims to English dominion of the sea had survived the ‘late Tyrant’. This show of intellectual force was not effective, however, to deter Van Tromp from refusing to salute Blake, and so starting the war. Steven Pincus has argued strongly that the parliament misunderstood the nature of the conflict and that, at least as far as Van Tromp and the Dutch Admiralty were concerned, their action was not a denial of *English* rights.⁴⁰

This is the context in which Andrew Marvell wrote his poem, ‘The Character of Holland’. The satire consists of fifteen verse paragraphs of which the eleventh and twelfth contain the main substance of Marvell’s charge, that England has just cause for prosecuting a war against the United Provinces. In the eleventh verse paragraph, the reader encounters a significant phrase Marvell’s previous use of which has been discussed in chapter 1. When the phrase ‘ancient Rights’ occurs in the context of the word-play and national stereotyping characteristic of ‘The Character of Holland’, it is not so immediately obvious as it is in ‘An Horatian Ode upon Cromwel’s Return from Ireland’ and ‘Tom May’s Death’ that justice is what is at stake, but a closer examination will show that the poem is dominated by considerations of rights in general and property rights in particular.

The repeated ‘fell’ in lines 5 and 8, connects the ‘slow alluvion’ of the Ocean with the ‘just Propriety’ which the Dutch are said to enjoy in the accumulation of tiny quantities of sand, earth and sea-shell that the English are content to throw away. The phrase ‘just Propriety’, it hardly needs to be pointed out, is double-edged. On the one hand, it might be thought that the Dutch would be entirely within their rights to lay claim to what they gain by alluvion — even if this alluvion is so ‘slow’ as to be

³⁹ Sir John Buroughs, *The Sovereignty of the British Seas: Proved by Records, History, and the Municipal Lawes of this Kingdome* (London: Humphrey Moseley, 1651).

⁴⁰ Steven C. A. Pincus, *Protestantism and Patriotism: Ideologies and the making of English foreign policy, 1650–1688* (Cambridge: Cambridge University Press, 1996), pp. 71–2. See further, p. 98 below.

imperceptible, and the claim unreasonably punctilious. On the other hand, that which is converted into property by means of their mad labour is, appropriately to their alleged ‘character’, the ‘indigested vomit of the Sea’ (l. 7).

However, even the ostensibly innocent sense of ‘just Propriety’ is itself double-edged. In Roman law, alluvion was the right of the owner of land abutting a river to the property in any accretions which were deposited by the river’s flow.⁴¹ Grotius uses alluvion as an illustration of his argument about private ownership of land, stating that modern Roman lawyers had misrepresented (as he saw it) rights of private property as arising by operation of natural law, rather than as a creation of the law of nations:

The *Roman* Lawyers, in order to prove the Laws used by them to be those of Nature, often alledge this Saying, That it is most agreeable to Nature, that he should have the Profit of any Thing who has also the Disadvantage of it; wherefore, since the River does often wash away Part of my Land, it is but reasonable that whensoever it makes any Addition it should be mine. (II.VIII.XVI; *Rights of War and Peace*, p. 652)

Grotius rejects this ‘natural’ theory of alluvion, explaining it instead as a positive right granted by the public (which will usually be the owner of any river powerful enough to move bits of land around and, where the case is not clear, should be presumed to be so) to the owners of the land abutting it. Alluvion, then, in the Grotian view of property rights, depends on the river’s being *owned*. It is the presumed intention of the river’s owner (i.e. the public) that is effective to transfer ownership to the landowner who benefits from the alluvion.

It is not clear that the use of the term in ‘The Character of Holland’, line 5, is necessarily an allusion to *De iure belli ac pacis*. It is impossible to be sure that Marvell had read that work by 1653 if, indeed, he read it at all.⁴² It is at least clear that he was

⁴¹ Grotius, *The Rights of War and Peace*, p. 648, n. 2 (Barbeyrac’s note).

⁴² There is no known English version of *De iure belli ac pacis* earlier than Clement Barksdale’s, *The Illustrious Hugo Grotius of the Law of Warre and Peace* (1654) Thomason E.1445. This is a considerably abridged translation which reorders the material and completely omits the passages on alluvion, quoted above. That is not conclusive against Marvell’s having read *De iure belli*, since he was capable of reading it in Latin.

aware that it deals with the just causes of war.⁴³ As has already been mentioned, Book II, the longest of the three, is the part of the work in which just causes are discussed. If Marvell had read attentively the opening chapters of that book, he would have seen that Grotius employs the concept of alluvion to support an important part of his argument as to the origin and sources of rights of private ownership.

Editors have usually taken Marvell to be using ‘alluvion’ in its physical sense, meaning ‘flood’ or ‘inundation.’⁴⁴ It is striking, however, that he uses the term in a context where property rights — particularly the ‘just Propriety’ of the Dutch in newly-formed land that displaces part of the sea — are very much in issue. It would be appropriate, then, if ‘alluvion’ in this context were to be understood in its legal sense, but it is not very likely that Marvell would have encountered that usage in an English work.⁴⁵ Although Bracton used the term in a passage evidently borrowed from the *Institutes* of Justinian,⁴⁶ it was not until the decision of the House of Lords in *Gifford v. Lord Yarborough* (1828) 5 Bing. 163–70, that there was an authoritative statement that the concept of alluvion is recognized in English law. Holdsworth’s *History of English Law* contains only three brief mentions of *alluvio*. In the third of these, the topic is described as ‘obscure’, while in the second *Yarborough* is cited as

⁴³ ‘The Character of Holland’ ll. 113–18, discussed below, p. 99.

⁴⁴ *Complete Poems*, p. 262; *Poems of Andrew Marvell*, p. 250; but compare *Poems and Letters*, I, 309.

⁴⁵ The judgement of Artegall as between Bracidas and Amidas in *The Faerie Queene*, V.iv indicates that the concept was not unknown to English writers; the word itself is not used by Spenser, however. Even in its physical, as distinct from its legal, senses the term is not exactly common in English works prior to Marvell’s use of it. The *OED* gives three earlier instances. The Latin word is more frequent, as in James Howell, *A German Diet, or, The Ballance of Europe* (1653) where it is quoted from Ammianus Marcellinus and translated as ‘encroachments’.

⁴⁶ Henry de Bracton, *De legibus et consuetudinibus Angliae* (c. 1265) Book 2, cap. 2, cited by Best, C.J. in *Gifford v. Lord Yarborough* (1828) 5 Bing. 163–70, at 166: ‘Item, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiretur. Est autem alluvio latens incrementum; et per alluvionem adjeci dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjicatur. Si autem non sit latens incrementum, contrarium erit.’ (Similarly, that which the river adds to your land by alluvion becomes yours under the law of nations. Alluvion is imperceptible accretion; and that is said to be added by alluvion which is added little by little so that it is not possible to discern the accretion from one moment to another. If, on the other hand, the accretion is not imperceptible, the case is otherwise [i.e. it is not alluvion].)

establishing ‘that English law had taken over via Bracton the Roman rules.’⁴⁷ The *OED* gives no example of the legal sense earlier than the second volume of Hume’s *Essays: Moral, Political and Literary* (1742), where it is treated as a term purely of the civil law.⁴⁸ *De iure belli ac pacis* is, therefore, a plausible source for Marvell’s use of the term. At least it can be said that, if we are to find in his poem an allusion to Grotius’s discussion of the topic, it is a rather neat one: the implication that the Dutch were taking the benefit of ‘th’Ocean’s slow alluvion’, while at the same time denying the ownership, public or otherwise, of the sea, would be consistent with a broader charge that the poem makes against the United Provinces, one of hypocrisy and selective reliance on Grotius’s principles.

Even if the Dutch have a legitimate claim to ‘th’Oceans slow alluvion’, they go beyond the mere insistence on their rights to the utmost, and wrong the ocean itself, in that they encroach on the area that should properly belong to it. The ocean in turn pursues its claim to satisfaction for this injury by invading the reclaimed land:

Yet still his claim the Injur’d Ocean laid,
And oft at Leap-frog ore their Steeples plaid:
As if on purpose it on Land had come
To shew them what’s their *Mare Liberum* (ll. 23–6)

To put it another way, if, as Grotius claims, the sea is open to all and owned by none, what business can his countrymen have in displacing part of it with ‘new-catched Miles’ (l. 18), which they then claim as their own? The language of the vindication of injured rights, and in particular property rights, is continued when we are told that ‘The Fish oft-times the Burger *dispossest*’ (l. 29, emphasis added).

The first four verse paragraphs of the poem describe the process of the formation of the land of Holland, both as a physical process — the mad labour of

⁴⁷ Sir William Holdsworth, *A History of English Law* 17 vols. (London: Methuen, 1903–1966) XIII, 527, 548, XVI, 68.

⁴⁸ Two earlier works on Scottish law, each with the title *The Institutions of the Law of Scotland*, by James Dalrymple, Viscount of Stair (1681) and Sir George Mackenzie (1684) likewise refer, in English, to alluvion as a civil law concept.

fishing the land to shore combined with the natural washing up of tiny quantities of soil by the sea — and as the systematic infringement or denial of property rights. There follow six verse paragraphs in which a satiric description of the origin and nature of the constitution of the United Provinces (verse paragraphs 5 and 10, lines 37–54 and 93–100) frames a disparaging account of the multiplicity of religious beliefs and practices that were tolerated there (verse paragraphs 6, 7 and 9, lines 55–80 and 85–92), which in turn frame the eighth verse paragraph, about which more will be said below. Taken together, the first ten verse paragraphs of the poem lead to a point where Marvell has laid the groundwork for his main allegations against the United Provinces.

The opening lines of the fifth verse paragraph constitute a striking example of Marvell's tendency to treat the targets of his satire betwixt jest and earnest. The first line is a pithy expression of a theory of the origin of governmental power which, in the second, is turned into a jibe at the government of the United Provinces:

Therefore *Necessity*, that first made *Kings*,
Something like *Government* among them brings. (ll. 37–8)

'Therefore,' the first word of the paragraph, refers back to the chaos represented by the games of leap-frog (l. 24), '*Level-coyl*' or *lever le cul* (l. 28) and duck and drake (l. 36) which are played in all seriousness by the Dutch and the ocean, as the latter attempts to obtain redress for its injured rights. The origin of government, this implies, lies in the necessity of regulating the enjoyment of rights and, particularly, in preventing the exercise of self-help remedies when those rights are infringed. However, in this case, the rights of the ocean must not merely be regulated, they must be wholly excluded, since they would otherwise threaten the existence of the 'land' itself. That the ocean is capable of suffering injury is not a notion that can be taken literally, of course. It is a comic inversion of the idea that rights subsist in the sea, treating those rights as though they were enjoyed *by* the sea, instead of being exercisable *over* it. By denying

the existence of such rights, the Dutch in effect confer rights on the sea, and immediately proceed systematically to infringe them. Marvell's metaphorical use of the language of rights in this context implies that this particular state is founded on injustice, that is to say on the refusal to recognize and enforce rights that belong outside the land itself. The character of the government that emerges is determined by the kind of necessity that gave rise to it:

Who best could know to pump an Earth so leak,
 Him as their *Lord* and *Country's Father* speak.
 To make a *Bank* was a great *Plot of State*;
 Invent a *Shov'l* and be a *Magistrate*.
 Hence some small *Dyke-grave* unperceiv'd invades
 The *Pow'r*, and grows as 'twere a *King of Spades*.
 But for less envy some *joynt States* endures,
 Who look like a *Commission of the Sewers*. (ll. 45–52)

This government is no less unjust to its own people than to the outside world, and may also be unstable, according to this. Line 51 is somewhat obscure. On the face of it, 'endures' might be transitive (puts up with or suffers something) or intransitive (survives for a long time). Since it is in the singular and is preceded by the phrase 'some *joynt States*', it is most likely that 'endures' is transitive, with '*joynt States*' as its object and the dyke-grave from the previous sentence as its subject. The sense of lines 48–52 would then be that a dyke-grave grew to be the monarch, because of his importance in the defence of the country from the encroachments of the sea. However, so as not to provoke resentment of his elevated status ('for less envy'), he tolerates the sharing of his power by the States. The States themselves resemble a Commission of the Sewers, a body which in English law was entrusted with the duty of maintaining sea walls and embankments, and given the power to raise taxes for that purpose.⁴⁹ In comparing the States to a body of this kind, Marvell seems to imply that their legitimate area of concern is petty, being restricted to the preservation of

⁴⁹ See Stuart A. Moore, *A History of the Foreshore and the Law Relating Thereto* (London: Stevens and Haynes, 1888), p. 566.

sea defences, while their capacity to impose burdens on the public is disproportionately great.

There is a possibility that here, and again in the short eighth verse paragraph, Marvell is being humorously dismissive of a book that, according to Richard Tuck, was one of Grotius's best-known works at the time. The work is *De antiquitate reipublicae Batavae*, an English translation of which had been published in 1649.⁵⁰ This was an early work in which Grotius had made extravagant claims about the continuation among the Dutch, from before the rebellion of Civilis in AD 69 up to the end of the sixteenth century, of a form of government which might fairly be described as aristocratic republican.⁵¹ According to Grotius, the Dutch had never submitted to the attempt by Philip II of Spain to abrogate their ancient constitution, and were therefore justified in throwing off Spanish rule.⁵² Indeed, he argues that the predecessors of the modern Dutch had never submitted to external government, citing Tacitus as having shown that the Batavians at the time of Civilis had been allies and not tributaries of the Romans, equal in rights, though obviously not in strength (pp. 39–45). It was because the Romans started to infringe their allies' rights that Civilis led a rising against them. Tacitus, he tells us, does not reveal the outcome of the conflict, permitting Grotius to assume that the Batavi maintained their independence (pp. 55–6). After the Romans and up to 'the first installing of the

⁵⁰ Hugo Grotius, *De antiquitate reipublicae Batavae* (Leiden: 1610); Richard Tuck, *Philosophy and Government* p. 164. The English translation is Hugo Grotius, *A Treatise of the Antiquity of the Commonwealth of the Battavers which is now the Hollanders*, trans. Thomas Woods (John Walker, 1649) Thomason E.1303[2].

⁵¹ He summarized the argument of the work in these terms: 'continually during more than 1700 years, the *Battavers* ... have used the same Government, the Sovereignty whereof hath always remained in the States hands, and so is it at this present. So that neverthelesse, a Principality hath belonged thereunto, sometimes in a greater and sometimes in a lesser manner of administration': *Antiquity of the Commonwealth of the Battavers*, pp. 130–1.

⁵² In *De iure belli*, II.IV.XIV (*Rights*, pp. 503–4) he was to argue that that submission to a conqueror could permanently deprive a people of the right to recover their freedom by force, citing King Agrippa in *Josephus*: 'It is glorious to engage and draw in the Cause of Liberty, but this should have been done long ago. For when people have been over-powered, and have for a great While submitted, to shake off the Yoke then, is to act like Madmen and Desperadoes, and not like Lovers of Liberty'. The argument as to the lawfulness of the rebellion against Spanish rule is to be found in *The Antiquity of the Commonwealth of the Battavers*, pp. 117–22.

Earls' (*Comites*) there is a period of about five hundred years in respect of which 'the Histories are very defective' (p. 63). Grotius relies on the paucity of evidence to justify his dissent from the view that the Franks had ruled over part of the territory of modern Holland (pp. 66, 69), again stressing the continuity of Batavian independence.⁵³

The installation of the 'Earls' he describes sympathetically in a manner which might have suggested to a more hostile observer a process by which 'some small *Dyke-grave* unperceiv'd invades / The *Pow'r*, and grows as 'twere a *King of Spades*':

It is thus then, That before the time of *Dederick*, who was counted the first of the Earls of *Holland*, there were in *Holland* many Princes that had their Authority not over the whole Nation, but each of them over some one part thereof: As those had whereof *Tacitus* and *Caesar* doe make mention of: These Princes were called by the names of *Graven* or *Grafiones*, which we in *English* call *Praetors*, and now the Dutch *Graven*, ... which to speak properly, is nothing else but Judges, from whence we call those that are the Officers and Controllers of the *Causies* and of those *Bancks* that doe check the Rivers and the Sea, we call them *Dyke-graven*, that is *Causie-Judges* or *Causie-Earls*. And with good reason were those Princes so called, because that their Principall Office was as is aforesaid to administer the Law ...⁵⁴

According to Grotius's account, before the appointment of the first 'Earl' of Holland, there were many such officials whose function was a mixture of the judicial and the administrative, and each of whom had jurisdiction over only a part of the country. Their role was limited, and so were their powers. The fear of external aggression, particularly from the Vikings,⁵⁵ prompted the nobles and the magistrates of the cities to think about appointing a prince with authority over the whole country, but without full monarchical powers:

... they thought it good after the example of their fore-fathers, who had Kings, yet their liberty not infringed, to ordaine a Prince, over the whole body of the Common-Wealth; which they intituled not with the Title of King, as being

⁵³ He uses a more questionable strategy to obscure the early days of the 'Earldom': see the Introduction to the recent *Biblioteca Latinitatis Novae* translation: Grotius, *The Antiquity of the Batavian Republic*, pp. 20–1.

⁵⁴ Grotius, *The Antiquity of the Commonwealth of the Battavers*, pp. 70–1.

⁵⁵ According to Woods's translation, the aggressors were 'People of Norway' (p. 75); Grotius's original calls them *Normanni*. The *Biblioteca Latinitatis Novae* version describes them as Vikings: Grotius, *The Antiquity of the Batavian Republic*, p. 83.

such a one as was not employed any other-way then in the chiefest and absolute Authority, but entitled him by that accustomed and usuall name or Title of *Gravii*, that is Judge or Earl, yet with this difference, that he was not called Earl with an addition of any Quarter thereunto, but simply, as being Judge himself over the other Judges. Unto this command (out of all question) he was chosen that was the very principall, both for Nobility and power amongst all other Princes: this was *Dederick* who in the old Records was called the *Friese*.⁵⁶

Whether or not he had this particular work of Grotius's in mind, Marvell is dismissive of the notion that the Dutch can enjoy a compromise between monarchy and democracy. The Dutch, he concludes, '*Half-anders, half wet, and half dry / Nor bear strict service nor pure Liberty*' (ll. 53–4). As before, there is an implication that the nature of their governmental system is determined by the character of the land itself: it is *because* they are half wet and half dry that their governmental system has characteristics of both liberty and servitude. Marvell's jibe could well be taken for a direct contradiction of the opinion expressed by Grotius at the very start of his book, that the best government is that of the nobles with, as he puts it, 'a Principality attached', because government of this kind achieves a balance between the excesses of democracy and monarchy. (Unsurprisingly, Grotius concludes that the ancient Batavian government was of exactly this type.)⁵⁷

As against the hypothesis that he is making fun of the arguments in *De antiquitate reipublicae Batavae*, it must be admitted that Marvell does not explicitly mention that work, as he does both *Mare liberum* and *De iure belli ac pacis*. He does, however, mention *Civilis*, the leader of the Batavian people in their fight against the Roman empire in AD 69:

Nor can Civility there want for *Tillage*,
Where wisely for their *Court* they chose a *Village*.
How fit a Title clothes their *Governours*,
Themselves the *Hogs* and all their Subjects *Bores*!
Let it suffice to give their Countrey Fame
That it had one *Civilis* call'd by Name,
Some Fifteen hundred and more years ago;

⁵⁶ Grotius, *The Antiquity of the Commonwealth of the Battavers*, pp. 75–6.

⁵⁷ Grotius, *The Antiquity of the Commonwealth of the Battavers*, p. 34.

But surely never any that was so. (ll. 77–84)

Tacitus's *Histories* IV is the source for most of what is known about Civilis. He also features prominently, however, in *De antiquitate reipublicae*, where Grotius reinterprets Tacitus, using Civilis as a central figure in the opening stage of his argument about the Batavian system of government. According to this reinterpretation, Civilis was not a monarchical ruler, but rather a leader who governed jointly with an assembly of the nobles:

Yet the History of *Civilis* approveth that the *Battavers* had this manner of Government, to the end that the wars might orderly be decreed against the oppression of the *Romanes*; for that end (saith he) hee assembled together the Princes of the Nations, and the ablest of the common people. Wherein appeareth then that the *Battavers* used the government of the Nobles, and yet in such sort, that there was a Principality annexed thereunto, which was either continually under the name of a King, or temporally under the name of a Generall ...⁵⁸

As has already been mentioned, Richard Tuck says that this was Grotius's best-known work, and it had appeared in English just four years before Marvell wrote 'The Character of Holland'. That being the case, a mention of Civilis in a poem that also makes two express references to Grotius, is likely also to call attention to *De antiquitate reipublicae*. Grotius's argument, that the character of Civilis's rule demonstrates the republican nature of the ancient Dutch system of government, is closely juxtaposed with another, which also draws on Tacitus. The second argument is that, as the Batavi, unlike the other Germanic peoples, lived in walled and fenced towns,⁵⁹ they must have had powerful local magistrates and that this was conducive to a government of the nobility:

... these fenced Cities could not consist without Magistrates, that those Magistrates next unto the Princes had very great Authority in their publike Assemblies: And that the simple common people busied themselves, some with tilling of the Land, others with feeding of Cattle, and others with fishing, and with Merchandize, and other occupations belonging thereunto, that they very willingly committed the charge of the Government unto the Magistrates

⁵⁸ Grotius, *The Antiquity of the Commonwealth of the Battavers*, pp. 34–5.

⁵⁹ The Woods translation uses the term 'cities', while the Bibliotheca Latinitatis Novae translation says 'towns'.

...⁶⁰

These two arguments are contiguous on the page — in the Latin version there is not even a paragraph break between them. The first, based on the nature of Civilis's leadership, starts on page 32 and ends on page 35 of Woods's English translation, and the second, inferring a 'government of magistrates' from the fact that the Batavi were supposed to live in towns, begins where the first ends and continues to page 38.⁶¹

Line 78 of Marvell's poem, which claims that the Dutch 'wisely for their *Court* ... chose a *Village*', is primarily a reference to the fact, noted in Margoliouth's, Donno's and Smith's editions, that the Hague was denied the status of a town so that it would not have a vote in the States.⁶² It is possible, however, to see in the lines a secondary meaning: a dismissive allusion to Grotius's theory of the republican character of the ancient Batavian constitution. The use of the word 'Civility' in line 77 seems designed to underline the juxtaposition of the idea of a village for a court, in the following line, with the reference to Civilis, in the next verse paragraph. The adjective *civilis* is defined in Lewis and Short's *Latin Dictionary* as meaning 'of or pertaining to citizens.'⁶³ So, while the main thrust of the allegation that the Dutch 'had one *Civilis* call'd by Name, / Some Fifteen hundred and more years ago; / But surely never any that was so', is that they are lacking civility and civic virtues, there appears to be a further implication that neither Civilis nor any of what might loosely be called his successors had in truth been a leader of *citizens*. Similarly, line 78 can be read as containing a secondary meaning equally dismissive of Grotius's argument, the '*Court*' being a denial that the government was republican and the '*Village*' that the Batavi had lived in towns.

A second person named Civilis makes an appearance in *De antiquitate*

⁶⁰ Grotius, *The Antiquity of the Commonwealth of the Battavers*, pp. 37–8.

⁶¹ The corresponding passages in the first edition are on pp. XIII–XIV and XIV–XV respectively.

⁶² *Poems and Letters*, I, 311, note to line 78; *Complete Poems*, p. 264; *Poems of Andrew Marvell*, p. 253.

⁶³ Charlton T. Lewis and Charles Short, *A Latin Dictionary*, (Oxford: Oxford University Press, 1922).

reipublicae Batavae. According to Grotius, he was a Batavian of royal blood who was appointed Governor of Great Britain during the reign of Julian the Apostate. This allegedly occurred at a time when the rule of the Roman empire in Britain was under threat, and the Batavi had helped the Romans to retake London (pp. 61–2). If it is the case that Marvell was making fun of Grotius’s partisan and republican history, his reference to ‘*one Civilis call’d by Name*’ (emphasis added) might be interpreted as a rejection of the notion that there was a second Civilis, one who governed Britain on behalf of the Roman Emperor.

In the light of the foregoing discussion, the fifth to the tenth verse paragraphs of Marvell’s poem can be described as forming an asymmetrical bow-like structure or curve, with paragraphs five and ten describing the government and constitution of Holland and the United Provinces (those of the former determining the character of those of the latter). Paragraphs six, seven and nine deal with the role played by religion in that country and the short eighth paragraph deals with Civilis, whom Grotius had made a central support of his argument about the continuing republican nature of the Dutch government. The movement through this bow is from the general to the particular: paragraph six is a sardonic attempt to deduce the Dutch approach to religion from what is already known about the character of the country:

How could the *Dutch* but be converted, when
Th’*Apostles* were so many Fishermen?
Besides the Waters of themselves did rise,
And, as their Land, so them did re-baptize. (ll. 57–60)

Paragraph seven deals in abstract terms with what is conceived as an actual historical process by which Amsterdam is said to have grown into the ‘Staple of Sects and Mint of Schisme’ (l. 72), while paragraph nine presents a very physical and particularized, if comically exaggerated, description of Dutch religious practice. In a similar movement from the general to the particular, paragraph five sets out the principles on which the Dutch government must logically have been founded (given the premises

as to the inherent injustice of the very process of land-formation itself, set out in the first four paragraphs), while paragraph ten paints a satirical picture of the realities of the present-day constitution of the United Provinces. That state is depicted as a lumbering colossus, 'Stagg'ring upon some Land' (l. 96), while its constituent parts fight among themselves, attempting to 'Cut out each others *Athos* to a Man' (l. 98).

Having described the United Provinces as warring internally in breach of their treaty obligations to each other,⁶⁴ Marvell has now laid the groundwork for his main accusation:

But when such Amity at home is show'd;
 What then are their confederacies abroad?
 Let this one court'sie witness all the rest;
 When their whole Navy they together prest,
 Not Christian Captives to redeem from Bands:
 Or intercept the Western golden Sands:
 No, but all ancient Rights and Leagues must vail,
 Rather than to the *English* strike their sail ... (ll. 101–8)

Van Tromp's refusal to strike his sail to the English admiral was the incident that started the war. The striking of the flag or sail had been sought under both of the Stuart monarchs as an acknowledgment of English dominion, that is to say, ownership, of the sea.⁶⁵ Van Tromp, an Orangist sympathetic to the English royalist cause, was unwilling to acknowledge that the dominion of the sea belonged to the Parliament of England: as far as he and the Dutch Admiralty were concerned, that right remained vested in the crown. According to Steven Pincus, it was only belatedly that the English Parliament understood the nature of the conflict — that it was not about England's rights as against other countries, but about the legitimacy of the claims of the English commonwealth as against those of the English king.⁶⁶ To Marvell in 1653,

⁶⁴ Grotius relates that the Treaty of Utrecht, 1579, established 'a Community or Fellowship both of Warre, Peace and forraign Alliances and Confederacies, as also of all other affairs' between the seven provinces, Gelderland, Holland, Zeeland, Utrecht Friesland, Overijssel and Groningen: Grotius, *The Antiquity of the Commonwealth of the Battavers*, pp. 138–9.

⁶⁵ Fulton, *The Sovereignty of the Sea*, *passim*, especially pp. 276 ff.

⁶⁶ Pincus, *Protestantism and Patriotism*, p. 72.

however, it appeared that the Dutch action was a breach of ‘ancient Rights and Leagues.’ As such, it constituted *iniuria*, and amounted to a justification of English belligerence against the United Provinces.

To the allegation of *iniuria*, Marvell next adds one of perfidy, with the poem’s second explicit reference to Grotius:

Was this *Jus Belli & Pacis*; could this be
Cause why their *Burgomaster of the Sea*
Ram’d with Gun-powder, flaming with Brand wine,
Should raging hold his Linstock to the Mine?
While, with feign’d *Treaties*, they invade by stealth
Our sore new circumcised *Common wealth*. (ll. 113–18)

‘Cause’ in this context, means ‘just cause’: by firing on Blake, Van Tromp opened the hostilities, and did so without any justification that Grotius would have recognized. The reference to the Dutch admiral as ‘*Burgomaster of the Sea*’ contrasts with the designation of his English counterparts as ‘Guardians of the Sea’ (*Custodes Maris*).⁶⁷ The English, who assert that the sea can be possessed and owned, place it in the custody of their admirals; the Dutch, who deny that it can be possessed, are therefore taken to invest *their* admiral with an authority equivalent to the judicial and administrative functions exercised by the chief magistrate of a town. If the story had been true of his ‘sweeping’ the Channel with a broom at his mast-head,⁶⁸ then Van Tromp might fairly have been accused of exceeding that authority. The implication is that the Dutch intend to go further than merely challenging the English dominion of the sea and to establish, without the slightest claim of right, their own. Here, as in the earlier allusion to Grotius, Marvell is turning that author’s arguments against his countrymen; implying that while they may appear to rely on those ideas up to a certain point, they inevitably go beyond that point and act in a way that is not justified by them.

⁶⁷ Selden, *Of the Dominion, Or, Ownership of the Sea*, II.XVI p. 306. Compare this line with the description of Sir William Coventry as ‘Keeper, or rather chanc’llor of the sea’ in *The Second Advice To a Painter*, l. 26.

⁶⁸ *Poems and Letters*, I, 312, note to l. 124.

This is also the point of the references to ‘feign’d *Treaties*’ in line 117. (*Treaties*’ in this context means the process of treating or negotiating, as opposed to what is now its usual sense, the concluded and ratified results of such negotiation, referred to in this poem as ‘Leagues’.)

In the penultimate chapter of *De iure belli ac pacis* (III.XXIV.III),⁶⁹ Grotius states that to ask for or agree to a peace conference (*colloquium*), is tacitly to promise that you will not injure the other party while negotiations are continuing. It is permissible to use the negotiations to divert the other party from preparations for war, or to build up one’s own strength, but not to attack. So, to ‘feign a parly, better to surprize’ — as Marvell would later accuse the court of Charles II of doing, in *The last Instructions to a Painter*, l. 232 — is a serious breach of the law of nations, not least because it damages the trust that must be placed in ambassadors if the right of embassy is to be continued to be observed.

If the Dutch, then, are making use of ‘feign’d *Treaties*’ to ‘invade by stealth / Our sore new circumcised *Common wealth*’, they are acting in a way wholly incompatible with Grotian principles of justice. The invasion complained of is not, however, an invasion of English *land*, but of what in later centuries would be called the territorial waters. In this context, one might suspect the presence of a play on the word ‘circumcised’. A note in Margoliouth’s edition points out that this is a reference to Genesis 34:25.⁷⁰ The conduct of the Dutch is implicitly likened to that of Jacob’s sons, Simeon and Levi, who treacherously attack Hamor, Shechem and their people while the latter are still ‘sore’ from the circumcision they have been persuaded to undergo as a condition for intermarriage with Jacob’s family. Marvell’s implication would therefore be that the Dutch led the English to believe that an alliance was in prospect, but only in order to catch the latter off their guard. However, it could be

⁶⁹ ‘So he that demands, or admits of a Parley, silently promises, that during the Parley, both Parties shall be secure’: *Rights*, p. 1634.

⁷⁰ *Poems and Letters*, I, 312, note to line 118.

argued that this is a similitude which requires further likeness. In other words, Margoliouth's explication does not make it clear in what sense the commonwealth can be said to be 'new circumcised'.

It is the fact that the alleged invasion does not involve an incursion onto *land* that suggests the presence of a pun. The word 'seisin' denotes a kind of possession, particularly one conferring legal title.⁷¹ 'Circumcised' would then appear to be a homophone of 'circumseised',⁷² meaning 'owning, by virtue of possession, that which is round about', in this case the surrounding sea.

Substantially the same allegation of treacherous invasion is made by Nedham in his dedicatory introduction to *Of the Dominion, Or, Ownership of the Sea*, which is addressed to the Parliament of England, where he alleges that the Dutch are guilty of:

... neglecting, slighting and slender protecting (to say no more) of your two Ambassadors, and at length in the louder language of the Cannon, during a Treatie of Peace for a more strict League and Union; when *Tromp* proclaimed to all the world, that their infamous design was by Treacherie to surprise and destroy our Fleets at Sea ...⁷³

Nedham also argues that it is equally possible for English waters to be invaded as English land:

And what greater extremitie than to invade a Neighbor's Territorie, and prosecute the Invasion by a design of Conquest: The Sea is indeed your Territorie no less than the Land ... so that the *Netherlanders* having enter'd your Seas, in defiance of your Power, are as absolute Invaders, as if they had enter'd the Island itself. It is just as if *Hannibal* were again in *Italy*, or *Charls Stuart* at *Worcester*; and the late affront given near *Dover*, was like to the one's braving it before the walls of *Rome*, and as if the other had com and knockt at the gates of London, or rather at your very Chamber-door; for, that insolent Act was don in that place, which our Kings heretofore were wont to call and

⁷¹ The development of the concept of seisin is discussed by S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd edition (London: Butterworths, 1981), pp. 19–122.

⁷² 'Seisin' was pronounced as 'season', and indeed Spenser rhymes the two words (*The Faerie Queene*, VI.iii.335), while Fulke Greville ('Sonnet XXVII', l. 3) and Elijah Fenton ('The Fair Nun', l. 13) both rhyme 'seisin' with 'reason'. This pronunciation would not necessarily preclude the possibility that 'circumcised' and 'circumseised' are homophones: a search of the Literature Online database shows that, while the most common rhyme word for 'circumcised' is 'baptized' and one also finds 'surprised', Samuel Colvil rhymes it with 'freezed': *Mock Poem, Or, Whiggs Supplication*, (1681) I.1004.

⁷³ Selden, *Of the Dominion, Or, Ownership of the Sea*, cv.–c2r.

account their *Chamber*.⁷⁴

That Marvell is consciously echoing Nedham is not clear, but they are certainly participating in the same argument. There is at least one further parallel between *Mare clausum* and Marvell's poem. Line 136, with its reference to 'our armed *Bucentore*', draws a comparison between the English commonwealth and the Venetian republic, the recognition of whose rights over the Adriatic Sea was, according to Selden, the clearest possible evidence that such rights were allowed under the law of nations.⁷⁵ Selden concludes his discussion of the Venetian claim to the Adriatic with a description of the ceremony to which Marvell refers, and an explanation of its significance:

But the Dominion of *Venice* over the Sea, is of far greater Antiquitie; to signifie which, they have an annual cerimonie, instituted, they say, by Pope *Alexander* the third, I mean the use of the Ring, which every year, upon *Ascension* daie, the Duke, in solemn manner, rowed in the *Bucentoro*, accompanied with the *Clarissimos* of the Senate, casts into the midst of the water, for the perpetuating (saith *Paulus Merula*) of their dominion over the Sea; signifying by that love-token, that hee betroth's the Sea to himself in the manner of a lawful Spous, using such a form of matrimonie, *Wee take thee to our wedded wife, O Sea, in token of a true and perpetual Dominion*. What should hinder then, but that wee may conclude, that the Venetians were looked upon, not onely by themselvs, but by their neighbor Princes, as Lords of that Sea, by as unquestionable and full a title, as of their Land and Citie? (p. 104).

Finally, it is arguable that the poem's ending can be interpreted as an allusion to Selden's work. Its last four lines introduce the three deities, Neptune, Jove and Pluto:

For while our *Neptune* doth a *Trident* shake,
Steel'd with those piercing Heads, *Dean, Monck and Blake*.
And while *Jove* governs in the highest Sphere,
Vainly in *Hell* let *Pluto* domineer. (ll. 149–52)

Richard Todd believes that 'an insistence on triplication has begun to muddy Marvell's clearly diptychal view of his subject matter' and suggests that 'it is hard to allegorize the triple personages (Neptune, Jove and Pluto) with any real precision,

⁷⁴ Selden, *Of the Dominion, Or, Ownership of the Sea*, dr.–dv. For the description of part of the territorial waters as the King's chamber, see II.XXII pp. 365–6.

⁷⁵ Selden, *Of the Dominion, Or, Ownership of the Sea*, I.XVI pp. 99–104.

although their portrayal in a group may be traced back indirectly to Plato (*Laws*, 828 B–D).⁷⁶ However, the reference may be explicable in terms of a passage in *Mare clausum*.⁷⁷

We have already seen that, in Book II, Selden had engaged in an exhaustive historical review of the rights claimed by England over the seas surrounding it. His method in Book I, where he dealt with the more general question of the recognition of such rights by the law of nations, was very similar. He would, he said, draw his examples from two ages, the fabulous and the historical.⁷⁸ The sole item in the category ‘fabulous’ is the division of the world after the defeat of the Titans. Citing Lactantius’s *De falsa religione* I.II to the effect that such fables were a disguised version of actual events, he suggests that the allotment to Jupiter, Neptune and Pluto of heaven, the sea and hell respectively in fact refers to an ancient division of the world, including the sea, among human beings:

They write, that in the fabulous time afore-mentioned, the *Titans* beeing subdued, the Brother-Deities, *Jupiter*, *Pluto*, and *Neptune*, divided the world by Lot; and that *Heaven* was allotted unto *Jupiter*, *Hell* to *Pluto*, the *Sea* to *Neptune*. But omitting those Trifles, whereby the vulgar suffered themselves with patience to be cozen’d, ... som of the Antients have taught, that the Truth it self which lay couched in this Fable, was quite another Thing. They say that these were not gods, but men. Also that *Jupiter* was not King of Heaven, but of the Eastern part from whence the Light first dawn’s upon mortal men; by which means also it seemed the higher part, and therefore was called Heaven: And that *Pluto* was King of the West, which point’s at the Sun’s setting and Night, and whence it is said to be lower and Hell. Lastly, that *Neptune* was Lord of the Sea and the Isles scattered therein. Thus it appear’s here, that a private Dominion of the Sea, no otherwise then of the Land, arose from Humane distribution. (pp. 47–8)

It will be apparent that Selden has in mind here the Grotian compact by which private property was first instituted and the point of his relating the story is that he admits that an agreement of this kind must have been reached, in some very ancient

⁷⁶ Todd, ‘National Stereotyping in “The Character of Holland”’, p. 185.

⁷⁷ This is the view taken by Andrew Fleck, ‘Marvell’s Use of Nedham’s Selden’, *Notes & Queries* 54 (2007) pp. 422–5.

⁷⁸ Selden, *Of the Dominion, Or, Ownership of the Sea*, I.VIII pp. 46–7.

time now known to us only by way of fable. In this, as has already been mentioned,⁷⁹ Selden accepts Grotius's premises. He departs from Grotius, however, in reading the ancient story as evidence that the subject matter of the agreement comprehended the sea as well as dry land.

It is tempting, therefore, to read Marvell's reference to the three deities as an allusion to this passage from *Mare Clausum*. As against this, there are a number of different sources (starting, as Todd says, with Plato) which might have suggested to Marvell their inclusion at the end of the poem.⁸⁰ The main thing that their presence implies is appropriateness: each of them has his proper sphere, with Jupiter's being 'the highest' (l. 151) while Pluto domineers 'in *Hell*' (l. 152), while 'our *Neptune*' (l. 149) by implication controls the extensive realm between these two. This is an interpretation that is supported by the passage from Plato's *Laws* to which Todd refers. There, the Athenian stresses the danger of confusing things that do not belong together, and the importance of keeping separate the festivals of the gods of the underworld and those pertaining to the heavenly gods.⁸¹

At any rate, it can be said that the last word of the poem, 'domineer', also recalls *dominium*, which means that the relationship between ownership and the other senses of 'propriety' is the dominant idea at the end of the poem, no less than at the beginning. The literal meaning of 'domineer' — to act tyrannously or arrogantly — is operative too: in so far as the Dutch seek to exercise rights outside their allotted sphere, or to prevent England from exercising hers, they do so 'vainly'.

'The Character of Holland', then, is a poem in which Marvell consistently makes allegations of injustice against the United Provinces, in its origin and constitu-

⁷⁹ Above, p. 82. See also Tuck, *Natural Rights Theories*, pp. 86–7.

⁸⁰ See, in particular, Milton's 'A Masque Presented at Ludlow Castle, 1634' lines 20–1, where Neptune 'Took in by lot, 'twixt high, and nether Jove, / Imperial rule of all the sea-girt isles ...'. Milton, Carey's note tells us, is referring to Homer, *Iliad*, XV, ll. 187–93 (which is presumably also one of Selden's sources): John Milton, *Complete Shorter Poems*, 2nd ed., ed. John Carey (Harlow, Essex: Longman, 1997) p. 181.

⁸¹ Plato, *The Laws*, trans. Trevor J. Saunders (Harmondsworth: Penguin, 1970, rpt. 1975) p. 322.

tion on the one hand and in its commencement and conduct of the war on the other. In doing so, he relies on ideas of justice drawn from the two works of Grotius that are mentioned in the poem, and in particular from the later of these, *De iure belli ac pacis*. In effect, he accuses the Dutch of hypocrisy, in that they fail to observe the Grotian principles on which they ostensibly rely. That is not to say, however, that Marvell himself accepted those principles. In his advancement of arguments similar to those to be found in Selden's *Mare clausum*, and in the introduction to Nedham's translation, he appears to reject, in particular, the Grotian doctrine of *mare liberum*, the proposition that the sea cannot be possessed.

'They feign a parly'

At more than 200 lines longer than 'Upon Appleton House', *The last Instructions to a Painter* is not only Marvell's longest poem but it is many times the length of most of his other poems, satirical and otherwise. As Marvell usually chose to work on a much smaller canvass than that of *The last Instructions*, it is not surprising that, until fairly recently, critics have tended to see the longer satire as a form in which he was not at his best, and the poem itself as lacking in unity. The most extreme version of this dismissive view is put forward by Legouis, to whom the poem appeared to be a kind of 'rimed chronicle', in which 'Marvell tells nine or ten months of the history of England, diplomatic negotiations, parliamentary debates, naval operations, intrigues of the bed-chamber or the lobby, and his narrative seems to be written day by day, as the events impress him immediately.'⁸² It was to counter this prevalent view that Michael Gearin-Tosh defended the poem's structure as a series of portraits, progressing through 'low portraits, two high portraits, one of an enemy, the other of a hero betrayed — and now the betrayer, and in an inversion of the state painting style.'⁸³

⁸² Legouis (1968), p. 168.

⁸³ Michael Gearin-Tosh, 'The Structure of Marvell's "Last Instructions to a Painter"', *Essays in Criticism* 22 (1972), pp. 48–57, 56.

Decorum required that a low style be used to represent ‘this race of drunkards, pimps and fools’ (l. 12), whereas the foreigners, De Ruyter and Douglas, Dutch and Scottish respectively, ‘deserved the style which the English court had forfeited’ (p. 52).

Most of the commentary on this poem can be seen as belonging to one of two categories, each of which is reflected in a particular thematic strand in the poem. The first of these is the theme of ‘poetic picture, painted poetry’, in part drawing on a deliberate misinterpretation of Horace’s admonitions on decorum. This is the strand of criticism to which Earl Miner belongs, along with Gearin-Tosh himself, and which is perhaps best exemplified by Annabel Patterson.⁸⁴ The other strand is that dealing with ‘sexual misconduct’. To this strand belong Steven Zwicker, Barbara Riebling (who argues that the abuse of sexual power, particularly rape, represents the abuse of political power) and, for the most part, David Farley-Hills (who advances a surprisingly persuasive case for seeing a version of the fisher-king story as the governing myth in the poem).⁸⁵ James Grantham Turner has shown one way in which these strands might be interwoven, by drawing attention to the significant presence in the poem of a scheme of allusion to Aretino’s ‘Postures’.⁸⁶

Before the narrative part of the poem commences, the reader is presented with three portraits, one each of Henry Jermyn, Earl of St. Albans (ll. 29–48), Anne Hyde, Duchess of York (ll. 49–78) and Barbara Villiers, Countess of Castlemaine (ll. 79–102). Although the portrait of the Duchess contains elements of sexual misconduct, it is mainly representative of the poem’s ‘grotesque picture’ strand:

Paint her with Oyster Lip, and breath of Fame,

⁸⁴ See, for example, Annabel Patterson, *Marvell and the Civic Crown*, (Princeton: Princeton University Press, 1978), p. 127.

⁸⁵ Steven N. Zwicker, ‘Virgins and Whores: The Politics of Sexual Misconduct in the 1660s’, in *The Political Identity of Andrew Marvell*, ed. Condren and Cousins, pp. 85–110; Barbara Riebling, ‘England Deflowered and Unmanned: The Sexual Image of Politics in Marvell’s “Last Instructions”’, *Studies in English Literature, 1500–1900* 35 (1995), pp. 137–57; David Farley-Hills, *The Benevolence of Laughter: Comic Poetry of the Commonwealth and Restoration* (London: Macmillan, 1974), chapter 4.

⁸⁶ James Grantham Turner, ‘The Libertine Abject’: The “Postures” of *Last Instructions to a Painter*, in *Marvell and Liberty*, ed. Chernaik and Dzelzainis, pp. 217–48.

Wide mouth that Sparagus may well proclaim:
 With *Chanc'lor's Belly*, and so large a Rump.
 There, not behind the Coach, her Pages jump. (ll. 61–4)

This might be thought to be rather more grotesque than either the Earl with his 'Drayman's Shoulders, butchers *Mein*, / Member'd like Mules, with Elephantine chine' (ll. 33–4) or the Countess, who merely 'grows old' and 'stooping stands' (ll. 80, 93). Castlemaine, on the other hand, is the main representative of the 'sexual misconduct' theme. The others have engaged in their share of that, too,⁸⁷ but Castlemaine outdoes them: it is only at the advanced age of 26 that she begins to distrust her 'oft-try'd Beauty' and 'now first, wisht she ere had been a Maid' (ll. 88, 90). If two of the introductory portraits correspond to two of the poem's thematic strands, that suggests that there is a third strand present, exemplified by Henry Jermyn.⁸⁸

But Age, allaying now that youthful heat,
 Fits him in *France*, to play at Cards and treat.
 Draw no Commission, lest the *Court* should lye,
 That, disavowing Treaty, ask⁸⁹ supply. (ll. 37–40)

Jermyn has been sent to Paris to negotiate with Louis XIV but (according to the poet) he has not been accredited as an envoy, in order that the court can mendaciously claim that no negotiations are taking place, and so persuade Parliament to raise money as if for the continuance of war.⁹⁰ This is a dishonest as well as a dangerous strategy, as is emphasized by the narrowly avoided rhyme-word, 'cheat'. The word itself does not appear in line 38, but it is present in lines 114, 122, 179, 314 and 584:

⁸⁷ Lines 62 and 64, which have just been quoted, seem to contain an element of sexual innuendo that is no less noticeable for being vague. In contrast, the allegations about Castlemaine's relations with her footman are quite clear.

⁸⁸ 'In the first part of the poem Marvell sketched three court leaders (ll. 29–104), and he then generalizes the attack by exposing their manoeuvres in the Commons (ll. 105–334)': Gearin-Tosh, 'The Structure of Marvell's "Last Instructions to a Painter"', p. 53.

⁸⁹ MS Eng. Poet. d 49 has 'asks': Michael Gearin-Tosh, 'Marvell's "Last Instructions": Textual Errors and their Poetic Significance', *Studia Neophilologica* 42 (1970), pp. 309–18 (p. 309).

⁹⁰ Legouis claims that Jermyn's written instructions from Clarendon 'answer the innuendo of l. 39': *Poems and Letters*, I, 351, n. to l. 29. The draft instructions say that, if Jermyn should find the French king amenable, and willing to offer assurances that the Dutch too will agree to peace, 'wee shall be contente speedily to send over Ambassadors': T. H. Lister, *Life and Administration of Edward, First Earl of Clarendon*, (London: Longman, 1838) III, 443. This suggests that Jermyn was to carry out negotiations only in a preliminary, conditional manner.

dishonest dealing is pervasive in this poem. There is also the suggestion (which will be confirmed in line 368) that Jermyn is playing, not merely at cards, but also at negotiations, that is that the process of peace-making is not being taken seriously, either by St. Albans or his masters. Abuse of the process of negotiation is the court's characteristic mode of doing business. It is a tactic that is dishonourably employed abroad, in the court's dealings with France and Holland, and at home, in its attempt to pass an excise bill through Parliament, where the court faction, led by Henry and William Coventry, 'feign a parly, better to surprize' the Parliamentary opponents of the proposed new tax. It is worth noticing that Henry Coventry is a leading figure in dishonest negotiations at home as well as abroad.

A significant part of the grim humour of the satire lies in the gradual revelation that in its foreign dealings no less than in the domestic sphere, the court, though acting in bad faith, is doing so *against* English interests instead of in furtherance of them, as might be expected. So, once Clarendon has raised '*Eighteen hundred thousand pound*' (ll. 332, 492; the repetition underlines the outrageousness of the figure) by way of a land tax, the Parliament is prorogued and St. Albans receives new instructions:

The *Count* forthwith is order'd all to close,
To play for *Flanders*, and the stake to lose. (ll. 367–9)

The secret instructions of Henry Coventry at Breda are of the same nature. He and his fellow-ambassador, Denzil Holles, are initially instructed to urge on the Dutch the idea that 'Treaty does imply / Cessation' (ll. 453–4), that is, that the very act of entering into negotiations indicates a willingness to reach agreement. This is true, in one sense, in that to negotiate without any intention of settling the dispute would be to mislead the other party, and would therefore be a mark of bad faith. However, by adding the scriptural comparison, 'as the look Adultery', the envoys are to attempt to force on this unobjectionable proposition an interpretation that it will not bear,

suggesting that the mere commencement of negotiations is as good as a concluded pact, and that the act of opening discussions in itself imposes on the parties a moral obligation to reach agreement. That the English are not prepared to be bound by the same conditions that they urge on the Dutch is confirmed a few lines later, when we are told that, if this gambit is not effective to persuade the Dutch to recall their fleet, the ambassadors are ‘to return home straight *infecta re*’ (l. 460).

Both sides would have been well aware that treaty did not, in practice, inevitably imply cessation. Oliver St. John had summarized the results of his mission of 1651 (the same one celebrated by Marvell in ‘In Legationem Domini Oliveri St. John ad Provincias Foederatas’): ‘The Embassie was, to renew the antient Amity and intercourse between the two Nations: While we treated upon these, we were recalled, *re infecta*, and the whole Embassie became fruitlesse.’⁹¹ Inconclusive negotiations between Holland and England were nothing new.

That is not the end of the matter, however: there is still the question of Henry Coventry’s coded instructions. These, quite simply, are that if the Dutch ‘won’t recal / Their Fleet, to threaten, we will give them all’ (ll. 461–2). In other words, the English ambassadors are charged with a preposterous task: they are to feign a parley, better to surrender. Only now does the full irony of the situation become apparent. The dubious proposition that Holles was to put forward turns out to be nothing less than the truth: in this instance, treaty really does imply cessation, because the English court is set on making peace at all costs. Furthermore, the contingent instruction to come home *infecta re* is now seen to be superfluous if not absurd, since it is hard to imagine any circumstances in which unconditional surrender could be left uncompleted. It seems that the court is in such a panic that it is not able to behave consistently, and resorts to unconscionable tactics almost as a matter of course, even when

⁹¹ *The Case of Oliver St. John, Esq. Concerning his Actions during the Late Troubles* (1660), Thomason Collection E1035.5, p. 5.

there is nothing to be gained.

A further indication of the court's bad faith lies in the fact that the designation of the two ambassadors at Breda is hardly any less misleading than that of Jermyn in France. St. Albans is an ambassador in effect (until, at any rate, Louis exploits his lack of credentials by 'bluntly' asking for his '*Character*', l. 442) though not in name, whereas the so-called '*Plenipotentiary Ambassadors*' (l. 452) are hedged around with specific (though mutually inconsistent) instructions, so that their powers are significantly more restricted than their commissions would indicate to the Dutch. The poem's first reference to their mission describes Coventry and Holles as 'Chain'd together ... Like Slaves' (ll. 369–70). The name '*Plenipotentiary Ambassadors*' is indeed abhorred, but not by verse (l. 451) which manages to accommodate it rather neatly in a decasyllabic line, with barely noticeable irregularity. In truth, it is Clarendon and, by implication, the king who abhor the name. It seems that they cannot bear to invest an envoy with full powers, even where the ultimate purpose of the embassy is complete capitulation and allowing the negotiators to use their discretion could not possibly result in a worse outcome than the one envisaged.

Three lines earlier, we have encountered a line which at least disturbs the verse, even if it is not abhorred by it: 'Two Letters next unto *Breda* are sent' (l. 449). The reader cannot be entirely confident as to how the line should be read. Is 'Breda' to be stressed on the first or second syllable? Does a beat fall on either syllable of 'unto'? Surely 'Two' is emphasized — this is the line that introduces the duplicity of Coventry's instructions — but what then of 'letters'? The fact that there are three groups of syllables that *can* be treated as double offbeats ('letters', 'unto', 'da are') suggests that one might be tempted to hear a predominantly falling triple metre:

$\underline{\quad} \quad \backslash \quad x \quad \underline{\quad} \quad \backslash \quad x \quad \underline{\quad} x \quad x \quad \underline{\quad}$
 Two letters next unto Breda are sent

Read like this, the line would have only four beats, and would apparently be an

intrusion from a different poem. Alternatively, however, one can scan the line in a way which, though somewhat irregular, better fits the poem's metre:⁹²

\ \ x \ \ x x \ x \
Two letters next unto Breda are sent

This would require a brief pause after “next”, perhaps suggesting that the narrator is at once fatigued and bemused at having to relate yet more pernicious folly. In any case the rhythmic uncertainty reflects the precariousness of the position of those who have to negotiate with Henry Coventry.

None of this is to claim that the other two parties, France and Holland, conduct their negotiations with strict probity. The Dutch incursion into the Medway takes place while the negotiations are proceeding at Breda; and Louis, when asked to restrain the Dutch, fails to keep his promise to St. Albans (ll. 427–48). On the spectrum of perfidious behaviour, the French are the worst offenders, the Dutch are relatively innocent and the English tend to follow the example of the former rather than the latter, just not so effectively. In a sense, England's behaviour provides the excuse, if not the justification, for Louis's betrayal. If Clarendon and the king shared the belief ironically imputed to St. Albans, that ‘the Golden Age was now restor'd, / When Men and Women took each others Word’ (ll. 47–8), they surely would not be behaving in such a way as to make such a restoration seem more remote than ever. Further, if St. Albans had been properly accredited, he would have had some hope of obtaining from Louis something more reliable than his ‘Word’ (l. 435). Grotius had argued that a promise made by one sovereign to another, as between equals, is binding according to the law of nature.⁹³ This is one respect in which he departed

⁹² I am grateful to John Creaser for suggesting this scansion of the line. The notation used is that proposed by Derek Attridge, *Poetic Rhythm: An Introduction* (Cambridge: Cambridge University Press, 1995), esp. Chapters 4 and 5.

⁹³ Grotius, *De iure belli*, II.XI.V.3 (*Rights*, pp. 709–10). The position as to promises made by a sovereign to his own subjects, and to foreigners who are not sovereign, is more complex: see *De iure belli* II.XIV (*Rights*, pp. 802–16). Grotius distinguishes between promises made by the sovereign as sovereign and those made as a private person. The former are not subject to the civil law but may nevertheless be binding according to the law of nature, as where they give rise to rights in a person

from the *raison d'état* view of the obligations of princes that had been very influential in the sixteenth century.⁹⁴ Louis presumably believes, in line with *raison d'état*, that anyone who relies on his word is taking an unwarranted risk and ought to know better. The English behaviour suggests that they share Louis's view of the duties of princes — but they take his word nevertheless.

The Dutch breach of faith is used by Marvell specifically to highlight the hypocrisy of the English court, in the passage which draws parallels between its behaviour towards the Parliament and that towards the other parties to the peace talks:

Pleas'd with their Numbers, yet in Valour wise,
They feign a parly, better to surprize:
They, that e're long shall the rude *Dutch* upbraid,
Who in a time of Treaty durst invade. (ll. 231–4)

John M. Wallace has argued against Marvell's authorship of the *Second* and *Third Advices* partly on the ground that the author of the earlier poems wants simply the immediate cessation of the war, whereas Marvell can see that peace is not a panacea, and that the situation is more complex.⁹⁵ On closer examination, it appears that the view of the war that emerges from *The last Instructions* is twofold. On the one hand, the unconscionable way in which the court has conducted its dealings with Holland would make it impossible that the war could be continued with justice, even if the court had been willing to continue it at all. On the other, and from a more pragmatic point of view, Marvell can see that the court may be led to water, but it cannot be made to prosecute a naval fight for which it very obviously has no stomach. The

relying on the promise.

⁹⁴ Richard Tuck cites Giovanni Botero's *Ragion di stato* as warning that 'he who treats with princes should put no trust in friendship, kinship, treaty or any other tie which has no basis in interest ...': Tuck, *Philosophy and Government*, p. 66. Tuck's view is that Grotius's work, along with that of Hobbes and others, constituted 'not ... resistance to the culture of *raison d'état*, but rather ... its remarkable transformation ...' (*Philosophy and Government*, p. xiv). Though Tuck may well be correct to emphasize the extent to which the practical effect of Grotius's work was to provide a justification for, rather than a restraint upon, the exercise of state power, it is nevertheless clear that Grotius was much more concerned with the form of legality than were the writers in the *raison d'état* tradition.

⁹⁵ Wallace, *Destiny his Choice*, pp. 152–5.

pretence of belligerence, which has served merely as an excuse for milking the taxpayer, should be dropped. According to Wallace, though:

The Last Instructions is not a peace poem at all ... and if a year had not passed since the writing of the two *Advices* ... one could assert categorically that all three of them could not have been the work of the same man. The treaty when it came caused widespread dissatisfaction, and the flippancy the two *Advices* was revealed the following year by the historical result of implementing their craven demands for a cessation of the war. Nowhere had they insisted that only an honourable peace was to be sought ... (p. 155)

However, by the time Marvell had finished *The last Instructions* it was far too late to seek an honourable peace. The peace that had been negotiated by Henry Coventry was already in place (ll. 821–4, 849–50) and a resumption of hostilities would necessarily have amounted to a breach of that agreement. Wallace, then, can hardly mean that Marvell thought it still possible to achieve an honourable peace at the time of writing *The last Instructions*. Presumably his argument is that, had Marvell been writing a year earlier, he (unlike the author of *The Second Advice to a Painter*) would have insisted that only an honourable peace should then have been sought. However, if Marvell believed that the war was unjust on the English side (at least) in 1667, there is no reason to assume that he thought differently in 1666. In heaping ridicule on the manner in which Peter Pett is treated as a scapegoat, he asks ‘Whose Counsel first did this mad War beget?’ (l. 769). This implies that, with the benefit of hindsight at least, he thought that the war had been a bad idea from the start. It is quite possible that he would have agreed in 1666 that it should be stopped as soon as possible.⁹⁶

‘Monk looks on’

Ephim G. Fogel, like Wallace, has argued that the *Second* and *Third Advices* express a view of the war and the combatants that is inconsistent with that put forward by Marvell in *The last Instructions*. One of his arguments is based on the alleged dispari-

⁹⁶ Patterson, *Marvell: The Writer in Public Life*, p. 87, points out that lines 313–30 of *The Second Advice* question the justice of the war.

ty between the treatment of Lord Albemarle in *The Third Advice* and in *The last Instructions*. Broadly speaking, Fogel regards the *Advice* as derisive of the general and the *Instructions* as broadly sympathetic towards him.⁹⁷ This section, while primarily concerned with Monck's behaviour during the final moments of Archibald Douglas, will incidentally attempt to show that, contrary to Fogel's position, both satires display an ambivalent but generally unfavourable attitude towards Albemarle and cannot be regarded as mutually inconsistent on this point.

The ambivalence of *The Third Advice* is relatively obvious. Albemarle is presented initially as fearsomely brave but as having lost some of his youthful skill as a soldier:

[He] swoll'n with sense of former glory won,
Thought Monck must be by Albemarle outdone.
Little he knew, with the same arm and sword,
How far the gentleman outcuts the lord. (ll. 39–42)

Though outnumbered, he engages De Ruyter's fleet in battle and fights fiercely (ll. 51–70). Undoubted courage, however, is not enough (ll. 71–2). The poet likens Albemarle to 'an old bustard, maimed, yet loath to yield' (l. 91) and suggests that the tearing of a 'large collop' (l. 125) from a buttock unaccustomedly turned towards the enemy is Fortune's 'Gentle correction for his fight so rash' (l. 128). 'Gentle' is obviously a matter of degree, and the precise degree to which the poem itself attempts the 'Gentle correction' of Albemarle is a question requiring fine judgment. The ambivalence is evident also in the linking of Monck with Cromwell, in pointing out that they had each at different times 'displaced' (l. 102) the Rump Parliament, and the suggestion that the injury to the general's 'rump' might be seen as revenge for that displacement (ll. 129–30).

Lady Albemarle is portrayed, John Wallace says, 'as so lewd and ignorant a woman that her hostile narrative about the government might appear to be discredit-

⁹⁷ Ephim G. Fogel, 'The Case for Internal Evidence: Salmons in Both, or Some Caveats for Canonical Scholars', *Bulletin of the New York Public Library* 63 (1959), pp. 223–236, 292–308.

ed before it began'. If the poem has often been regarded as unworthy of Marvell's abilities, it is at least in part because 'point of view is so badly handled'⁹⁸ that the criticism of the court loses some of its force in being put into the mouth of a witness who, as she speaks, undermines her own credibility. On this view, however, if the poem is a failure, it is at least an ambitious one. By leaving the attack on the handling of the war and other aspects of the court's behaviour to somebody whose own reliability is doubtful, the satirist avoids raising false hopes that the situation will easily be remedied. In the envoi, Lady Albemarle is compared to Cassandra (l. 447), implying that she is telling the truth but fated not to be believed;⁹⁹ indeed, the poet urges the king to believe her, thereby going some way towards assuaging the reader's doubts. The suggestion may be that the satirist's own position is not much better: he is likely to be believed, but his lines may inspire laughter rather than a serious attempt at repairing the damage he describes.

Among other things, the Duchess suggests that her husband's talents have not been put to their best possible use in giving him a naval command:

One valiant man on land, and he must be
Commanded out to stop their leaks at sea! (ll. 204–05)

In summary, the poem acknowledges Albemarle's bravery and recognizes that there is at least an argument for attributing the mishandling of the Four Days' Battle to age and understandable misjudgment and, because of decisions taken by others, to his being out of his element.

If *The Third Advice* is a little less unequivocally derisive of Albemarle than Fogel has taken it to be, *The last Instructions* is considerably less laudatory than it might appear. The reader first encounters the general at line 596 where he is initially

⁹⁸ Wallace, *Destiny his Choice*, p. 154.

⁹⁹ On the Duchess as truth-teller, see Martin Dzelzainis, 'Presbyterian Sibyl': Truth-telling and Gender in Andrew Marvell's *The Third Advice to a Painter*, in *Rhetoric, Women and Politics in Early Modern England*, ed. Jennifer Richards and Alison Thorne (London and New York: Routledge, 2007), pp. 111–28.

presented as a sympathetic figure. He is left behind to do his best with insufficient ammunition and unpaid, mutinous men when the 'feather'd *Gallants*' (l. 597) flee back to London at the approach of the Dutch. He had, we are told, often complained of the inadequacy the defences but, instead of 'succour', had received 'Confusion, folly, treachr'y, fear, neglect' (l. 610). His anger, grief and frustration at the capture of the *Royal Charles* is compared to the reaction of a helpless tigress who sees, from the far side of the river, her cubs taken by 'Robbers' (l. 624). So far, Albemarle is presented as a perspicacious and conscientious figure, let down by the greed and incompetence of his superiors. The comparison with the tigress, however, suggests that frustration may lead him to act in an ineffectually destructive way:

At her own Breast her useless claws does arm;
She tears herself since him she cannot harm. (l. 627–8)

Recent discussion of the poem has tended to concentrate on the passage describing the death of Archibald Douglas.¹⁰⁰ A number of commentators have suggested that that sacrifice is excessive, or that there is an element of self-indulgence to Douglas's acquiescence in it. So, Elsie Duncan-Jones asked whether Marvell was not hinting 'at the self-love and self-congratulation, not to say narcissism, that might be part of a heroic suicide, however sanctioned by naval tradition?'¹⁰¹ John Creaser frankly sees the young man's death as a waste:

After all, his death, however courageous, was stubborn and futile. Had he not disdained to save his 'precious life' (l. 671) with the 'known art' (l. 672) of swimming, the Dutch would have been no better off and the 'sad Stream' (l. 692) would not have needed to drink his ashes. Even in the heroic calm with which he approaches death, there is a trace of the potential narcissism which made him swim from the peeping nymphs, since the 'secret Joy' (l. 675) that he feels comes from the presumed admiration of his

¹⁰⁰ Chernaik and Dzelzainis note that 'this was one of the two passages most frequently cited in papers delivered at the 1996 conference' on Marvell and Liberty: *Marvell and Liberty*, ed. Chernaik and Dzelzainis, p. 15.

¹⁰¹ Elsie Duncan-Jones, 'Marvell: A Great Master of Words', *Proceedings of the British Academy* 41 (1975), pp. 267–90 (p. 278).

general.¹⁰²

Paul Hammond similarly takes up Duncan-Jones's suggestion of narcissism, noting that Marvell's 'descriptions of his hair and cheek contribute nothing to any martial image, but present a doubly narcissistic movement as the "yellow locks" seek themselves, and also court his own cheek'. Hammond adds that, in line 676, 'Monck's gaze is the homosocial gaze of soldier on soldier'.¹⁰³

It is worth pointing out, however, that if the decision to sacrifice the young soldier's life was 'stubborn and futile', the blame for that decision must attach, not to Douglas himself, but to the general who 'looks on' while it is within his power to stop it. Creaser's remarks draw attention, as Hammond's do not, to the fact that Monck's relationship to Douglas was not simply that of fellow-soldier but rather that of commanding officer to subordinate.

The rigidity of the rule that, without orders to do so, a soldier should not leave his post in any circumstances was a commonplace. It is the first specific duty mentioned by Aristotle, in the first chapter of the book in *Nicomachean Ethics* that deals with 'justice and injustice':

Law requires us to do the acts of a courageous person — not, for example, to desert our post, run away or throw down our weapons — as well as those of a temperate person — such as not to commit adultery or wanton violence — and those of an even-tempered person — not to hit or slander anyone, for instance.¹⁰⁴

Grotius treats the rule as a special case, an exception to the general principle that human laws should not require a person to suffer death rather than breach them:

I do not deny, but that some Acts of Virtue may by a human law be commanded, though under the evident Hazard of Death. As for a Soldier not to quit his Post; but it is not easily to be imagined, that such was the Intention of the Legislator; and it is very probable that Men have not received so extensive a Power over themselves or others, except in Cases where extreme Necessity

¹⁰² John Creaser, "As one scap't strangely from Captivity": Marvell and Existential Liberty, *Marvell and Liberty*, ed. Chernaik and Dzelzainis pp. 144–172 (pp. 155–6).

¹⁰³ Paul Hammond, 'Marvell's Sexuality', *The Seventeenth Century* 11 (1996), pp. 87–123 (pp. 105–06).

¹⁰⁴ Aristotle, *Nicomachean Ethics*, trans. and ed. Roger Crisp (Cambridge: Cambridge University Press, 2000), p. 82 (1129b).

requires it. For all human Laws are, and ought to be so enacted, that there should be some Allowance for human Frailty. (*De iure belli*, I.IV.VII; *Rights*, p. 357).

(This occurs in an important passage in which Grotius considers the question whether the law can compel a person to submit to being killed rather than offer resistance to the sovereign power. See also *De iure belli*, III.IV.XIII (*Rights*, p. 1288), where he again refers to the rule that a soldier should not quit his post.)

As Douglas's commanding officer, Albemarle was in a position to order the soldier to swim to safety. The fact that he did not do so indicates that (unless he was guilty of appalling inadvertence) he took a deliberate decision that the young Scot should be sacrificed. As Marvell relates the story, Douglas is fully aware that the general is present and can see his situation. By doing nothing, Albemarle makes his will as clear as if he had signalled a direct order: Douglas is to remain on the ship. This being the case, we can conclude that when 'secret Joy in his calm Soul does rise' (l. 675) it is not simply or primarily a narcissistic pleasure in the fact that his courage is evident to his commanding officer. In large part, it arises from his awareness that his impending death will *not* be the result of a stubborn and pointless adherence to standing orders. If Douglas had been completely free of narcissistic self-regard and had simply acted in the strictest accordance with his duties, he would not have behaved any differently. To the extent that he was motivated by narcissism, it reinforced his obedience to duty. If indeed his life was thrown away to no good effect, the fault did not lie with him.

Monck's reasons for allowing Douglas to be burned alive are not difficult to guess at. It is true that, on a strict calculation of material advantage and disadvantage, the Dutch were no worse off for Douglas's death. Monck, however, presumably reasoned that the expectation that *no* soldier on the English side would remain at his post would encourage the Dutch to continue upriver to London, confident that they would meet no serious resistance. The terrible death of just one soldier who refused

to abandon ship would at least be a step towards undermining that confidence. Douglas's life was the biggest but not the only sacrifice that Albemarle made to the objective of discouraging the Dutch advance. He was responsible, too, for a decision to sink ships in the river in an attempt to block the invaders' progress.

Albemarle gave his report to the House of Commons on the 'miscarriages at Chatham and Sheerness' on 31 October 1667. In it, he blames Peter Pett for failure to supply tools and for not having moved the *Royal Charles* away, though ordered to do so nine or ten weeks previously. He says that he, Albemarle, ordered the sinking of ships both inside and outside the chain. At first, he was advised by Pett and the 'masters of attendance' that three ships outside the chain would be enough, then that another two were needed. Then Sir Edward Spragge found another passage which the pilots and masters of attendance had not previously thought deep enough to allow great ships to pass, but which was in fact deep enough. He ordered the sinking of 'the *Sancta Maria*, a great *Dutch* prize, to be sunk in the deepest place between the two foresaid ships; and I judged it so necessary to be done that I charged Commissioner *Pett*, and the masters of attendance, on peril of their lives, to do it by morning'. Instead, 'by the carelessness of the pilot, and masters of attendance', she was run aground. Albemarle states that, if she had been sunk where he ordered, the Dutch would not have been able to get through.¹⁰⁵ It appears to have been partly as a result of Albemarle's report that Pett was brought before the bar of the House of Commons.

Marvell, it is clear, deplores what he portrays (*The last Instructions*, ll. 765–90) as the grossly unjust treatment of Pett, who is made to carry all the blame for the catastrophe.¹⁰⁶ He also deprecates a similar decision to sink ships further upriver in the Thames:

¹⁰⁵ Anchitell Grey, *Debates of the Houses of Commons, From the Year 1667 to the Year 1694*, 10 volumes (London: T. Becket and P. A. De Hondt, 1769), I, 23–7

¹⁰⁶ For Pett's treatment, see *Poems and Letters*, II, 370, n. to l. 767, citing Henry Savile; *The Poems of Andrew Marvell*, p. 388, n. to l. 767.

Officious fear, however, to prevent
 Our loss, does so much more our loss augment.
 The *Dutch* had robb'd those Jewels of the Crown:
 Our Merchant-men, lest they should burn, we drown.
 So when the Fire did not enough devour,
 The Houses were demolish'd near the *Tow'r*.
 Those Ships, that yearly from their teeming Howl,
 Unloaded here the Birth of either Pole;
 Furs from the *North*, and Silver from the *West*,
 From the *South* Perfumes, Spices from the *East*;
 From *Gambo* Gold, and from the *Ganges* Gems;
 Take a short Voyage underneath the *Thames*.
 Once a deep River, now with Timber floor'd,
 And shrunk, lest Navigable, to a Ford. (ll. 709–22)

Making a loss greater in order to limit it and sinking ships 'lest they should burn' are perfect examples of what Carey called 'the self-defeating reversibility of our actions'. That is not necessarily to say, however, that in this instance the reversibility was inevitable. As the parliamentary representative of a sea-faring constituency, Marvell evidently feels chagrin at the end to which these well-travelled merchant ships have come. The passage contains no suggestion that he thought the sacrifice necessary or worthwhile.

Albemarle's actions are not necessarily as open to criticism as those that Marvell describes. He sank a few ships, including a captured Dutch prize, in an attempt to stop the Dutch from breaking through the chain. 'Officious fear', in contrast, is said to have ordered the wholesale scuttling of English merchantmen, doing the enemy's work for it out of panic. As line 711 makes clear, the Dutch had already reached Chatham when the merchantmen were sunk further upriver, so the failure of Albemarle's tactic should have been apparent. It may be, therefore, that Monck's decision is distinguishable from the later one, though the parallels between them are nevertheless suggestive. To someone who was familiar with Monck's role and actions in the Chatham disaster, *The last Instructions* can hardly have seemed an unequivocally favourable appraisal. At best, it leaves open the possibility that the sacrifice of Douglas's life and of the ships was a necessary, though high, price to pay

for the safety of the capital. The probability, however, is the other way.

Marvell implies that the Dutch pulled back, not because they were deterred by Douglas's awful display of heroism, or Albemarle's strategic response to their incursion, but because they were sated with easy pickings:

Now (nothing more at *Chatham* left to burn)
The Holland Squadron leisurely return:
And spight of *Ruperts* and of *Albemarles*,
To *Ruyter's* Triumph lead the captive *Charles*.
The pleasing sight he often does prolong:
Her Masts erect, tough Cordage, Timbers strong,
Her moving Shape; all these he does survey,
And all admires, but most his easie Prey. (ll. 723–30)

The case is not clear beyond doubt, but seems that the likelihood is that Monck's actions (and, in the case of Douglas, his inaction) were not effective to impede the Dutch invasion and were not the cause of their withdrawal.

In terms of strict legality, the treatment of Douglas cannot be regarded as an injustice. The captain was under a duty to obey orders and Albemarle had both a right to command him and a duty to defend the shipyard. Accordingly, Albemarle's tacit order that the young soldier should allow himself to be burned to death did not amount to *iniuria*, though it can hardly be denied that it was *damnum*.

The tendency of recent scholarship has been to accept the *Second* and *Third Advices* as the work of Marvell. To the extent that it answers one of Fogel's reasons for denying the attribution of the *Third Advice* to Marvell, the present argument is consistent with that tendency. Annabel Patterson favours Marvell's authorship, first, on the basis of the authority of the Popple manuscript (Bodleian MS Eng. Poet d. 49) which, she argues, is a collection of Marvell's verse assembled by people who knew what they were doing 'as if for a new edition.'¹⁰⁷ The second part of her argument is based on internal evidence, such as verbal echoes, the reworking of rhymes that

¹⁰⁷ Annabel Patterson, 'Lady State's First Two Sitzings: Marvell's Satiric Canon', *SEL* 40 (2000), pp. 395–411 (p. 398).

Marvell had used in earlier poems and the use of characteristic devices, such as the introduction of a second speaker (the European king in *The First Anniversary*, the panicking sailor who curses Noah ‘and all his race’, in *The Second Advice*).¹⁰⁸ Nigel Smith argues, mainly on the basis of ‘detailed attention to diction, prosody and rhyming’, that the two satires ‘contain’ (not necessarily exclusively) the work of Marvell.¹⁰⁹ The ‘computational approach’ of John Burrows supports both the authority of the Popple manuscript and the attribution of the *Second* and *Third Advices* to Marvell.¹¹⁰

It is clear that the two poems share some of the concerns of *The last Instructions* with such questions as the justice of the war and of the behaviour of the court generally, and the ‘dominion’ of the sea. The passage beginning with line 317 of *The Second Advice* is described by both Patterson and Smith as bringing into question the justness of the war.¹¹¹ The passage is a litany of the various ways in which the war has failed to achieve its objectives, and generally been counterproductive, the first being:

If to espouse the ocean all the pains,
Princes unite, and will forbid the bains. (ll. 319–20)

The espousal of the ocean is the ceremony by which the Doge of Venice each year threw a wedding ring into the sea, as Nedham’s translation of Selden has it, ‘for the perpetuating (saith *Paulus Merula*) of their dominion over the Sea.’¹¹² As we have seen, Marvell alludes to this ceremony in ‘The Character of Holland’ line 136, where he speaks of ‘our armed *Bucentore*’ (and reference has already been made to it in *The*

¹⁰⁸ One parallel that does not seem to have been noticed between *The Second Advice* and *The last Instructions* is the innuendo that Clarendon has suffered a ‘rupture’ or hernia: *Second Advice*, ll. 117–8; *The last Instructions*, ll. 473–4. The latter work further implies that the Chancellor might have undergone a drastic remedy.

¹⁰⁹ *Poems of Andrew Marvell*, p. 322.

¹¹⁰ John Burrows, ‘Andrew Marvell and the “Painter Satires”’: A Computational Approach to their Authorship’, *Modern Language Review* 100 (2005), pp. 281–97.

¹¹¹ ‘The other motive, and the second major indecorum of *The Second Advice*, is to question the justice of the war’: Patterson, *The Writer in Public Life*, p. 87; ‘The questioning of the justness of the war in *The Second Advice* ... reads almost like a list of the committee’s findings’: *Poems of Andrew Marvell*, p. 325.

¹¹² See above, p. 102.

Second Advice, ll. 73–4). To say that ‘Princes unite, and will forbid the banns’ (i.e. ‘banns’: they will object that the marriage would be unlawful) is probably to acknowledge that the opinion and practice of sovereigns is already tending to favour the Grotian theory of *Mare liberum* over the Seldenian *Mare clausum*. To present this as in part a consequence of the Second Dutch War may be to suggest that misguided English belligerence in the short term has contributed to an enormous long-term loss, that of the right and ability to control and exploit the oceans. If the *Second Advice* is Marvell’s, these lines suggest that he had come to the conclusion that English claims to sea-dominion, which he seemed to favour in ‘The Character of Holland’, could no longer be sustained.

In this respect, they are consistent with *The last Instructions*, the ending of which shows that England no longer has the means to maintain her dominion over the sea: one of her great ships has been seized as prize, two others have been burnt and in any case, even without this damage inflicted by the enemy, the fleet would be out of commission. The *Royal Charles*, ‘that fatal Pledge of Sea-Command’, is now held by De Ruyter, while the other Charles’s claim to such command is merely the inscription on the most trifling coin in circulation:

The *Court* in Farthing yet it self does please,
A female *Stewart*, there *Rules the four Seas*.
But Fate does still accumulate our Woes,
And *Richmond* here¹¹³ commands, as *Ruyter* those. (ll. 761–4)

Even the sea-god that could once be called ‘our *Neptune*’ seems now to have changed sides (*The last Instructions*, ll. 543–6, 749–50).

Similarity in difference

Separated as they are by fourteen years that included the succession of the Protectorate to the ‘*Common wealth*’, the collapse of the former and the Restoration of the

¹¹³ *Poems and Letters* prints ‘here’ rather than ‘her’, following the original publication in *Poems on Affairs of State* of 1689.

Stuart monarchy, it is not surprising that these two poems, both of them dealing with hostilities between England and Holland, should have marked dissimilarities as well as similarities in their attitudes to Anglo-Dutch relations. Both poems charge the Dutch with unconscionable behaviour — specifically, that they ‘invade’¹¹⁴ English waters under cover of diplomatic negotiations — but while the earlier poem recounts this alleged perfidy in a tone of outrage, the later one suggests that the English are in no position to criticize, their king and his advisers being guilty of similar dishonesty.

A comparison of the two poems does not, without further evidence, reveal whether Marvell was persuaded by Grotian arguments. In ‘The Character of Holland’, he seems to be using Grotius primarily as a means of accusing the Dutch of hypocrisy, and himself to endorse Selden’s counterarguments as to the possibility of owning the sea. By the time he comes to write *The last Instructions*, his main target is the English court, against whom he levels charges that owe more than a little to Grotius’s precepts as to what may lawfully be done during war.

¹¹⁴ ‘The Character of Holland’, l. 117, *The last Instructions*, l. 234.

Chapter 3. The problem of justice in Marvell's pastoral and lyric poetry

'Translated, and by whom'

In chapter 1, it was suggested incidentally that 'Tom May's Death' is sufficiently consistent with 'An Horatian Ode' to remove any serious doubt as to their being the work of a single author. Nonetheless, those who would like to deny Marvell's authorship of the later poem can draw some support from the fact that it contains a number of examples of what might be called typically Marvellian figures, but which appear in a looser or more diffuse form than they do elsewhere in Marvell's poetry, giving the poem more the appearance of an imitation of Marvell than of the genuine Marvellian article. So, the translator translated, not being precisely a reflexive figure, does not seem so tightly self-enclosed as 'the Mower mown'.¹ May is translated (l. 26), in the sense of being carried across, by Death; the mower, more economically, is mown by Death's 'charmingly absurd colleague'² — himself.

Another example can be found in the use of syllepsis and similar figures. What Rosalie Colie calls the failure of parallelism in 'The Picture of little T. C.' ('Nip in the blossome all our hopes and Thee', l. 40)³ is, as she points out, itself paralleled by a 'simpler example of a grammatical pivot' in 'Tom May's Death': 'By this *May* to himself and them was come' (l. 25). This, however, is not the only example of such a device in 'Tom May's Death': there is a second, when Jonson accuses May of 'Apostatizing from our Arts and us' (l. 73). Colie is right to describe the first example from

¹ On the related questions of reflexivity and self-enclosure in Marvell's poetry, see Christopher Ricks, "'Its Own Resemblance', in *Approaches to Marvell*, ed. Patrides, pp. 108–35.

² John Creaser, 'Marvell's Effortless Superiority', *Essays in Criticism* 20 (1970), pp. 403–23 (p. 408).

³ Rosalie L. Colie, *'My Echoing Song': Andrew Marvell's Poetry of Criticism* (Princeton: Princeton University Press, 1970), pp. 85, 93. The two following quotations are also from p. 93.

‘May’ as ‘simpler’; in ‘Little T. C.’ the figure, grammatically suspect though it may be, fulfils an important function. As Colie says:

‘Nip in the blossome all our hopes and Thee’ plays, with degrees of metaphor as well as with ‘nip’ as a syntactical pivot: the line begins as a cliché and gains power as we realise that T. C. is taken, throughout the poem, as a ‘flower,’ and that both girl and flower are taken as symbols of transience.

Just at the moment that it impinges on the reader’s consciousness that the nipping ‘in the blossome’ of all our hopes must, if it occurs, entail the nipping of the flower-girl too, the implication is made unavoidably explicit, with ‘and Thee’. The effect is to underscore the sense of potential loss and to admonish the reader against a euphemistic, or simply a careless, interpretation of the cliché, just as the interpretation is on the point of being made. It is also to make concrete the indeterminate phrase ‘all our hopes.’⁴ On the face of it, the device does not seem to be doing anything nearly so useful when it occurs in ‘Tom May’s Death’. Of May’s coming ‘to himself and them’, Colie justly remarks that it ‘allows a rather doggerel wit, fitting the kind of inferior accomplishment Marvell attributes to May’. The effect is funny, apt in its awkwardness, enacting May’s initial disorientation and the shock of coming to himself and — the real shock — to them, but it could easily be experienced as a disappointment after ‘Little T. C.’ (and ‘May’, it will be remembered, *does* come immediately after ‘Little T. C.’ in the folio).

The second time that the device occurs in ‘Tom May’s Death’, it is spoken by Marvell’s ‘Jonson’. Its articulation by a character in a dramatic setting gives to the figure a new quality: Jonson is attempting to be severely judicious, but in the end is unable to withhold an expression of personal affront (‘and us’) at May’s apostasy. (It is for this reason that this second example is treated as syllepsis and not merely as belonging to the more general category, zeugma. The contrast between the abstrac-

⁴ Compare ‘On *Paradise Lost*’, ll. 33–4 where, by keeping ‘things divine ... inviolate’, Milton likewise preserves himself.

tion of 'Arts' and the concrete 'us' emphasizes the double character of Jonson's objection.) Gerard Reedy believes that the personal animus is not merely 'Jonson's' but Marvell's own.⁵ One possible reason why Marvell might well have felt anger towards May has been outlined in the first chapter, that is, that the latter had seemed to make too easily a decision which had cost the former much difficulty. On the other hand, one might take the view that Marvell manages to be precise and controlled in his depiction of Jonson's sense of betrayal, and that the use of 'and us' is a good example of this.

This may give some inkling as to why 'May' was placed after 'Little T. C.' in the folio. The two poems have a thematic similarity which is merely figured in their sharing of an unusual grammatical device. 'Little T. C.' too looks at the idea of a retributive justice, and finds it unsatisfactory and carrying the potential for great injustice. The girl is warned to

Gather the Flow'rs, but spare the Buds;
Lest *Flora* angry at thy crime,
To kill her Infants in their prime,
Do quickly make th'Example Yours;
And, ere we see,
Nip in the blossome all our hopes and Thee. (ll. 35–40)

As Colie points out, what Marvell has achieved in this poem is paradoxical almost to the point of self-contradiction: a *carpe florem* poem that enjoins discrimination. The paradox is one of the elements contributing to a sense of shock and discomfort that the poem produces. Another such element is the fact that Marvell considers as a real possibility the death of a young child. However, these elements alone are not enough to account for the powerfully disturbing effect of the poem. What is most shocking is the suggestion that a young child might have the same liability as an adult to be punished for the harm she innocently does. To a twenty-first-century reader, at least, this is immediately experienced as unjust, but a little reflection makes it clear that the

⁵ Gerard Reedy, S.J., "An Horatian Ode" and "Tom May's Death", *SEL* 20 (1980), pp. 137–51.

true situation is even worse: the death of a child, and with it 'all our hopes', bears no necessary relation to the harm done by him or her, innocently or otherwise.

'Ev'n Beasts must be with justice slain'

Similar ideas about the nature of justice play a part in 'The Nymph complaining for the death of her Faun'. This, more than any other poem of Marvell's, seems to offer the reader a multitude of possible, yet mutually inconsistent, interpretations. It contains unmistakable references to Canticles, raising the expectation that it is a religious allegory.⁶ The appearance of 'Troopers' in the first line, in conjunction with the killing of an inoffensive creature, adds to this the possibility of its being a political allegory.⁷ The poem, however, includes elements pointing firmly away from an allegorical reading. Its recollection of classical laments for dead pets is one such indicator. However, the main difficulty for those who would read the poem as allegory is that all such readings seem to be incomplete or contradicted by another element in the poem. For example, as Le Comte points out, the nymph's denial that the troopers can derive 'any good' (l. 6) from the fawn's death poses a problem for an interpretation that sees the fawn as standing for Christ.⁸ Geoffrey Hartman acknowledges that it is an error to seek 'a sustained allegory' in this poem and proposes instead that it is a 'brief' one for a process by which detachment from the world is achieved in stages, when a 'love that has turned from temporal fulfilment to temporal consolation becomes a disconsolateness which is love still, but removed from this world.'⁹ Graham Parry says that the poem's political allegory 'cannot be subjected to a clear

⁶ Karina Williamson, 'Marvell's "The Nymph Complaining for the Death of Her Fawn": A Reply', *Modern Philology*, 51 (1954) pp. 268–71, responding to Edward S. Le Comte, 'Marvell's "The Nymph Complaining for the Death of Her Fawn"', *Modern Philology* 50 (1952), pp. 97–101.

⁷ Yvonne L. Sandstroem, 'Marvell's "Nymph Complaining" as Historical Allegory' *SEL* 30 (1990) 93–114 provides one such allegorical reading.

⁸ Le Comte, 'Marvell's "The Nymph Complaining for the Death of Her Fawn"', p. 98.

⁹ Geoffrey Hartman, "'The Nymph Complaining for the Death of her Fawn": A Brief Allegory', *Essays in Criticism* 18 (1968), pp. 113–35 (p. 119). Hartman sees 'the progress of the soul' as an example of this process, which is a general one.

exposition' because it is concealed by a 'pastoral apparatus' the signification of which is inconsistent because it is changing: 'Pastoral poetry is opening into political poetry, but the change is not complete, and Marvell here seems to be feeling his way.'¹⁰

The title contains the first of the poem's many ambiguities. The ambiguity of the word 'Faun' has attracted some discussion.¹¹ Of more interest for present purposes is 'complaining.' It indicates, primarily, the obvious fact that the poem is a lament, but it also has a legal meaning,¹² and it becomes very clear that, as well as lamenting her slain pet, the nymph also claims that its killing was the denial or violation of a right:

It cannot dye so. Heavens King
Keeps register of every thing:
And nothing may we use in vain.
Ev'n Beasts must be with justice slain;
Else Men are made their *Deodands*.
Though they should wash their guilty hands
In this warm life-blood, which doth part
From thine, and wound me to the Heart,
Yet could they not be clean: their Stain
Is dye'd in such a Purple Grain.
There is not such another in
The World, to offer for their Sin. (ll. 13–24)

There are a number of points to be made about this. In the first place, the nymph is attempting to discover whether and how the wrong committed by the troopers can be put right. So far as she can see, it cannot. She protests that she does not wish the killers ill (ll. 7–8), and it soon becomes clear that at least part of the reason for this is that their punishment would be ineffectual to undo the wrong they have done: 'There

¹⁰ Graham Parry, 'What is Marvell's Nymph Complaining About?', *Critical Survey* 5 (1993) 244–51 (p. 249).

¹¹ See John J. Teunisson and Evelyn J. Hinz, 'What is the Nymph Complaining For?', *ELH* 45 (1978), pp. 410–28 (pp. 415–6).

¹² 'Complain' in one form or another occurs 11 times in *Miscellaneous Poems*, including the title of the poem under discussion. In several places the meaning is either unequivocally legal ('Horatian Ode', l. 37) or, as here, the word carries an important though secondary legal significance. Haber has argued that 'Remedies themselves complain' ('Damon the Mower', l. 30) is Marvell's version of Theocritus's pun on *pharmakon*, which means both 'remedy' and 'poison': Judith Haber, *Pastoral and the Poetics of Self-contradiction: Theocritus to Marvell* (Cambridge: Cambridge University Press, 1994), p. 10. One may suspect the presence of a legal pun too, since both 'remedy' and 'complain' have a legal significance.

is not such another in / The World, to offer for their Sin.’ The second thing to note is that the nymph attempts to posit an exact equivalence — what might be called a quantitative concept of justice — between the killing by a pet of a human and that by a human of a pet. ‘Deodand’ was a term applied to a chattel (a term that could include a tame animal) which had occasioned the death of a human, and which was therefore ‘forfeit to the king, to be applied to pious uses.’¹³ Critics have sometimes been surprised that the childish vocabulary of the nymph should include such a technical word. It is indeed a surprise that she uses it, but this is not an effect that Marvell achieves at the expense of verisimilitude. Blackstone, as quoted in Elsie Duncan-Jones’s note, goes on to remark that ‘Deodands are granted out to lords of manors ... to the perversion of their original design.’ Deodand was experienced, inevitably, as a tax;¹⁴ but was a particularly objectionable one because its imposition was arbitrary and unpredictable, being occasioned by accidental death. It was not, in other words, a term that would be remote from the lives of farm labourers and others who worked with dangerous implements.

The lines quoted above successively depict the failure of a number of different models of justice. The inverted application of the concept of deodand to the human killers produces an absurd result which casts doubt on the efficacy (and fairness) of its actual application. The absence of ‘such another ... to offer for their Sin’ suggests that reparation (and still more so retribution) may too often be the adding of one wrong to another rather than the cancelling out of the original wrong by its opposite. The nymph chooses to die too, but without any sense that her death atones for the killing of the fawn. In this she resembles Astraea rather than Christ¹⁵ — leaving

¹³ William Blackstone, *Commentaries on the Laws of England* 1st ed. (Oxford: Clarendon Press, 1765; facsimile rpt. University of Chicago Press, 1979) Vol. 1, pp. 290–3, quoted by Duncan-Jones in *Poems and Letters*, I, 251, note to l. 17.

¹⁴ Blackstone’s discussion of the subject occurs in a chapter with the title ‘Of the King’s Revenue.’ See also below, p. 148, on the subject of escheat.

¹⁵ Hartman, “‘The Nymph Complaining for the Death of her Fawn’: A Brief Allegory”, p. 119, sees the fawn, not the nymph, as resembling Astraea because it undergoes an apotheosis; Margarita

behind a world in which justice has failed, rather than allowing herself to be sacrificed in order to restore it. This may suggest one possible reason for the apparent proliferation of arguments or themes in the poem. Marvell is concerned, perhaps primarily, with the abstract idea of justice, and the differing possible interpretations are concrete, though incomplete, workings out of the central problem. Thus the lines, 'There is not such another in / The World, to offer for their Sin' quite obviously call Christ to mind, yet there is no sustained allegory of Christ's passion and death, nor is there an obvious parallel between the killing of a fawn (a small matter, except to the nymph) and the sins of humankind. Christ is evoked because his suffering was the type of an act of restorative justice, such as the nymph cannot imagine as now being possible.

It may be the case that the nymph is overreacting outrageously to the kind of minor event that happens every day. But if she is right in asserting that reparation for the fawn's death is impossible, then the trivial nature of the actual occurrence is no real consolation. If justice is not available in such a small matter, it may not be available in larger ones either. The troopers' action has been 'wanton': arbitrary, unpredictable and without good cause. This is one of the reasons why the event described in the poem does not seem trivial, despite the reader's not sharing the nymph's emotional attachment to the animal.¹⁶

This, it hardly needs to be said, is not put forward as a full account of the poem. For one thing, only the frame of the story has yet been discussed. The framed

Stocker finds allusions to the returning Astraea of Virgil's Eclogue IV in the 'Letter to Doctor Ingelo' (Margarita Stocker, 'Remodeling Virgil: Marvell's New Astraea', *Studies in Philology* 84 (1987), pp. 159–79) and in the picture of Maria at the end of 'Upon Appleton House' (Margarita Stocker, *Apocalyptic Marvell: the Second Coming in Seventeenth-Century Poetry*, (Brighton: Harvester Press, 1986), pp. 137–64). If Astraea is indeed a presence in 'The Nymph complaining', it is the departing goddess who '*terras ... reliquit*' in Ovid's *Metamorphosis* Bk. 1, rather than Virgil's returning one.

¹⁶ The starting point for the Jungian reading of Teunissen and Hinz is the conviction that the 'emotional impact generated by the poem ... must be in proportion to the instance used to evoke it, and generally speaking grief over the death of a pet is not a subject for high tragedy and, if treated in that way, would normally produce only bathos.' ('What is the Nymph Complaining for?', p. 410.)

narrative, the story of Sylvio's gift, his betrayal of the nymph and his replacement as the object of her love, would appear to be the real substance of the poem, and it is related only tenuously to the theme of justice that is the subject of this thesis. Yet, though tenuous, the relationship is real. Sylvio, in the nymph's view, has done her an injury. She may have had no right to prevent him from taking his heart, but his actions have (she implies) given rise to a legitimate expectation that he would not do so. He has beguiled her. She does not say how; possibly the memory of her own credulity is too painful for her to make more than a glancing reference to it. The whole course of the courtship (or whatever it was) is related in twelve lines out of the poem's 122, and the first two of these immediately reveal that it did not go well. The end of the affair is briefly told:

But *Sylvio* soon had me beguil'd
 This waxed tame, while he grew wild
 And quite regardless of my Smart,
 Left me his Faun, but took his Heart. (ll. 33–6)

The nymph, it seems, is bravely trying to be objective, to assign to Sylvio's breach with her the importance it properly bears in the overall scheme of things. But, as she exaggerates the importance of the fawn's slaying, she understates that of Sylvio's betrayal. Indeed, it is arguably because she has played down the latter that she attaches an excessive importance to the former. This draws attention to the relationship between the two losses, that is to say, to the extent to which the fawn has been a substitute for Sylvio's love. If the death of the fawn, whatever its significance in the history of the universe, is no minor matter to the nymph, then neither is Sylvio's breach of faith, despite her almost dismissive allocation of four lines to its narration.

But, as we have seen, the nymph *complains* for the death of her fawn; that is, she pleads for justice and redress. Has she any reason to expect redress for Sylvio's beguiling? Part of the huntsman's deception, it is implied, is that he has presented the fawn as one thing — a token of love — while intending it as something else entirely

— compensation for the withdrawal of love; or rather, since love can never be guaranteed, for the withdrawal of his presence:

Said He, look how your Huntsman here
Hath taught a Faun to hunt his *Dear*.
...
And quite regardless of my Smart
Left me his Faun, but took his Heart. (ll. 31–2, 35–6)

It has to be admitted that we hear only the nymph's side of the story, and that Sylvio may be innocent of the cynical calculation here ascribed to him. What is beyond doubt, however, is that the nymph believes him to have been false from the beginning. The first word she uses to describe him is 'Unconstant' and she continues with a reference to the time, at the beginning of the relationship, 'when yet / I had not found him counterfeit' (ll. 25–6). In the nymph's view — the only view we have — he has been consistently untrue throughout the entire duration of the relationship.

After his departure, if the nymph wishes to minimize her losses, she has little choice but to take Sylvio's offering in the spirit in which she believes it was intended. The responsibilities that he has assumed towards her have been regarded by him, without her knowledge, as being in the nature of contractual obligations, capable of being discharged by payment of compensation. It may be significant that the only unambiguous reference to the fawn as a *gift*¹⁷ occurs in the context of the nymph's speculation about its possibly proving false:

Had it liv'd long, I do not know
Whether it too might have done so
As *Sylvio* did: his Gifts might be
Perhaps as false or more than he. (ll. 47–50)

The gift is false indeed, though not necessarily in the way she imagines. If it had been what it appeared to be, a love token, it would have been no part of a bargain and a genuine gift. In the context of rights and obligations in which it is actually given and

¹⁷ 'Gave' in line 29 is etymologically related to 'gift' but unlike that word does not necessarily imply a voluntary donation independent of any obligation or consideration.

received, the term is misleading.

The troopers' wanton action, then, deprives the nymph of the compensation she ought to have had for the loss of Sylvio. Even before that happened, though, there were indications that the compensation was not entirely commensurate with the loss she had suffered. She says:

But I am sure, for ought that I
 Could in so short a time espie,
 Thy Love was far more better then
 The love of false and cruel men. (ll. 51–4)

Here, Marvell appears to be using a familiar device to suggest that we should not take at face value the nymph's comparison between what she has lost and what she has found. Like several other speakers in his poetry, she is unable to distinguish between subject and object. 'Thy Love' is, on the face of it, a subjective genitive: the love the fawn for the girl who feeds it and allows it to play in her garden. 'The love of false and cruel men', on the contrary, is primarily an objective genitive, since men who are *ex hypothesi* 'false and cruel' cannot be supposed to feel much love. The difference between the two formulations is stressed by the use of the possessive pronoun 'Thy' in one and not in the other. In effect the nymph says that it is better to be loved by the fawn than to love false and cruel men, a statement plausible enough in itself but which is rendered doubtful by the attempt to suggest that the fawn's love and that of the men are comparable.

The nymph's attempt to make a judgment of value is compromised by her inability properly to distinguish between the terms of the comparison. A capacity for judgment may not be something that we expect to find in the nymph; she is, after all, the complainant, and we should be surprised to find her acting as a judge in her own cause. She is not impartial, but it does not follow that she is not right, or that the wrongs which have been committed against her are not serious injustices. If Sylvio's compensatory 'gift' is not of equal value to his heart, then the nymph has already

been the victim of an injustice before the troopers have come along and deprived her of even that consolation. The implication is that as there is no equivalence between a fawn and a heart — as, indeed, the two are not comparable because different in kind — it may well be that the very possibility of a compensatory justice, relying as it does on incomplete resemblances and perceived rather than real equivalences, is as illusory and deceptive as a pun. At law, compensation for an injury has generally taken the form of damages. A broken limb, the incapacitation of a breadwinner, a sullied reputation are all converted by the legal process into sums of money. The relationship between the injury and the damages awarded is necessarily an arbitrary one and the awards themselves (except when made by a jury) are frequently ungenerous. A major part of the administration of justice is taken up with the attempt to equate the incommensurable.

In its linking of the two stories, the poem lies at the meeting point of the public and private spheres.¹⁸ The nymph is forced to distinguish between the public injustice done to her by ‘wanton Troopers’ (a phrase that encapsulates the idea of armed force unchecked by any rational discipline or control; or, to put it another way, the disjunction of might and right) and the private, domestic hurt occasioned by Sylvio, even while she stresses the relationship between these two injuries. Having made the distinction, she describes the public wrong in terms that suggest it to be the more serious injustice, the wrong that she asserts to be irreparable, while relegating the private wrong to the level of an old story, quickly told. The reader, as we have seen, suspects that the hurt felt by the nymph is much greater at the private than at the public wrong. However, the law would take a relative attitude to the two events remarkably similar to that expressed by the nymph. That is to say, it would be more likely to take notice of, and offer a remedy for, a wanton act of destruction of private

¹⁸ Everett, ‘Poetry and Politics in Andrew Marvell’, *passim*, is concerned with the relationship between public and private in his poetry. See also the remarks of Worden and Carey on the ambiguously public character of, respectively, ‘An Horatian Ode’ and ‘Tom May’s Death’, below, p. 145.

property than a breach of faith in an affair of the heart. (It is true that, until the nineteenth century, there existed a legal remedy for breach of promise of marriage. Its application was limited, however, and the world in which such a remedy would be useful seems remote from the nymph's.) Is it possible that Marvell is suggesting that, in its inability to deal adequately with the personal sources of much of the hurt suffered by human beings and its tendency instead to concentrate its efforts on providing a remedy for public wrongs, the law adopts a perspective as distorted as the nymph's? Whether or not it is, it seems clear from this poem that even the lesser and more publicly amenable injury is likely to go without an effectual remedy; *a fortiori* the greater and more private.

So, Astraea-like, the nymph prepares to depart from a world without justice. One must be careful not to make too much of this resemblance. What the nymph plans to do, once she has bespoken the fawn's grave, is die. Astraea, in contrast, did not die but became a star, and eventually returned to earth. The resemblance lies solely in the fact that it is the absence of justice in the world that leads the nymph to wish to leave it. In a poem which already suggests a connection between her and Diana (l. 104) and, probably, draws a comparison between her and Niobe (l. 116) the addition of another classical allusion might appear to be confusing rather than elucidating. However, it can be argued that the recognition of the presence of Astraea in the poem helps to clarify the relevance of Diana and Niobe, given that the resemblances between them and the nymph are not entirely obvious. She does not, as Leo Spitzer has pointed out, resemble Niobe in boastfulness, and according to D. C. Allen she is not a mother.¹⁹ The significance of Niobe, in this context, if the argument of this chapter is correct, is as a demonstration that the gods can be excessive and

¹⁹ Leo Spitzer, 'Marvell's "Nymph Complaining for the Death of her Faun": Sources versus Meaning', *MLQ* 19 (1958), pp. 231–43 (p. 242); Don Cameron Allen, *Image and Meaning: Metaphoric Traditions in Renaissance Poetry*, (Baltimore: Johns Hopkins University Press, 1960), p. 112. For Teunissen and Hinz, however, she stands for the mother of mothers, the *magna mater*: 'What is the Nymph Complaining for?', pp. 420–2.

unjustly vindictive in their punishments. The nymph's relation to this image is an ambivalent one. Like Niobe, she is the victim of unjust treatment but, in her case, the treatment is not intended to punish her; at any rate, she has not disclosed any wrongdoing on her part that would merit punishment.

On the other hand, unlike Latona, she *appears* not to be vindictive. She says that she does not wish the troopers ill, and that she will pray that heaven 'forget' (l. 10) the fawn's murder. In part, as has been suggested above, this is because she cannot believe in the possibility of atonement or reparation. It should not, however, be mistaken for an indication of a generously forgiving nature. In fact, her use of 'forget', where 'forgive' is expected and more appropriate, may be a deliberate rejection of the possibility of forgiveness.²⁰

She immediately goes on to assert, in effect, that heaven *cannot* forget: its 'King / Keeps register of every thing' (ll. 13–14). It may be the case that, by choosing to pray for something that she knows to be impossible, rather than for something that she believes that God can readily grant, she is dissembling her vengeful feelings. Alternatively, it may be that she has no ill wishes to waste on the troopers because she has reserved them for Sylvio.

One of the best-known incidents involving Diana is the punishment of Actaeon (*Metamorphoses*, Bk. 3). He, having been turned into a stag by the goddess, is torn apart by his own hounds, in another example of a punishment that is clearly excessive. It may be inferred that the nymph regards Sylvio, the self-described 'Huntsman' (l. 31), as a suitable candidate for similar treatment. By placing an offering in her shrine, the nymph is attempting to invoke the goddess, in a context where a huntsman has offended. That it is the Actaeon episode from the *Metamor-*

²⁰ Christine Rees, *The Judgment of Marvell* (London: Pinter Publishers, 1989), p. 73, takes it as an indication of her lack of both learning and experience: 'she turns to the language of religion, a language familiar yet distinctively hers in its ingenuous vocabulary and its awkward syntax. ... But she gets it a little wrong, by substituting "forget" for the more exemplary Christian "forgive" ...'

phoses that the reference to Diana is intended to bring to mind is a reasonable, though not inevitable, inference from the poem's apparent debt to Ovid. Sarah Annes Brown has described 'The Nymph complaining' as 'a profoundly Ovidian poem.'²¹ This is a difficult proposition to demonstrate conclusively. While Cyparissus's killing of a stag (*Metamorphoses* Bk. 10, ll. 106–42) is one of the tales which has been seen as a possible source for the events described in 'The Nymph complaining', and Niobe and the Heliades are also to be found in the *Metamorphoses*, it would be dangerous to conclude on those grounds only that Marvell's poem makes direct reference to Ovid's. As Brown puts it, such stories 'represent part of the furniture of the Renaissance mind, ... they had been treated so very frequently by artists of all kinds that by Marvell's time they were very common coin.'²² She therefore attempts to establish the Ovidian character of Marvell's poem by showing that Marvell and Ovid share certain qualities of mind, such as the liking for reflexivity noted, in Marvell's case, by Christopher Ricks, a fondness for witty inversion and a preoccupation with the process of metamorphosis.²³

If Brown is right about the relationship of 'The Nymph complaining' to the *Metamorphoses*, this may help to elucidate the nature of the nymph's slender yet apparently real resemblance to Astraea. That goddess's position in the *Metamorphoses* is an ambiguous one. Explicit reference to her occupies just a line and a half: *et virgo caede madentis / ultima caelestum terras Astraea reliquit* (Bk. 1, ll. 149–50). Nevertheless, her star turn at the beginning of the poem might be said to mirror the apotheosis of Julius Cæsar at its end. Her return to earth is not mentioned by Ovid but it is clear from Virgil and others that it coincides with the beginning of Augustus's reign

²¹ Sarah Annes Brown, 'Ovid and Marvell's The Nymph Complaining for the Death of her Faun', *Translation and Literature* 6 (1997), pp. 167–85 (p. 168).

²² Brown, 'Ovid and Marvell's The Nymph Complaining for the Death of her Faun', p. 167.

²³ Sidney Gottlieb, while agreeing as to the poem's Ovidian nature, sees the *Heroides* rather than the *Metamorphoses* as its model: Sidney Gottlieb, "'The Nymph complaining for the death of her Faun': Marvell's Ovidian Study in Hysteria", *Huntington Library Quarterly* 62 (1999), pp. 273–94, esp. at pp. 288–9.

— in effect, Julius Cæsar and Astraea have changed places, or Cæsar's departure from the world coincides with the return of Justice. To put it another way, although she is hardly mentioned in the *Metamorphoses*, Astraea can be seen as a kind of presiding absence over the events described in that poem. Certainly, the injustice of the gods is one of its recurring themes.

If the punishments of Niobe and Actæon appear excessive to an objective observer, it is because they are fixed by the injured parties themselves. Both Latona and Diana are, in effect, judges in their own respective causes; it follows that their actions can more properly be characterized as revenge than punishment. It may be that the nymph is aware that the injustice that she deplores in the world is also part of her own constitution; that her desire for justice does not prevent her from harbouring vengeful wishes that she may not be able to refrain from acting upon, and that this fact reinforces her belief that justice is beyond reach. If even she, well-meaning as she tries to be, is capable of injustice, how can she hope for justice from the world at large?

Another prominent classical reference in 'The Nymph complaining' might seem to undermine, or at least complicate, the reading presented here. The nymph's tears are likened to those of 'The brotherless *Heliades*' (ll. 99–100).²⁴ The story of Phaethon (the brother of whom the Heliades have been deprived) has, on the face of it, less to do with justice and injustice than have those of Actæon and Niobe. It is an analogue of the Fall, in which Phaethon's desire for knowledge of his identity, his pride, and his aspiration to fulfil a role which is beyond his capability, lead both to his own death and to the near-destruction of the earth's fertility, the creation of deserts and extremes of climate. It would be possible to regard Phaethon's death as fitting

²⁴ It is not entirely clear that the tears are hers rather than the fawn's. Certainly, the fawn weeps: l. 95. However, 'these' (l. 100) should probably be taken to mean 'mine', in the same way as 'this warm life-blood' (l. 19) apparently refers to the nymph's. If the fawn's tears are being compared to those of the Heliades, then it is suggested that the bereaved are not distinguishable from the dead or dying: the injury to the latter is felt by the former.

punishment for his pride, for his disregard of Phoebus's pleas, and for his arrogantly inflated view of his own capacities. On the other hand, he is a young man who has just discovered that his parentage really does give him reason to be proud. Further, it is clear that the main reason for his death is not that he deserves to be punished, but that it is necessary to prevent further destruction. As Ovid relates the story, Phoebus complains that no one *deserves* to die for not being able to control his (that is, Phoebus's) horses. In Sandys's translation, the sun-god says:

Some other now may on my Chariot sit.
 If all of you confesse your selves unfit;
 Let *Jove* ascend: that he (when he shall trie)
 At length may lay his murd'ring thunder by.
 Then will he finde, that he, who could not guide
 Those fire-hoof'd Steeds, deserv'd not to have dy'd.²⁵

The necessity of Phaethon's death is hard to deny, but that does not in itself render it just. In any case, by referring, not directly to Phaethon, but to his grief-stricken sisters, Marvell makes it clear that such a necessary death, whether or not just in itself, may entail unmerited suffering on the part of the blameless.

'Fame and Interest'

It might be argued that the attitude of the nymph bears some resemblance to that of the garland-maker in 'The Coronet', in that it is partly her own failure that persuades her of the unattainability of human justice, while his inability to avoid the 'wreaths of Fame and Interest' (l. 16) prevents him from weaving a chaplet that will 'redress that Wrong' (l. 4) that the Saviour has suffered as a result of his sins. 'The Coronet' has been seen as combining Calvinist ideas about the absurdity of attempting to earn or merit salvation with a meditation on the enormous difficulty of creating a religious art that is untainted by impure motives, including pride in one's achievement and the

²⁵ George Sandys, *Ovid's Metamorphosis Englished, Mythologiz'd and Represented in Figures*, ed. Karl K. Hulley and Stanley T. Vandersall (Lincoln: University of Nebraska Press, 1970) p. 90 (Book 2, ll. 389–94).

desire for public admiration.²⁶ It is surprising that more has not been written about the place of justice in the poem. John Klause, in his book on the subject of theodicy in Marvell's work, spends relatively little time on a discussion of one of the few works in which Marvell explicitly writes about justice in the context of relations between humankind and the divine.²⁷ It is noteworthy that the poem's speaker desires not to praise Christ, or to glorify him, or indeed to worship him; but specifically 'to redress that Wrong' (l. 4) that he has done Christ by his sins. He wishes to remove an injustice by making reparation for the part that those sins have played in Christ's suffering and death. That suffering is represented by the crown of thorns to which the poem's speaker has contributed. The speaker initially conceives the coronet of the poem's title as the equivalent opposite of the crown of thorns.²⁸ It is striking that it is in his very act of atonement to the Father for the sins of humankind that Christ sustains the wrong with which the garland-maker is preoccupied.

Christians believe that Christ suffered and died to atone to God for those sins. In addressing the questions of sin and atonement, it is usual to think of the Father as the injured party and of Christ as the one who has made reparation. The garland-maker sees Christ from a less familiar point of view: as himself the injured party. In terms of human justice, it is possible to think of a number of situations in which somebody other than the debtor pays a debt — for example, when the creditor assigns it to a third party. The original creditor is satisfied, but the debtor still owes the debt, only now it is owed to the third party. The garland-maker is applying the same principle to relations between us and two of the persons of the Trinity. On the

²⁶ See, in particular, Annabel Patterson, 'Bermudas and The Coronet: Marvell's Protestant Poetics', *ELH* 44 (1977), pp. 478–99, esp. at p. 491.

²⁷ Klause, *The Unfortunate Fall*, pp. 119–21, which deals, not with the ideas of justice that are evident in the poem, but with the difference between the 'categorical' and the 'paradoxical' approaches to salvation.

²⁸ Brunner speaks of 'an element of poetic justice' in the intended substitution of the coronet for the crown of thorns: Larry Brunner, "'So Rich a Chaplet': An Interpretation of Marvell's The Coronet", *The Cresset* 44 (September 1981), pp. 21–4 (p. 21).

face of it, this is a reasonable thing to do, as our sins can indeed be said to be the effective cause of Christ's suffering. However, as a result, the speaker finds himself in something of a trap. According to Christian doctrine, Christ's sacrifice was necessary in the first place because humans are not capable of making atonement on our own behalf. If the speaker could not redress the wrong that he had done to the Father, why should he suppose that he will be able to redress exactly the same wrong when it is done to the Son? He finds that he cannot, recognizing that because of his mixed motives he is quite incapable of offering an adequate remedy for the injury. The skill and care (l. 24) which are a necessary condition of his weaving 'So rich a Chaplet ... / As never yet the king of Glory wore' (ll. 11-12) are also a source of pride which undermines the value of that achievement.

It is not merely the lure of 'Fame' that taints and undermines the speaker's efforts. There is also 'Interest', which Annabel Patterson perceptively identifies with 'his hopes of being able to "redress" his previous errors by acts of poetic devotion.'²⁹ His very wish to offer recompense for Christ's suffering is itself in part the result of the serpent's insinuation of sinful motives into what might appear to be the least selfish of acts. Specifically, the speaker is compelled to recognize that his attempt to 'redress that Wrong' is motivated, not purely by a desire to make up for the suffering of Christ, but also by his wish to free himself from the obligation to which his sins have subjected him. In short, he finds that he has been attempting to acquire rights as against God.

So long as it is assumed that the obligation that the sinner owes to Christ is equivalent to that for which Christ atoned to the Father, the sinner is caught in a paradox: on the one hand, the very obligation by which he is bound is precisely that he should attempt to atone for his sins while, on the other, if he should succeed in fulfilling his obligation, he would be discharged from it and would no longer owe

²⁹ Patterson, 'Bermudas and The Coronet: Marvell's Protestant Poetics', p. 491.

anything to Christ; but to wish to be in this state — or to imagine that it is attainable — is itself sinful.

It is a paradox that can be resolved only by Christ himself. Therefore, the speaker directs a prayer to him that offers two alternative suggestions:

Either his slipp'ry knots at once untie,
And disentangle all his winding Snare:
Or shatter too with him my curious frame:
And let these wither, so that he may die,
Though set with Skill and chosen out with Care. (ll. 20–4)

With the first possibility, the speaker recognizes that it is open to Christ to purify his motives and thereby make him capable of weaving a chaplet that would *not* 'debase ... Heavens Diadem' (ll. 17–18). He recognizes, with the second, that it may not please Christ to do this, but rather to destroy the serpent and coronet together. In that case, the speaker's crown of flowers will adorn the Saviour's feet, not his head — it will not supplant the crown of thorns. In either event, he will not have been able to offer, by his own unaided effort, atonement for the injury to Christ.

We might, at this point, be drawn to the conclusion that the garland-maker's error is to apply the terms of imperfect human justice to relations between us and God, or to treat human and divine justice as similar in kind. To seek to redress Christ's wrong is, as has been suggested above, to conceive of him as the assignee of a debt. The very fact that this leads Marvell's speaker into a trap must indicate that the comparison between the two orders of justice is misconceived. Human justice may derive from God's justice but it is a debased and defective copy, that can tell us very little about theodicy. The difficulty with this argument is that our human idea of justice is the only idea of justice that we have and we cannot hope to grasp even an approximation of divine justice without reference to the human variety. Richard Baxter, in his *Aphorismes of Justification* (1649), is aware of the difficulty:

I know mans guilt and obligation to suffer, is but Metaphorically called his debt. Therefore when we would search into the nature of these

things exactly, wee must rather conceive of God as the Lawgiver and Governour of the World, then as a creditor, lest the Metaphor should mislead us. Yet because it is a common & a Scripture phrase, and conveniently expresseth our Obligation to beare the penalty of the violated Law, I use it in that sense. But here we are cast upon many and weighty and very difficult Questions. Whether Christ did discharge this debt by way of solution or by way of satisfaction?³⁰

Baxter goes on to explain that to discharge a debt by way of solution is to pay back exactly the thing that is owed. This the creditor has no choice but to accept, and the debt is automatically discharged. To discharge by way of satisfaction, on the other hand, is to pay an equivalent which is acceptable to the creditor. In this case, the creditor has a discretion whether or not to accept the payment. It is clear that Christ's atonement belongs to the second category: the thing that was owed was our complete obedience to the divine law, and we remain disobedient notwithstanding that atonement.

Baxter similarly likens the sinner to a tenant who has built up arrears of rent which he will never be able to pay, and Christ's atonement to the action of the landlord's son who pays the debt and reinstates the tenant at a peppercorn rent.³¹ The substitution of a peppercorn for the original rent is a metaphor for Christ's introduction of a new covenant. Baxter's examples demonstrate that the attempt to understand divine justice in terms of our human conceptions is not necessarily hopeless and, incidentally, that the dilemma of Marvell's garland-maker can be resolved if it is recognized that, through Christ's forbearance (and only through that) our obligation to him may be considerably less onerous than the obligation that he satisfied on our behalf.

'Lawful Form'

If the argument that has been presented here is correct, certain of Marvell's private, lyric poems — 'Little T. C.', 'The Nymph complaining' and, indirectly, 'The Coronet'

³⁰ Richard Baxter, *Aphorismes of justification, with their explication annexed* (1655), pp. 16–7.

³¹ Baxter, *Aphorismes of Justification*, pp. 83–4.

— exhibit a scepticism about temporal justice that one would not expect to find in poems written in praise of a public figure. Such poems will usually find it necessary to present the person being praised — the most obvious example in Marvell's work is the Cromwell of *The First Anniversary* — as someone capable of restoring or upholding justice. 'An Horatian Ode' is unusual in this respect, since (as has been argued in the first chapter) it praises Cromwell not in his capacity as putative future ruler but rather in that of obedient military leader. 'Tom May's Death', which (as, again, has been argued in chapter 1) seems to participate in the same argument or discussion as the Ode, is starkly pessimistic about the possibility of attaining justice. The Ode has been described as 'the most private of public poems', while Carey's remarks about 'Tom May's Death' bring out the ambiguity of its 'wonderfully public' quality.³²

A poem that seems to be carefully positioned in the middle of the public-private spectrum is 'Upon Appleton House'. In the early 1650s Marvell was tutor to the daughter of Thomas, third Baron Fairfax, who had been Cromwell's predecessor as general of the army but had retired to his estate following the killing of the king. As many scholars and critics have pointed out, the poem contains a meditation on the active as against the retired life.³³ However, it also seeks to show that Fairfax and his family have acted justly and can be expected to continue to do so. The justice theme is first encountered in the dilemma that confronts William Fairfax arising from the nuns' attempt to frustrate his marriage to Isabel Thwaites:

What should he do? He would respect
Religion, but not Right neglect:
For first Religion taught him Right,
And dazled not but clear'd his sight.
Sometimes resolv'd his Sword he draws,
But reverenceth then the Laws:
For Justice still that Courage led;

³² Worden, 'Marvell, Cromwell, and the Horatian Ode', p. 150; Carey, *Andrew Marvell: A Critical Anthology*, pp. 21–2, cited in chapter 1 above.

³³ See, in particular, the works by O'Loughlin, Creaser and Hirst and Zwicker discussed in chapter 1.

First from a Judge, then Souldier bred. (stanza XXIX)

On the face of it, this would suggest that there is a simple conflict between respect for religion, or its appearance, on the one hand and right on the other, the latter encouraging William to insist on the 'promis'd faith' of Isabel Thwaites, the former tending to make him accept the nuns' dispensation with it (ll. 196–7). The Catholic Church's claim to be able to free people from the obligations of their oaths and promises was to remain a substantial ground of Marvell's antipathy to that religion. In *An Account of the Growth of Popery* (1677), he wrote that the Pope 'by his *Dispensation* annuls *Contracts* betwixt man and man, dissolves Oaths between *Princes*, or betwixt them and their People, and gives allowance in cases which God and nature prohibites.'³⁴ The binding quality of oaths and contracts was, for writers such as Grotius and Hobbes, the foundation on which systems of law and justice rested. The Pope's practice of dispensing with such obligations could therefore be seen as endangering the very existence of justice. Accordingly, 'right' would entitle William Fairfax to insist that the marriage should go ahead, while 'religion' maintained that Isabel's promise to him was no longer binding.

However, the conflict between religion and right is not as straightforward as this reading suggests. It is significant that it is his reverence for the *laws* that dissuades William from marching into the convent with his sword drawn (ll. 229–30). This clearly suggests that considerations of right, rather than of religion, are causing him to hesitate. Conversely, respect for religion might actually require him to frustrate the nuns' perversion of it. This would be consistent with Marvell's presentation of the nuns as distorting scripture and with his later insistence that:

Though many a *Nun* there made her Vow,
'Twas no *Religious House* till now. (ll. 279–80)

In this case, the presentation of William's dilemma can be seen as Marvell's attempt to

³⁴ Andrew Marvell, *An Account of the Growth of Popery and Arbitrary Government in England*, ed. Nicholas von Maltzahn, in *Prose Works*, II, 229–30.

imagine the situation of a conscientious Christian living before the Reformation. To such a person, at least some of the abuses and doctrinal errors of the Church would presumably have been apparent, but he or she would lack a legitimate basis on which to prefer the authority of his or her own conscience to the teachings of the Church. In such circumstances, reverence for 'the Laws' (l. 230) might be the best way to reconcile the claims of conscience with outward obedience to the Church. In William's case the dilemma is resolved when:

The *Court* him grants the lawful Form;
Which licens'd either Peace or Force,
To hinder the unjust Divorce. (ll. 234–6)

With this judgment, religion and right are no longer in conflict, and William Fairfax is prepared to invade the nunnery and recover or rescue Isabel Thwaites. Subsequently (though not, as Marvell suggests, immediately), at the dissolution of the monasteries, the convent 'To *Fairfax* fell as by Escheat' (l. 274). The Fairfax family, then, has been well compensated for the inconvenience of the abduction. By compressing the timescale, Marvell is able to make the change of ownership appear a direct consequence of the nuns' dishonourable and unjust attempt to 'intercept' (l. 248) both Fairfax's line and his future wife's fortune.

The story of William's dispute with the nuns may be fictional: Lee Erickson calls it 'a founder's myth, apparently invented by Marvell', pointing out that Clements Markham's biography of Lord Fairfax — which is cited by Margoliouth as establishing the facts — in turn relies on Marvell's poem as its sole source for the circumstances of the dispute.³⁵ Erickson further states that there is no record of any case in which a court granted 'the lawful Form' to William Fairfax, though Isabel had been a ward of the King, under the age of 16, at the time of her marriage. Specifically, he says that no

³⁵ Lee Erickson, 'Marvell's Upon Appleton House and the Fairfax Family', *English Literary Renaissance* 9 (1979), pp. 158–68 (p. 160). See also, *Poems and Letters*, II, 279, 282, n. to l. 84 and Clements R. Markham, *The Life of the Great Lord Fairfax* (London: Macmillan, 1870), pp. 3–4.

relevant Chancery proceedings have been found.³⁶

Whether the episode is purely Marvell's invention or he adapted a family tradition to his purposes,³⁷ it is significant that the house is said to have fallen to the family 'as by Escheat'.³⁸ The expropriation is effected, not by the well recognized legal process but by a procedure analogous to it. To determine the precise nature of the analogy, it is necessary to distinguish between two different but related meanings of the term. A. W. B. Simpson makes a distinction between escheat *propter defectum sanguinis* and escheat *propter delictum tenentis*.³⁹ Both refer to what was originally a feudal 'incident': the right of a feudal lord to take possession of land theretofore held by a tenant. In the first case, the right arose when the tenant died without heirs, in the second when the tenant was adjudged guilty of felony. The second type was abolished in 1870 while the first survived until 1925. However, as the feudal system declined, the significance of escheat changed.

In the first place, as it came to be more efficient to pay soldiers and agricultural workers in money than in land, the feudal *incidents* (such as escheat and wardship — benefits that accrued to the lord irregularly, as on the death of a tenant) assumed a much greater importance than the *services* that the system had been designed to secure.⁴⁰ In the second, as the feudal pyramid gradually collapsed, more and more tenants came to hold directly of the monarch, without any intermediate ('mesne') lords. The result was that, by the Tudor period, the Crown was the principal beneficiary of escheat and wardship which, however, were not economically significant because they were easily avoided by the straightforward device of conveying land to

³⁶ Erickson, 'Marvell's Upon Appleton House and the Fairfax Family', p. 160, n. 13.

³⁷ Brian Patton, 'Preserving Property: History, Genealogy, and Inheritance in "Upon Appleton House"', *Renaissance Quarterly* 49 (1996), pp. 824–39 (p. 827), cites George Johnson as saying that 'the care with which the family records of the Fairfaxes were preserved is almost without parallel.'

³⁸ J. H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), p. 239, n. 68, notes that 'escheat' derives from *eschier*, to fall.

³⁹ A. W. B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford: Clarendon Press, 1986), pp 19–20.

⁴⁰ Baker, *Introduction to English Legal History*, pp. 227–8.

uses.⁴¹ Henry VIII successfully attacked, both by legislation and in the courts, the employment of uses to deprive him of the benefit of the feudal incidents. The Statute of Uses (1536) was contemporaneous with the beginning of the dissolution of the religious houses — and Robert Palmer has argued that it took the precise form it did for reasons closely connected with the dissolution.⁴² Henry's assault on the use resulted in a great increase in Crown revenue from escheat and wardship. It will be apparent that, like *deodand* in 'The Nymph complaining', escheat in the second sense was a form of quasi-punitive confiscation: Blackstone mentions escheat in the paragraph immediately following his discussion of *deodand*, as '[a]nother branch of the king's ordinary revenue'.⁴³

Marvell glances at both meanings of 'escheat'. The nuns are incapable of producing legitimate heirs, even though '*Virgin Buildings* oft brought forth' and though William Fairfax believes he knows 'what Fruit their Gardens yield / When they it think by Night conceal'd' (ll. 86, 219–20). Officially, the nuns are sexually abstemious, but the poet regards them as enjoying an unnaturally unproductive erotic life. The lands belonging to convents and other religious bodies were held by corporations, which were incapable of dying and therefore had no need of heirs. In feudal times, this resulted in a loss of revenue for the feudal lords of these lands, since the incidents that ordinarily arose on the death of a tenant never fell due. A series of statutes in the thirteenth century had sought to deal with the problem, culminating in the Statute of Mortmain (1279). In practice, religious bodies continued to accumulate substantial landholdings, since the king frequently gave dispensations from the

⁴¹ Baker, *Introduction to English Legal History*, pp. 252. The avoidance of incidents was a side effect, rather than the main reason for the popularity of conveyances to uses, which also provided a means of working around the inability of landowners to dispose of real property by will.

⁴² Robert C. Palmer, *Selling the Church: The English Parish in Law, Commerce, and Religion, 1350–1550* (Chapel Hill and London: University of North Carolina Press, 2002), pp. 231–6.

⁴³ Blackstone, *Commentaries*, I, 292. Bryan A. Garner, *A Dictionary of Modern Legal Usage* (New York and Oxford: Oxford University Press, 1987, rpt. 1990), p. 222, shows that escheat, too, was susceptible to abuse: 'From the perceived unfairness of the system — once the lords had begun to abuse it — evolved the aphaeretic form cheat.'

legislation.⁴⁴

By the time of the dissolution in the second half of the 1530s, the feudal system had long since faded away (though, as we have seen, the feudal incidents were about to become significant again). When Henry VIII and Thomas Cromwell set about divesting the religious houses of their assets, they employed a variety of methods, among which escheat did not play a significant part. There is thus a complicated irony in Marvell's statement that, so far as Nunappleton is concerned, the dissolution operated '*as by Escheat*' (emphasis added).⁴⁵

In the first place, the nuns' inability to produce legitimate heirs (reflecting the actual tenant corporation's similar inability, as well as its 'immortality') meant that over the preceding centuries many potential escheats must have been indefinitely postponed. In the second, however, the nuns have particularly laid themselves open to escheat in the other sense, the consequence of felony. William Fairfax calls them 'such Theeves ... / As rob though in the Dungeon cast', and claims that only death will restrain them from further cheating and theft (ll. 207–08). It is arguably just, then, that the nuns should be 'in one instant dispossesst' (l. 272), but does it necessarily follow that the Fairfax family is entitled to benefit from the expropriation? Perhaps that 'as by' raises a doubt. Perhaps, on the other hand, it attempts to quell one. If 'The Nymph complaining' suggests, among other things, that Marvell has doubts about the principle of *deodand*, it is conceivable that he had similar doubts about other types of confiscation. So, it might be the case that 'as by' is meant to distinguish the Fairfax appropriation as being more just rather than less so than the process of feudal origin to which it is compared.

⁴⁴ Corinne Comstock Weston and Janelle Renfrow Greenberg, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in England* (Cambridge: Cambridge University Press, 1981), p. 26.

⁴⁵ There is a further irony in the fact that Thomas Fairfax, by barring the entail on his estate, had avoided (or rather, as it turned out, postponed) the danger of its passing out of his family for want of male heirs: see Lee Erickson, 'Marvell's Upon Appleton House and the Fairfax Family', *English Literary Renaissance*, 9 (1979), pp. 58–68.

The third factor that complicates the irony is the fact that, by the time of the dissolution, the person to whom any lands could be expected to fall by escheat was the king, because mesne feudal lords were by now very rare. It cannot be assumed that Marvell was even aware of the feudal origins of escheat, so it is not necessarily the case that he is imagining Fairfax as being in the position of the nuns' immediate feudal lord. But why otherwise would he present Fairfax as enjoying a right that would ordinarily be the king's? At the time that Marvell's poem was written, there no longer was a king. Moreover, feudal tenures and services had been ended by the Long Parliament — and would not be revived at the Restoration: Military Tenures Abolition Act 1660 (12 Car. II, c. 24). Escheat, however, was not abolished. Commissioners were appointed to collect this revenue for the benefit of the Commonwealth. Marvell was thus writing *at* a time when escheat had been sufficiently detached both from its feudal origins and its association with the Crown to survive the abolition of monarchy and feudal tenures, *about* a time when its importance as a source of royal revenue, independent of its feudal origins, was being established.

In any case, it is clear from the researches of Erickson and, later, of Brian Patton that the convent did not *fall* directly to Fairfax, whether as by escheat or otherwise.⁴⁶ It was surrendered to the Crown on 5 December 1539,⁴⁷ and subsequently granted to 'Robt. Darkenall, of the Household'⁴⁸ who eventually seems to have sold it to Sir William Fairfax.⁴⁹ In 1562/3, a dispute as to Sir William's estate was arbitrated by Thomas, Lord Wharton, and two other arbitrators.⁵⁰ Thomas Fairfax

⁴⁶ Patton, 'History, Genealogy, and Inheritance in "Upon Appleton House"', p. 832, esp. n. 3.

⁴⁷ This suggests that the priory was not considered one of the smaller religious houses that were confiscated by statutory authority. Nineteen women were granted pensions, including one Janet or Jane Fairfax: *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, Vol. XIV p. 232.

⁴⁸ *Letters and Papers*, XV, 563 and XVII, 1, 163.

⁴⁹ *Calendar of Patent Rolls Preserved in the Public Record Office ... Edward VI*, Vol. V. (1926), p. 266..

⁵⁰ William Brown, F.S.A., ed. *Yorkshire Deeds* Vol. II, Record Series Vol. L for the year 1913 (Yorkshire Archaeological Society, 1914), p. 129. Markham suggested that Thomas, the eldest surviving son of Sir William, inherited Nunappleton from his mother, Isabel Thwaites, but it is not clear what evidence he had to support this suggestion.

(the grandfather of the Lord General) was awarded Nunappleton but the bulk of the lands in dispute went to his brother Gabriel. There is no reason why Marvell should have been aware of any of these dealings, all but the last of which took place a century before he wrote 'Upon Appleton House'. The poem's narrative simplifies and distorts the actual sequence of events, but the extent to which Marvell was aware of the simplification and distortion remains obscure.

The William of the poem can foresee that the nuns' occupation and enjoyment of the house will be brought to an end, and relatively soon:

'But sure those Buildings last not long,
 'Founded by Folly, kept by Wrong.
 ...
 'Fly from their Ruine. How I fear
 'Though guiltless lest thou perish there. (ll. 217–8, 223–4)

It is unlikely that his foresight extends to the dissolution of the monasteries, but it has probably occurred to him that, if the 'Ruine' were to occur, by whatever means, he and his heirs would be potential beneficiaries. To the extent that (within the poem's fictional narrative, though not in actuality) the transfer of ownership to Fairfax was virtually automatic, it was predictable. Therefore, awareness that by bringing about the destruction of the convent, he might accomplish his own unjust enrichment, would provide another reason why respect for 'right' would cause him to hesitate. Conscience compels him to examine carefully his own motives in taking an action which, to a disinterested post-Reformation observer, is patently in accordance with the requirements of both justice and religion. The court's 'Form', among other things, relieves him of the role of a judge in his own cause.

William Fairfax behaves conscientiously in deciding upon his course of action. John Mark Heumann argues that the point of the nunnery episode is that Marvell's patron, like his ancestor, faces a crisis of conscience. Whereas William opted to take action, it is not necessarily the case that a similar choice is the appropri-

ate one for the Lord General in his particular circumstances.⁵¹ Of course, William did not *simply* opt for activism, he did so after deliberation and only after the court's judgment assured him that he had right on his side in doing so. Once he is sure that he is right to act, he does so decisively and effectively. As one who was 'First from a Judge, then Souldier bred', he thus combines the qualities of his ancestors in something approaching the optimal proportions.

By analogy, Thomas Fairfax ought also to act conscientiously and with deliberation. As has been noted in chapter 1, it has appeared to several commentators, M. J. K. O'Loughlin and John Creaser in particular, that Marvell is — with tactfully appropriate deference — indicating to his patron that it is time to emerge from his retirement. This is particularly so as the poem was written at a time when a Scots invasion of England was imminent, and Fairfax's previous objections to an attack on Scotland had lost their force.⁵² One must be careful not to posit too stark a contrast between these commentators on the one hand and Hirst and Zwicker (who see the tutor as 'attenuating' or 'extenuating' his patron's crises) on the other. The very delicacy of Marvell's attempt to influence his patron makes the task of teasing out the precise direction in which he sought to influence him itself a delicate one. On any view, it is clear that Fairfax's conscience must be the arbiter of his actions. Like his ancestor William, Fairfax recognizes that his own motives may require careful scrutiny and that he as well as the cause of justice might benefit from a course of action which would in all likelihood bring him glory, and possibly political power. As in the case of William Fairfax, the poet acknowledges that a choice which might appear straightforward from an objective point of view may genuinely perplex the person who is faced with making it, who has to attempt to take into account his own motives.

⁵¹ John Mark Heumann, 'Prophecy, Casuistry and Epideictic in Marvell's Upon Appleton House XXVI–XXXV', *Cahiers Elisabethains* 44 (1993), pp. 33–43.

⁵² Hirst and Zwicker, 'High Summer at Nun-Appleton, 1651', p. 255.

And yet there walks one on the Sod
 Who, had it pleased him and *God*,
 Might once have made our Gardens spring
 Fresh as his own and flourishing. (ll. 345–8)

This falls some way short of being an assertion that Fairfax's duty is clear. 'Might once' not only recognizes the impossibility of knowing in advance where 'Heavens choice may light', but also the possibility that the moment has now passed when Fairfax might have made a difference. What might have 'pleased ... *God*' remains a mystery, to Fairfax no less than to everybody else. The best that Fairfax can do is to examine his conscience before deciding what pleases him.

In chapter 1, the possibility was examined (but not finally endorsed) that such consistency as there is between 'An Horatian Ode' and 'Tom May's Death' lies partly in the recognition that it is quite possible for two people to adhere to allied causes, one of them acting in accordance with principle and conviction, the other unconscionably. 'Upon Appleton House' explores the converse proposition, that conscience may lead different people, in similar circumstances, in completely different directions, one towards action and the other into retirement. In William Fairfax's case, conscience was the arbiter between claims of justice and religion, which initially appeared to conflict, but which were eventually brought into agreement. In the case of the Lord General, its task is to arbitrate between duty and ambition. The complexity, indeed ambiguity, of the treatment of ambition in the poem, is an indication of how hard a judgment that might be — and Thomas Fairfax, unlike his ancestor, cannot rely on a court to relieve him of the responsibility of decision.

First, we are told that Fairfax 'did, with his utmost Skill, / *Ambition* weed, but *Conscience* till' (ll. 343–4). The contrast would seem to be clear: conscience is to be cultivated, ambition rooted up and destroyed. In the following stanza this appears to be confirmed, when Fairfax's garden gives the impression that it 'quarrell'd' (l. 365) the ambition of the archbishop, owner of nearby Cawood Castle. However, to 'weed'

ambition is not necessarily to treat it as a weed — it might be to pull up the weeds (such as presumption) that surround it, and to give it space to grow freely. That the poet is not wholly critical of ambition in all circumstances is made clear at the end of the poem, where Fairfax's estate is urged to

Employ the means you have by Her,
And in your kind your selves preferr;
That, as all *Virgins* She preceds,
So you all *Woods, Streams, Gardens, Meads*. (ll. 749–52)

The woods, streams, gardens and meadows of Nunappleton do not automatically surpass the various wonderful places that are listed in the following stanza. If they are to do so they must actively 'prefer' themselves, as the poet exhorts them to do. The complexity of Marvell's views on ambition and preferment may be seen in stanza LXXIV:

The Oak-Leaves me embroyder all,
Between which Caterpillars crawl:
And Ivy, with familiar trails,
Me licks, and clasps, and curls and hales.
Under this *antick Cope* I move
Like some great *Prelate of the Grove*, (ll. 587–92)

In the light of Marvell's earlier association of prelacy with the kind of ambition that may provoke a quarrel (ll. 365–6) and of his known dislike of bishops,⁵³ it is something of a surprise to find the speaker referring to himself as a prelate. The word is related to 'prefer', deriving from the past participle of *praeferre*, to carry before. The speaker resembles a 'Prelate of the Grove' (emphasis added) because he presents the appearance of having been preferred *by* the grove, which has crowned him with oak — classically the reward for civic virtue. The sense of these lines is thus very close to that of the beginning of 'The Garden', where the poet jokingly berates those who are ambitious to be

⁵³ See, in particular, 'The Loyall Scot', ll. 83–235 and *A Short Historical Essay, Touching General Councils, Creeds, and Impositions in Matters of Religion*, ed. Annabel Patterson, in *Prose Works*, II, 115–76, *passim*, esp. at pp. 125–6

Crown'd from some single Herb or Tree.
Whose short and narrow verged Shade
Does prudently their Toyles upbraid; (ll. 4–6)

Ambition is mocked, but ambivalently: the speaker's recommendation, in 'The Garden', of a complete withdrawal from all society cannot be taken literally, however attractive it might temporarily appear, and it is clear from the Lovelace poem that the loss of 'the civic crown' is not something about which Marvell is sanguine. The implication of the references to the subject in 'Upon Appleton House', taken together, is that ambition will usually be a dangerous temptation, but not invariably so, and that the need to discern when it is appropriate and when not calls for the development of an acutely discriminating conscience.

The theme of justice is not central to 'Upon Appleton House', but it nevertheless plays an important part, as being incidental to the theme of conscience, which *is* central. The story of William Fairfax's incursion, in fulfilling its primary purpose of assuring Marvell's patron that he was right in not lightly taking decisions on matters of conscience, at the same time demonstrated that his family's acquisition of its Nunappleton estate was not merely formally legal but also just (though, as we have seen, Marvell's compression of the historical timescale complicates this lesson). There are two significant recurrences of the theme later in the poem. The first of these is the incident in which an unnamed mower inadvertently slaughters a rail:

The Edge all bloody from its Breast
He draws, and does his stroke detest;
Fearing the Flesh untimely mow'd
To him a Fate as black forebode. (ll. 397–400)

On the face of it, the mower's fear seems absurd.⁵⁴ The rail, rather like the nymph's fawn, is an insignificant creature whose death can surely not have such disproportionate repercussions as the death of a man. The disproportion, like Thestylis's casual greed, is one of the factors contributing to the comedy of the episode. Yet the

⁵⁴ With 'Flesh' as its singular subject, 'forebode' is evidently in the subjunctive mood: he is afraid lest 'the Flesh untimely mow'd' should 'To him a Fate as black forebode.'

situation is the converse of that in 'The Picture of little T. C.' where the effect is not at all comic. Thomas Corns finds the 'ancient, though illogical impulses of sympathetic magic' behind the advice to the young girl to 'spare the Buds' in the hope that she too will be spared.⁵⁵ Another way to look at it, as has been suggested above, is to view the feared outcome as retaliation or punishment for the girl's putative destruction of the budding flowers. The fact that the girl is too young to be held responsible, and that the mower is 'unknowing', will not necessarily save them. The situation is analogous to the law of *deodand* where, as we have seen, a tame animal or an inanimate item of property could be deemed to be 'responsible' for causing a death, and therefore liable to confiscation.

The mower is in a situation similar to those of William Fairfax and the Lord General, though the resemblance is not exact in all respects. He is unlike them in that his reason for self-examination is not particularly creditable: he does not repent his action for its own sake but because of the injury to himself that he fears may result. Nevertheless, his crisis can be viewed as, in part, one of conscience, as he is led to consider the possibility that he may have *merited* punishment. A dismissive rejection of his qualms is implicit in Thestylis's appropriation of the dead bird and her intentional but unreflective killing of its companion. (It is possible that 'quick' in line 405 might be read as an adverbial qualification of 'lights'; however, that meaning is at best incidental, as the verb already carries its own connotation of speed. The primary function of 'quick' is that of an adjective qualifying 'another'.) On this view, Thestylis represents those who would impatiently reject the conscientious hesitations of Thomas Fairfax or his ancestor as dangerous vacillations in the face of an obvious duty or right. His ascription to her of selfish and destructive behaviour makes it harder to believe that the poet shared such impatience at Fairfax's retirement.

⁵⁵ Thomas Corns, *Uncloistered Virtue: English Political Literature, 1640–1660* (Oxford: Clarendon Press, 1992), p. 224

The second return to the justice theme is in stanzas LXVIII–LXX. Here, ‘Treason’s Punishment’ (l. 560) is presented as the impersonal and unintended, but inevitable and fitting, consequence of a natural process, the woodpecker’s search for food and shelter for its offspring. That the universe is so ordered that justice will be done, and serious wrong punished, sooner or later, through the working-out of what amounts almost to a law of nature is suggested but it is not explicitly asserted. Instead, the next stanza begins: ‘Thus I, *easie Philosopher*, / Among the *Birds* and *Trees* confer ...’ (ll. 561–2). The hypothesis of universal and automatic justice is ‘*easie*’ philosophy, the result of conference with birds and trees. Even if the hypothesis is a correct one, it is comforting only when viewed from a distance: ‘the Oake *seems to fall content*’ (l. 559, emphasis added) but, for all the remote observer knows, the tree may already be dead.

‘*Without Redress or Law*’

The unsatisfactory nature of such possibly deceptive consolations arises too in ‘Upon the Death of Lord Hastings’. This is one of the relatively few Marvell poems that can be easily dated. Its subject, the son of the Earl of Huntingdon, died of smallpox at the age of nineteen in June 1649. Later that year there appeared *Lachrymae Musarum*, a collection of elegies on the young nobleman. Marvell’s poem is the first of a number that seem to have been added to the volume at a late stage. The poem has attracted less critical attention than one might expect. Writing in 1981, Michael Gearin-Tosh complained that ‘[w]hether because of Empson or not, “Lord Hastings” is still dismissed as prentice work even in full-scale studies of Marvell.’⁵⁶ Gearin-Tosh’s attempt to awaken critical interest in the elegy was only partly successful. It prompted a ‘Supplementary Note’ from Jeremy Maule, who elucidated two interpretive cruces: the use of the expression ‘at this measure’ in line 19 and the transition from Hy-

⁵⁶ Michael Gearin-Tosh, ‘Marvell’s “Upon the Death of the Lord Hastings”’, *Essays and Studies* 34 (1981), pp. 105–22 (p. 105).

menaesus to Aesculapius in lines 43–50.⁵⁷

Perhaps the critical reticence results from the fact that substantial passages in the poem remain obscure, notwithstanding the light that Gearin-Tosh and Maule have been able to throw on them. For example, Gearin-Tosh is no doubt right to explain lines 27–32 in terms of the entertainment (or festive detention) of Philip of Castile by Henry VII but, even with this information, it remains difficult to work out to whom the deceased Lord Hastings is being compared and the precise terms of the comparison. Presumably Philip enjoyed his sojourn with Henry, but he was the victim of a kind of trick, and he was detained only temporarily. It is surely unlikely that Marvell wished to suggest that either of these things was true of Hastings's stay in heaven. Similarly, the references to Hymenaesus and Aesculapius remain riddling and elusive notwithstanding Maule's erudite commentary. The elegy's obscurities persist, surviving their explication.

One reference whose obscurity has been frankly admitted is that to 'the *Geometrick* year' in line 18.⁵⁸ A few attempts have been made to explain this term, few of them satisfactorily persuasive. Margoliouth suggests that an antithesis is being posited between the solar year (measured by the sun) and the geometric one (measured by the earth).⁵⁹ This is an attractive idea but, quite apart from the strangeness of the suggestion that the standard of measurement applied in heaven is provided by the earth, it does not explain why that standard should produce such widely varying results when applied to the 'Phelgmatick and Slowe' on the one hand and to Hastings on the other. S. K. Heninger, Jr. offers an alternative explanation:

The gods allot to each man a geometric year, a prototypical pattern for time which comprises all the components of time, such as the four

⁵⁷ Jeremy Maule, 'Marvell's Hastings Elegy — A Supplementary Note', *Review of English Studies* 37 (1986), pp. 395–9.

⁵⁸ Nicholas McDowell, *Poetry and Allegiance in the English Civil Wars: Marvell and the Cause of Wit*, (Oxford: Oxford University Press, 2008), p. 213, suggests that Marvell echoes the term 'Geometrically proportionate' in John Hall's contribution to *Lachrymae Musarum*.

⁵⁹ *Poems and Letters*, I, 240, n. to l. 18.

seasons, and therefore the full range of possible experience. When a man has completed this pattern, regardless of how many earthly years have passed, he has fulfilled the period that the gods allow. ‘Those of growth more sudden, and more bold’ complete the pattern more quickly than the ‘Phlegmatick and Slowe’, and therefore they ‘are hurried hence’ — whatever their passing years may be, ‘as if already old.’⁶⁰

Heninger is clearly right to the extent that the point of the passage is that the short life of the vigorous, active man is somehow commensurate with the prolonged existence of the person who tries, by not actually doing anything, to fool heaven into thinking that he has hardly lived. What is not so clear is how, exactly, this commensurability relates to geometry. Earlier, Heninger has argued that an emblem in which the four seasons are depicted in the quarters of a circle set within a rectangle ‘is manifestly a representation of the year as a geometric form.’⁶¹ It would perhaps be more accurate to say that it is a representation of the year that *makes use of* such geometric forms as a rectangle, a circle and right angles. Heninger reproduces the emblem, by Barthélemy Aneau. It is not part of Heninger’s argument that Marvell was familiar with this particular emblem, but rather that Aneau drew on ideas that had wide circulation at the time and of which Marvell was clearly aware. The difficulty with this argument is that, if Aneau’s unification of the four seasons with the life of man was widely conceived as being in some sense geometric, one might reasonably expect to encounter references to ‘geometric’ years, days or hours in other places besides Marvell’s elegy. Legouis explicitly states that he did not do so⁶² and it does not appear that any of Marvell’s other editors has been more fortunate.

The word ‘For’ with which line 17 begins makes it clear that the reference to the geometric year is an explanation, illustration or amplification of the argument of the earlier part of the verse paragraph:

⁶⁰ S. K. Heninger, Jr., ‘Marvell’s “Geometrick yeer”’: A Topos for Occasional Poetry, in *Approaches to Marvell*, ed. Patrides, pp. 87–107 (pp. 99–100).

⁶¹ Heninger, ‘Marvell’s “Geometrick yeer”’, p. 98.

⁶² *Poems and Letters*, I, 240, n. to l. 18.

Alas, his *Vertues* did his *Death* presage:
 Needs must he die, that doth out-run his *Age*.
 The Phlegmatick and Slowe prolongs his day,
 ...
 While those of growth more sudden, and more bold,
 Are hurried hence, as if already old. (ll. 9–11, 15–16)

As has already been mentioned, this amounts to a claim that there is a commensurability or equivalence between the extended life and the abruptly curtailed one. When we are told in the final two lines of the verse paragraph that, in heaven, ‘They *number* not as here, / But *weigh* to Man ...’ (emphasis added), it becomes clear that the poet is suggesting that this equivalence is not an accident but the result of precise calculation on heaven’s part.

For practical reasons, much geometry is plane geometry, that is to say, the geometry of figures in two dimensions. A line (which has only one dimension), is as much a geometric figure as is a rectangle or a circle but one quickly reaches the limits of what can usefully be said about the properties of single lines. Add a second line, as close as you like and parallel to the first, and we are already dealing with two dimensions. Two-dimensional figures have the advantage that they can easily be drawn on a piece of paper. Many three-dimensional figures can be described using plane ones, notably the parabola, the ellipse and the hyperbola, which can be conceived as the cross-section obtained when a plane intersects a cone — a double cone in the case of a hyperbola. When Marvell wrote, the idea of a figure with more than three dimensions would have seemed absurd. In short, a great deal of work can be done in geometry using just two dimensions.⁶³

Since it is clear from its context that Marvell’s use of the term ‘*Geometrick*

⁶³ Descartes used the phrase ‘ordinary geometry’ to mean ‘the use of straight lines and circles traced on a plane surface’: *The Geometry of René Descartes*, trans. David Eugene Smith and Marcia L. Latham (Chicago: Open Court Publishing Company, 1925) p. 13. The original French reads: ‘la Geometrie ordinaire, c’est a dire, en ne se seruant que de lignes droites & circulaires tracées sur vne superficie plate ...’ (p. 12). Commenting on Descartes’s then unusual use of powers of two and three, Smith and Latham remark: ‘At the time this was written, a^2 was commonly considered to mean the surface of a square whose side is a , and b^3 to mean the volume of a cube whose side is b ; while b^4 , b^5 , ... were unintelligible as geometric forms’ (p. 5, n. 6).

yeer' is as an illustration or amplification of the idea that the long and the short lives are somehow of equal value, it is surprising that the possibility does not seem to have been considered that he is thinking in dimensional terms. The expression suggests that we should conceive of a life as analogous, not to a line, which has a single dimension (length), but to a figure such as a rectangle, which has two. The second dimension may conveniently be thought of as depth. If the short but deep life and the long but shallow one are represented by rectangles, both figures (according to the assertion made in the poem) will have the same area. This equivalence will have come about, not by chance, but as a result of the way that they 'number' and 'weigh' in heaven. Heaven, that is to say, practises a kind of distributive justice in determining the lifespans of mortals. Someone like Hastings is compensated for the shortness of his life by its intensity and richness (to vary the metaphor of depth). Conversely, the 'Phlegmatick and Slowe', though he lives longer, gains nothing of value from his attempt to beguile heaven.

It may be objected that, because a line is itself a geometric figure, Marvell cannot have been using '*Geometrick*' as, in effect, another term for 'two-dimensional'. Strictly speaking, this objection has a point; but since, as has already been stated, hardly any useful geometry can be carried out using just one dimension, and a great deal can be done using two, it does not seem at all fanciful or unlikely that Marvell should think of plane figures as being characteristic of geometry.

Whether or not the notion of a heavenly distributive justice in the allocation of lifespans is to be taken as literally true, its primary function is presumably as a consolation for the bereaved. It is a consolation that, as the poem progresses, is found to be wanting. Hastings himself requires no assurance that his treatment has been just: he finds that, in the next life, he 'better recreates his active Minde' (l. 32) and he

⁶⁴ *Poems and Letters*, I, 240, n. to l. 40.

⁶⁵ See Gearin-Tosh, 'Marvell's "Upon the Death of the Lord Hastings"', p. 117, Maule, 'Marvell's Hastings Elegy — A Supplementary Note', p. 398.

has the comfort of seeing the names of his family-members ‘enroll’d’ in ‘th’ *Eternal Book*’ (ll. 37–9). This book, being genuinely eternal, contains not only the names of those who are already in heaven, but also those of everyone who will join them there in the future. Hence, it can include the name of Hastings’s mother, whom he predeceased.⁶⁴ However, as in the case of the Heliades, the young man whose life has been cut short is not the only one who is affected by the death. If Hastings has no grounds for complaint that he has been unjustly treated by heaven, the recognition of this fact may not bring much comfort to those who are left behind to grieve. In Hastings’s case, these included a fiancée and a distinguished prospective father-in-law. He had been about to marry the daughter of Sir Theodore Turquet de Mayerne, the royal physician.

Among the gods, only Hymenaeus and Aesculapius are unhappy at Hastings’s presence in heaven. Hymen is frustrated at the preemption of the young man’s marriage, while Aesculapius ‘Himself at once condemneth, and *Mayern*’ (l. 48) because of their inability either to heal him or, if that proved impossible, to bring him back to life. Aesculapius, or Asklepios, the great healer, was said to have been slain by Zeus’s thunderbolt because he had raised people from the dead. In some versions of the story, Zeus killed him because he thought it necessary to prevent him from bestowing immortality on humans in general, though in other versions Zeus acted out of resentment.⁶⁵ Jeremy Maule implies that Marvell’s juxtaposition of Aesculapius and Hymenaeus indicates that he is alluding in particular to Apollodorus’s telling of the tale,⁶⁶ which is one of those in which Zeus is actuated by jealousy or resentment.

In any case, Mayerne is seen as a modern Aesculapius — Gearin-Tosh tells us that the physician was flattered to have been painted by Rubens in front of a life-sized

⁶⁷ Gearin-Tosh, ‘Marvell’s “Upon the Death of the Lord Hastings”’, p. 201.

⁶⁸ There is some uncertainty as to whether the ‘he’ of the final verse paragraph is Mayerne or Aesculapius. Klause takes it to be the latter (*The Unfortunate Fall*, p. 77) while Gearin-Tosh believes it to be part of the humiliation of Mayerne that he is forced to rely on herbs in his unsuccessful attempt

statue of the demigod.⁶⁷ So, when Marvell writes ‘... how Immortal must their race have stood, / Had *Mayern* once been mixt with *Hastings* blood!’ (ll. 51–2), he implies that the death of Lord Hastings, even at such an early age, is a necessary death in the same way that Aesculapius’s was. All deaths are necessary, if the human race is to be able to renew itself — and, if the prevention of human immortality had indeed been necessary, the necessity could not have been vitiated by the baseness of Zeus’s motives — but some deaths may appear to come before their due time. The ambivalent and implicit recognition of necessity in lines 51–2 modifies the suggestion earlier in the poem that it is mere jealousy (l. 22), or a wish to preserve its own distinguished state, that causes heaven to ensure that, ‘Lest He become like Them’ (l. 24), no one eats from the tree of life as well as from that of knowledge.

The necessity of Hastings’s death is no consolation to Mayerne, who ‘wept, as we, without Redress or Law’ (ll. 57–8).⁶⁸ As well as the poet himself, ‘we’ can be taken to include Mayerne’s daughter, Hastings’s mother and surviving family and, perhaps, the other contributors to *Lachrymae Musarum*. The unavailability of ‘Redress or Law’ appears to reflect the helplessness of justice in the face of necessity, but the next line seems to withdraw the apparent concession of lines 51–2 that this death, at this time, was indeed necessary: ‘For *Man* (alas) is but the *Heavens* sport’ (l. 59).

The elegy might be said to exhibit an unresolved ambivalence about the relationship of justice to necessity. John Klause suggests that this is the only work in which Marvell permits his misgivings about divine justice to be voiced.⁶⁹ The poem

⁶⁷ Marvell (1928) p. 34, Marvell (1968) p. 15.

⁷¹ Warren Chernaik, *The Poet’s Time: Politics and Religion in the Work of Andrew Marvell* (Cambridge: Cambridge University Press, 1983), p. 18.

mingles a Christian with a pagan frame of reference. Aesculapius, Hymenaeus and the gods who ‘cannot their Joy conceal’ (l. 40) clearly belong to the latter, while ‘th’ *Eternal Book*’ in which the names of the elect are enrolled belongs to a very different idea of heaven. If the reference to the inscription of Lady Huntingdon’s name in that book seems disturbing, it is partly because of its incongruity in the predominantly pagan context. (There are two other reasons: in the first place, there might appear to be an element of vicarious presumption in the assertion that the countess’s salvation is a certainty while, in the second, to use the occasion of her son’s early death as a *memento mori* seems, to a twenty-first century reader, to verge on the brutal.)

While the coexistence of Christian and pagan elements in the same poem is not unknown in Marvell’s work, it is unusual enough to require comment. Legouis emphasizes that the Horatian Ode contains ‘nothing Christian.’⁷⁰ While it deals in part with ‘The force of angry Heavens flame’ (l. 26), the Ode contains nothing that cannot be read in purely classical terms. Warren Chernaik sees the exclusion of Christian elements from the Ode as a strength:

The classical, secular framework, here as in ‘To his Coy Mistress’, permits a dramatic tension which the introduction of explicitly Christian terms would subvert: the Roman historical parallels and the classical ethical values implicit in the presentation of Charles and Cromwell are in keeping with the ideas of an amoral Fortune and a Fate indifferent to human ideas of justice and merciless to human weaknesses.⁷¹

This can in part be seen as a kind of decorum, in that it keeps apart elements that do not belong together. Christianity, as a monotheistic religion that makes claims to universality, leaves no room for the gods of ancient Greece or Rome. A poem that is to accommodate those gods, must either leave Christianity entirely out of the picture or mute its references to that religion. Even in ‘Clorinda and Damon’ — a dramatic dialogue between two pastoral figures, one of whom has undergone a conversion to

⁷² St. Augustine is aware of this possible objection to God’s benevolence and offers an answer: ‘For God would never have created a man, let alone an angel, in the foreknowledge of his future evil state, if he had not known at the same time how he would put such creatures to good use, and thus

Christianity — there is a notable lack of pagan reference, apart from a glancing mention of Flora (l. 5) and the presence of Pan, who is identified with Christ. However, Marvell does not choose to observe this decorum in all his poetry. As we have already seen, ‘The Nymph complaining’ combines veneration for Diana (l. 104) and the implied presence of Zeus (in the mention of the Heliades, l. 99) and Latona (in the allusion to Niobe, l. 116) with an appeal to ‘Heavens King [who] Keeps register of every thing’ (ll. 13–14).

‘The Garden’ does something similar. At the beginning of that poem, we encounter Apollo and Pan (the latter, in this case, not a surrogate for Christ but the pursuer of the nymph Syrinx, ‘for a Reed’: l. 32). At its end, the poet refers to the Garden of Eden (stanza VIII) and to ‘the skilful Gardner’ (l. 65). It is arguable that ‘The Garden’ is a special case; at least, in this poem, the conflict between Christian and pagan is submerged and inconspicuous, to a much greater extent than it is in the other two poems. Although they are described as ‘*Gods*’ (l. 27), it is not for their divinity that Pan and Apollo are of interest to the poet but because of the metamorphosis of their quarry into plants.

The mixture, in the Hastings elegy, of two incompatible conceptions of the nature of divinity allows it to make contradictory claims about the behaviour of ‘heaven’ towards humans. On the one hand, it is strictly and scrupulously just: ‘They ... weigh to Man the *Geometrick* yeer’ (ll. 17–18). On the other, it is capricious and aloof: ‘For *Man* (alas) is but the *Heavens* sport’ (l. 59). Nor is it always clear that justice is exclusively associated with the Christian element in this shared heaven, and caprice with the pagan. The trees of life and knowledge (ll. 20–1) are mentioned in a context in which it is initially suggested that a base or petty motive might lie behind the denial of immortality to humankind; it is only later, with the introduction of Aesculapius, that a concession is made that human mortality may be a necessity. Even

then, though, it is not conceded that what is necessary is necessarily just.

It is likely that Zeus killed Aesculapius (as he did Phaethon) because he thought it necessary. No necessity can be imagined for the creation of a race of beings many or most of whom would (admittedly through our own fault) ultimately be condemned to eternal punishment.⁷² No blame could attach to God for the sins of humankind, or for the consequent damnation of vast numbers of humans, because to sin is a choice that we make voluntarily. Yet God, with his foreknowledge of everything that will happen, might have prevented the damnation of so many. If he had not been prepared to do so by making us better able to withstand temptation, he might have avoided the problem entirely by refraining from creating us in the first place.⁷³ God's behaviour towards humans, starting with our creation, is perfectly just, though it leads indirectly to a great deal of suffering that cannot be said to be necessary;⁷⁴ Zeus's actions towards such as Aesculapius and Phaethon are presumably necessary, though otherwise unjust.⁷⁵ If that is so, the elegy seems to suggest that, from the human point of view, the certainty of God's justice is not in itself a great comfort,

⁷⁶ This is particularly noticeable in the volume of York Tercentenary Lectures (ed. Patrides, cited above, n. 1), mentioned in the opening paragraphs of the Introduction, above. Lamont, in seeking to remove any doubt as to Marvell's religion, remarked that in other respects '[i]nconclusiveness is [Marvell's] secret weapon; it even infects those who write about him': William Lamont, 'The Religion of Andrew Marvell: Locating the "Bloody Horse"', *The Political Identity of Andrew Marvell*, ed. Condren and Cousins, pp. 135–55.

⁷⁷ Klause, *The Unfortunate Fall*, p. 77.

since necessity and justice alike may lead to the early death of a young man and the disconsolate grief of his family and friends. On this view, it might be preferable to be governed by a group of capricious gods who occasionally make us their 'sport' but are for the most part indifferent to human actions, than by one God, who sees everything we do and always acts towards us with justice.

Words such as 'elusive' and 'inconclusive' have often been applied to Marvell's poetry.⁷⁶ They seem particularly apt to 'Upon the Death of Lord Hastings'. It is clear, at least, that justice — divine justice in particular — is a central theme in the poem, though less clear how the questions that it raises on that subject are to be resolved. Klause may well be right to say that, in the Hastings elegy (and nowhere else), 'Marvell let[s] his anger and frustration over the problem of evil run unchecked.'⁷⁷ This is not certain, however. The poem is written in the persona of one of the bereaved, as the 'we' in line 58 makes explicit. Perhaps, then, the elegy should be read as incorporating a warning that extreme grief may lead us, if we are not on our guard, to question or deny God's goodness and justice. In that case, the *mélange* of Christian and prechristian ideas of the divine may be taken as an indication of the speaker's confusion; it may be that his thinking has been distorted by grief, so that he fails to perceive that the different conceptions of the fundamental nature of the world that he simultaneously holds are mutually incompatible.

Seen in this light, the resemblances between the elegy and 'The Nymph complaining' are remarkable. Not only do we find in each a Christian reference in a predominantly pagan context, but the references themselves are strikingly similar: one is to the book in which the names of the elect are enrolled, the other to the

⁷⁸ Spitzer, 'Marvell's "Nymph Complaining for the Death of Her Faun": Sources versus Meaning', p. 240.

⁷⁹ Hartman, "'The Nymph Complaining for the Death of Her Fawn': A Brief Allegory", p. 124.

'register' maintained by the King of Heaven. Both poems make explicit, if brief, reference to justice and legal process: 'The Nymph complaining', ll. 16–17, 'Upon the Death of Lord Hastings', l. 58. Both deal with the death of a young person: in Hastings's case, a death which has already occurred, in the nymph's, a death that is about to. Both poems present formidable problems of interpretation, so that it is tempting to try to read one in the light of the other.

In each case, the possibility needs to be examined that the speaker's employment of an eclectic conception of divinity is to be taken as an indication that his or her reliability is questionable. In the elegy, this seems likely to be true, since the speaker says in terms that the world lacks justice, and is at best undecided as to whether this is the responsibility of the Deity. Such a view would contradict Marvell's (few and, in one case, much later) explicit statements on the subject of divine justice and it seems impossible to dismiss the possibility that a certain distance is being maintained between the poet and the persona in which he speaks. The case of the nymph is more complicated. In the first place, she is more obviously distanced from the poet than the speaker of the elegy, in that she speaks in the voice of a naive young woman or girl. There are already indicators, apart from the failure to keep the pagan apart from the Christian, that what she has to say may not be trustworthy. Some of these have been discussed above — her apparent confusion of 'forget' and 'forgive', for example. And yet (as has also already been discussed) one does not doubt the broad outlines — or many of the details — of the picture that she presents of duplicity and wanton cruelty. It may be, then, that while caveats against too easy an acceptance of the speaker's worldview are, in the elegy, submerged and unobtrusive, and in the nymph's complaint they are visible on the surface, those in the latter are, after examination, to be discounted in a way that is impossible in the case of the former. If this is so, the two poems would appear to be paradoxically complementary: in the elegy, we have a

poem that is optimistic in import but deeply pessimistic in tone, while the charming and graceful tone of the lament disguises its pessimistic import.

On the other hand, it might be argued that, if the combination of Christian and prechristian elements in the same poem is not a device to undermine the nymph's reliability, it cannot consistently be maintained that it *does* perform this function in the Hastings elegy. One answer to this is that, in the elegy, the different ideas of heaven are closely related to the question of heaven's justice, so that the speaker's inconsistent (if ultimately pessimistic) beliefs about justice derive from, or are analogous to, his contradictory ideas about the nature of heaven. If the latter are mistaken, it is all the more likely that the former are, too. In 'The Nymph complaining', on the other hand, the relationship is much less clear, and alternative explanations have been suggested for the coexistence of pagan with Christian elements. For example, according to Leo Spitzer, the location of the poem 'at the point of confluence of two powerfully literary currents, Ovidian and Christian',⁷⁸ is characteristic of Marvell's metaphysical wit, one of the features of which is the bringing together of disparate elements. For Geoffrey Hartman, likewise, the disparate elements should not appear mutually contradictory, but reconciled:

The poet needs a world in which metamorphosis is possible ... This is the world of Pan, the reconciler of man and nature — in Marvell's conception, the reconciler of all things, even of Pagan and Christian. ... The poet is himself a Pan who has created through the accepted magic of poetry a middle-world pointing to the ultimate reconciliation of Pagan and Christian. His consciousness, like the nymph's love, stands ideally beyond the division into sacred and profane.⁷⁹

It is doubtful whether such reconciliation can be said to occur in the Hastings elegy but, if it does, it would appear to be a reconciliation in which the requirements of necessity and the indifference to human suffering of the ancient gods carry more weight than the justice of the one God of Christianity.

⁸⁰ Klause, *The Unfortunate Fall*, pp. 13, 77; Gearin-Tosh, 'Marvell's "Upon the Death of the Lord Hastings"', p. 122.

Whatever the import of the Hastings elegy, its tone of near-despair cannot be ignored. It is because of this that Klause can see the elegy as angry, frustrated and defiant and Gearin-Tosh can comment that '[w]e can have no confidence in there being another world, and certainly not a better one than this.'⁸⁰ While a strong argument can be made that, notwithstanding its penultimate line, the elegy seems rather to assume God's justice than to question it, it does so, if at all, in such a way as to imply that just treatment may be no easier to bear (and perhaps markedly less so) than indifference punctuated by occasional caprice. 'The Nymph complaining', on the other hand, disposes of the idea that a world in which injustice prevails is in any way preferable to or easier to live in than one that is governed justly.

Chapter 4. The law and the king's prerogative

Contingation thwarted

(a) Absolutists and their opponents

In a discussion of justice in seventeenth-century England, the relationship between the king and his subjects is of central importance. There has been controversy among scholars and historians of the period about the degree of ideological disagreement that existed as to the nature and characteristics of the relationship. On the one side, there are historians such as Johann Sommerville, who argue that deep ideological conflict existed between three main groups: first, absolutists (among whose number are to be included the first two Stuart kings of England) who believed that the king's will was law; second, those who held that the monarch was accountable to the people, usually as the result of a original contract between ruler and ruled; and, third, those ('ancient constitutionalists') for whom the king's power to act was bounded by ancient or immemorial customary law.¹

Opposing Sommerville are the historians who believe that prior to 1640 there was a high degree of consensus among Englishmen as to the nature of their polity. A leading figure is Glenn Burgess, who claims that there were very few absolutists in early Stuart England — and that neither James I nor Sir Thomas Fleming (Chief Baron of the Exchequer, whose judgment in *Bate's Case* has been much discussed by both sides in the scholarly debate) should properly be counted among the few who did exist. Burgess defines 'absolutist' narrowly, as someone who argues that the king is *legibus solutus* or 'free of the laws.'² He particularly denies that a recognition that

¹ J. P. Sommerville, *Politics and Ideology in England, 1603–1640* (London: Longman, 1986). In Part One of that work, these three groups are given a chapter each.

² Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven: Yale University Press, 1996).

the subject is never entitled to resist the king, even when the latter is acting in a way forbidden by law, is enough to make one an absolutist. There was practically universal agreement, he says, that the king could not lawfully be resisted. But if force of arms could not legitimately be used to control the monarch's behaviour, might there not be other methods of making the king answerable to the injured subject? The king could not be sued directly in what were regarded as his own courts. His immunity from suit could be justified on the ground that he was the 'fountain of justice', one of whose responsibilities was to provide his subjects with courts, judges and the entire mechanism by which they could complain of their grievances and obtain their entitlements.³ Burgess argues that in the end it is not true to say that the king is free of the laws, because he is expected (and bound by his coronation oath) to observe them, even if there is no direct means of compelling him to do so.

It will be seen, then, that the question whether there was fundamental ideological disagreement as to the nature of the monarchy and the king's rights and (at least in the broad sense) duties, is not an easy one to answer definitively. It is not uncommon to find apparently conflicting statements made by the same person in different circumstances. A good example of this is provided by the case of Sir John Davies, Attorney General for Ireland under James I. The statement by Davies, in *Le Primer Report des Cases et Matters en Ley* (1615) that 'the *Common Law of England* is nothing else but the *Common Custome* of the Realm', a phrase he also uses in *The Question Concerning Impositions*,⁴ makes him an important figure for Pocock and other proponents of the doctrine of an ancient constitution.⁵ Elsewhere,⁶ Davies

³ See, for example, *Chedder v. Savage* (1406) Y.B. Mich. 8 Hen. IV, fol. 13, pl. 13, cited in J. H. Baker, *An Introduction to English Legal History*, 4th edition (London: Butterworths, 2002), p. 97, where it was held that 'the king has committed all his judicial powers to various courts'.

⁴ Sir John Davies, *The Question Concerning Impositions* (1656), p. 135, Wing D407A

⁵ See Pocock, *The Ancient Constitution and the Feudal Law*, pp. 32–3; Paul Christianson, 'Ancient Constitutions in the Age of Sir Edward Coke and John Selden', in *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*, ed. Ellis Sandoz (Columbia: University of Missouri Press, 1993), pp. 89–146 (p. 107); see also J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: Johns Hopkins University

made a pronouncement that Sommerville regards as particularly clear in its absolutism.

When, as a parliamentarian, Sir Edward Coke attacked the king's supposed power to imprison without cause shown, he was quickly reminded that he had earlier, as a Privy Councillor, defended it as a power that the king enjoyed at common law.⁷ The fact is that 'absolutists' and 'constitutionalists' alike agreed that the king needed — and had — discretionary powers that permitted him to act outside the ordinary law. True, they disagreed as to whether this area of unfettered discretion was accorded to the king by the law itself or was antecedent to the law — whether, for example, it was a power that a much earlier king had reserved to himself and his successors when he first agreed to govern by law (if, indeed, such an agreement had ever been made).⁸ Absolutists and common lawyers alike were vague about the extent and subject matter of the discretionary power. In describing it, both sides typically made reference to the good of the commonwealth or the *salus populi*.⁹ From both points of view, the vagueness made sense. To the absolutist, the king was empowered to do *anything* that he deemed necessary for the common good; his powers were limited only by *his own determination* of what that good required. To the common law judge, accustomed to deciding on a case by case basis the issues that came before him, a comprehensive definition of the prerogative powers would be undesirable because discretionary powers existed precisely to deal with situations where the ordinary, promulgated law would not permit the king to act in the best interests of the kingdom.

This is not to say that attempts to enumerate the prerogative powers were

Press, 2000), chapter 4, for a critical view of Pocock's reading of Davies.

⁶ In *The Question Concerning Impositions*, discussed below, pp. 179–80.

⁷ Sommerville, *Politics and Ideology in England, 1603–1640*, pp. 163–5.

⁸ That such a reservation of power had taken place was the view of Sir John Davies: Sommerville, *Politics and Ideology in England, 1603–1640*, p. 37, citing Davies's *The Question Concerning Impositions*, pp. 30–1.

⁹ See Sir Thomas Fleming's judgment in *Bate's Case*, discussed below, pp. 186–7.

unknown. Francis Bacon, like Ellesmere immediately before him, had a foot in each of two of the camps, having been trained as a common lawyer and later become Lord Chancellor. In his *A preparation toward the union of laws of England and Scotland*, having listed the king's prerogatives (with every appearance of exhaustiveness) under such headings as 'The King's prerogative in matters of trade and traffic' and 'The King's prerogative in the persons of his subjects', he goes on to speak of a 'twofold power of the law' and a 'twofold power in the king'.¹⁰ The law has power to direct the king, but not to correct him. It is not clear in what respect this 'power of the law' is 'twofold' but the underlying idea seems to be the familiar one that the king is obliged (or at least *ought*) to follow the law but that this obligation (to put it at its strongest) is unenforceable. It will be seen that the controversy between Sommerville and Burgess is more difficult to resolve because, given that the king cannot personally be held to account before the courts, there is little point in lawyers and judges spelling out what they consider to be the nature of his duty: whether it is a binding (though unenforceable) legal obligation or simply something that is to be expected of so beneficent and wise a person as the king.

Bacon's 'twofold power in the king' consists of, first, 'His absolute power, whereby he may levy force against any nation'; and, second, 'His limited power, which is declared and expressed in the laws what he may do'.¹¹ This seems to imply that the absolute power is wholly concerned with matters of war, peace and foreign relations. Such a power would arguably be wide enough to permit the extraparliamentary raising of money at home for the purposes of external defence (or attack). Earlier, under the heading 'The King's prerogative in war and peace', Bacon had stated 'The King hath power to command the bodies of his subjects for service of his wars, and to muster, train and levy men, and to transport them by sea or land at his pleasure.'

¹⁰ *The Works of Francis Bacon, Baron of Verulam, Viscount St. Alban, and Lord High Chancellor of England* 10 vols., (London: F. C. & J. Rivington and others, 1819), vol. iv, pp. 287–381 (pp. 303–4).

¹¹ *Works of Francis Bacon*, vol. iv, p. 304

It was not unusual for lawyers' descriptions of the absolute prerogative to be frustratingly imprecise. It would seem that, even when they are attempting to be detailed and thorough, as Bacon appears to be, they are motivated by a self-contradictory aim: to define without limiting, so to speak. The scholarly disagreement between Sommerville and Burgess has been in part made possible by the difficulty in deciphering such pronouncements as Sir Thomas Fleming's, in *Bate's Case* and elsewhere, on the absolute prerogative.¹²

In the circumstances described above, it is not surprising that ideological conflict as to the nature of the king's discretionary powers should have failed to reach crisis point until the king attempted to use those powers for a purpose for which, on any theory of royal power, they were not intended. When Coke defended the power to imprison without cause shown, it was because it was always foreseeable that circumstances might render it necessary that such a power be exercised for 'matter of state' — in effect, it was a measure against treason.¹³ When he condemned it, it was because it was apparent that the king was using it to compel reluctant subjects to pay the forced loan. By resorting to the power for this purpose, the king implied that those unwilling to pay were comparable to traitors.

Similarly, the king justified the imposition of ship money on the ground that he deemed it necessary for the naval defence of the country. The necessity was far from obvious to many of the subjects who were being asked to pay. In both cases, the king showed every appearance of abusing the power which hardly anybody denied that he had. In Sommerville's words, the years 1626–7 (when the imprisonments without cause occurred) 'witnessed ... the most flagrant violations of English liberties perpetrated by a monarch in over a century'.¹⁴ It was when the question arose as to

¹² See below, pp. 186–7.

¹³ Sommerville, *Politics and Ideology in England, 1603–1640*, pp. 163–4.

¹⁴ Sommerville, *Politics and Ideology in England, 1603–1640*, p. 222. Burgess comments that the loopholes hidden by the consensus that 'the king was limited but there was no earthly forum in which his transgression of the limits on him could be legally judged ... were neither apparent nor important

how (if at all) that kind of abuse could be restrained that the ideological differences began to bite. There was no pressing reason why anybody should have to decide whether he was absolutist, contractualist or ancient constitutionalist until the king began to use his discretionary powers for unjustified purposes. This is not to say that the ideological disagreements perceived by Sommerville are merely our *ex post facto* interpretation of the various nuances inevitably to be found in a general consensus as to the nature of the monarchy and the polity. It is clear, in particular, that many churchmen (Maynwaring and Sibthorpe being the most obvious examples)¹⁵ held views that the typical common lawyer found repugnant.

In summary, there was a degree (as to the extent of which there is room for argument) of ideological conflict about the origin or basis of the king's discretionary power to act independently of the law. On the other hand, there was broad agreement across the ideological divide that a strict definition of the extent or area of operation of that power would not be helpful. In arguing against the view that the doctrine of the ancient constitution was the dominant politico-constitutional theory of early seventeenth-century England, Sommerville points out that a number of Coke's fellow common law judges — Fleming in *Bate's Case*, Berkeley in *R. v Hampden* and Davies in *The Question Concerning Impositions* (1656) — 'displayed a clear bias towards absolutism'.¹⁶ Perhaps this shows the narrowness rather than the breadth of the ideological gulf between common lawyers and absolutists. After all, Coke himself had defended the power of imprisonment.

(b) *The ancient constitution*

The various ideas to which the term 'ancient constitution' could be applied have until the English found themselves with a king patently willing to exploit them': Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 25.

¹⁵ 'I give you those particular relations for an example of what was then the Doctrine a-la-mode at that time in most of your Pulpits and which you here attempt to bring <again> in fashion': Marvell, *The Rehearsall Transpos'd: The Second Part*, ed. Martin Dzelzainis and Annabel Patterson, in *Prose Works*, I, 313.

¹⁶ Sommerville, *Politics and Ideology in England, 1603–1640*, p. 108.

already been discussed in chapter 1. If the arguments in that chapter are persuasive, Sommerville is almost certainly right to deny that the doctrine of the ancient constitution was the dominant ideology in early Stuart England.

It may be that the Protectorate, with its Instrument of Government, had shown Englishmen that government in accordance with a constitution was at least a possibility. This was a lesson that many were willing to forget in the aftermath of the Restoration, until the problem of a king who seemed unwilling to be bound by what was understood to be the law again became pressing.

(c) *Contract*

If the ideological divide between absolutists and the common lawyers could be plastered over with little difficulty — so long as the king exercised self-restraint — what of Sommerville's third group, the contractualists? The first thing to be said about this group is that it covered a wide spectrum: it managed to encompass those who held both authoritarian and libertarian views¹⁷ on the subject's relationship to his monarch. Both Milton and Hobbes had their precursors among the contractualists of the early seventeenth century.¹⁸ As Sommerville points out, the putative original contract between monarch and people¹⁹ was not extant, so its presumed content was a matter of speculation, deduction and inference.²⁰ It was reasonable to suppose that

¹⁷ These terms may seem anachronistic and are applied here somewhat loosely. In *The Rehearsall Transpos'd: The Second Part*, (*Prose Works*, I, 325) Marvell contrasts 'Clemency of Government' with 'the sanguinary course': see below p. 199.

¹⁸ To some degree, each of them has a precursor in Selden! Jason P. Rosenblatt has traced the influence of Selden on Milton's divorce tracts, on parts of *Paradise Lost* and on *Samson Agonistes*: Rosenblatt, *Renaissance England's Chief Rabbi: John Selden*, chapters 3, 4 and 6. There is no obvious English source for Milton's fiduciary conception of the relationship between king and subject (as to which, see note 24 below) but it clearly owes something to earlier contractualists. For Selden as a forerunner of Hobbes, see Tuck, *Natural Rights Theories*, chapter 6 and Tuck, *The Rights of War and Peace*, chapter 4.

¹⁹ Hobbes, atypically, would write of a contract between the people inter se, not *with* the sovereign: in *Leviathan*, chapter 17, he defines a commonwealth as 'One Person, of whose Acts a great Multitude, by mutuall Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence' (Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), p. 121, emphasis added).

²⁰ Sommerville, *Politics and Ideology in England, 1603–1640*, p. 64.

whoever had originally held power had, in agreeing to share it, made exceptions and reservations, the better to be able to deal with unforeseen contingencies. So, if one believed that power had originally vested in the people, who had then agreed to choose a king, the exceptions and reservations would tend to benefit the people and to limit the power of the king. Conversely, if one believed that, by divine gift, the law of nature or the law of nations, kings had originally had unfettered power and had subsequently agreed to govern according to laws and limitations,²¹ the exceptions and reservations would tend to be in the king's favour, at the expense of the people. On the other hand, it was possible to believe that power had originally been the people's, but that they had agreed to give it up permanently and unconditionally. Hobbes was to offer an explanation as to why all people, in all commonwealths, could be presumed to have done this, even though it might appear to have been contrary to their interests.

The second thing to be said about the contractualists is that there appears to have been an overlap of membership with both of the other groups. Again, Sir John Davies is an instructive, if not necessarily typical, case. It was mentioned above that he is an important figure for Pocock and the proponents of an ancient constitution (having described the common law as 'the common custom of the realm') who also made absolutist-sounding pronouncements in his *The Question Concerning Impositions*. It is time to look more closely at what he said there.

According to Davies, under the law of nature there had been no private property but everything had been held in common. Private property, which in turn led to contracts and trading, was introduced by the law of nations. Kings were

²¹ One lawyer who believed this, as we are about to see, was Sir John Davies. Perhaps the most influential advocate of this view was James I who put forward the doctrine that has been characterized by Paul Christianson as 'constitutional monarchy created by kings'. According to this doctrine, kings had had unfettered power in their 'first originall' but had assumed by 'paction' the obligation to govern in accordance with fundamental laws: Christianson, 'Ancient Constitutions in the Age of Coke and Selden', pp. 93-4.

likewise an institution of the law of nations ‘as the first and principal cause of making Kings, was to maintain property and Contracts, and Traffique, and Commerce amongst men.’ For Davies, the law of nations existed before kings, who in turn existed before the laws of particular nations, such as the common law in England:

[A]ll these things, namely Property, and Contract, and Kings, and Customes, were before any positive Law was made; then came the positive Law, and limited the Law of Nations, whereas by the Law of Nations the King had an absolute and unlimited power in all matters whatsoever. By the positive Law the King himself was pleased to limit and stint his absolute power, and to tye himself to the ordinary rules of the Law, in common and ordinary cases, ... retaining and reserving notwithstanding in many points that absolute & unlimited power which was given unto him by the Law of Nations, and in these cases or points, the Kings Prerogatives do consist; so as the Kings Prerogatives were not granted unto him by the people, but reserved by himself to himself, when the positive Law was first established;²²

He goes on to make the familiar distinction between the king’s absolute power, ‘which is not bound by the positive Law; and an ordinary power of Jurisdiction, which doth co-operate with the Law’.

This is at the same time contractualist — in its reference to a reservation by the King to himself — and capable of being called in aid by Sommerville as tending towards absolutism. The king’s absolute power is uncontrolled by the ordinary laws of the land, including the common law and the ecclesiastical law. However, Davies’s work does not support an argument that the king was an absolute ruler in Burgess’s sense of the term. His purpose in *The Question Concerning Impositions* had been to assert that the king had an unfettered power to levy impositions similar to Customs duties on imports and exports. That power, he repeated, had been acknowledged and recognized by a statute passed in the reign of Richard II but it had not been granted either by common law or statute, as it had existed prior to both. Further, although there was a sense in which this power was ‘absolute’, its area of application was limited to international trade; it was clearly not a general power for the king to do as he

²² Davies, *The Question Concerning Impositions*, pp. 30–1 cited in part by Sommerville, *Politics and Ideology in England, 1603–1640*, p. 37.

wished.

In any case, even the king's absolute power is not wholly 'free of the laws' in that it accords with, and was originally conferred by, the law of nations, which Davies sees as having been at first universally binding, and still in force to the extent that it has not been modified by more local laws.²³ As Sommerville remarks, the passage shows that not all common lawyers believed that the common law was necessarily superior to and independent of concepts of law having their origin in continental Europe. Davies, we see, had a developed and coherent legal theory, but it is not one that fits easily into a framework of either 'absolutism' or 'ancient constitution.' Insofar as it is contractualist, it is clearly distinguishable from the ideas of Hobbes and Milton, who think in terms of an agreement of the people to be governed,²⁴ whereas Davies posits an agreement by an ancient king to govern in accordance with laws.

We know of no more thoroughgoing contractualist in early Stuart England than John Selden,²⁵ who was first of all a common lawyer. In so far as there were constitutionalists Selden was one of those, too, in that he believed that the king's prerogative was within the law, not outside it, and he accorded to the law an important role in the government of the country.²⁶ In a much-quoted remark from his *Table Talk*, he also made it clear that his contractualist views were compatible with an authoritarian politics not far removed from absolutism. He is reported to have said:

²³ Davies, *The Question Concerning Impositions*, pp. 4, 20–21.

²⁴ As Martin Dzelzainis makes clear, Milton conceives of the relationship between the king and the people as a trust rather than a contract, because the people may end it at will, without any default or misconduct on the part of the king. It does, however, bear some family resemblance to contractual theories, as evidenced by Milton's use of terms such as 'mutual Covnant': Milton, *Political Writings*, pp. xvii–xviii.

²⁵ See Sommerville, *Politics and Ideology in England, 1603–1640*, p. 64.

²⁶ See the comments attributed to Selden on the subject of the prerogative in *Table Talk* (London: Joseph White, 1786), p. 125: 'the King's prerogative is not his will, or what divines make it, a power to do what he lists. ... [It is] the law that concerns him in that case.' See Tuck's brief comments on this passage: Richard Tuck, "'The Ancient Law of Freedom': John Selden and the Civil War', in John Morrill, ed. *Reactions to the English Civil War 1642–1649* (London and Basingstoke: Macmillan, 1982), pp. 137–161 (p. 147). Paul Christianson characterizes Selden as a proponent of the mixed monarchy version of the ancient constitution: Christianson, 'Ancient Constitutions in the Age of Coke and Selden', pp. 102–4 and 111–14.

If our fathers have lost their liberty, why may not we labour to regain it? *Answer.* We must look to the contract, if that be rightly made, we must stand to it. If we once grant that we may recede from contracts, upon any inconvenience that may afterwards happen, we shall have no bargain kept.²⁷

On Selden's view, a variety of 'constitutional' arrangements, including absolutism, is possible, depending on what the contracting parties agreed to. A people who submitted to an absolute government would presumably be acting under some form of duress (even if it were only that arising from the Hobbesian 'warre of every man against every man'²⁸), but that would not be enough to vitiate the agreement. This is not to suggest that Selden thought of the English monarchy as an absolute one, but only that he believed that absolutism could be a legitimate type of government.

Selden had a particularly uncomplicated approach to the relationship between rights and remedies. From his point of view, it made little sense to speak of liberties of the subject (or of obligations of the king) which were unenforceable. If the prerogative is within the law, it must also be controlled by the law, where necessary. So, in a conference between the Commons and the Lords on the Petition of Right (1628), he argued for the following principle:

In all cases, my Lords, where any right or liberty belongs to the subjects by any positive law, written or unwritten, if there were not also a remedy by law for the enjoying or regaining this right or liberty, when it is violated or taken from him, the positive law were most vain and to no purpose. And it were to no purpose for any man to have any right in any land or other inheritance if there were not a known remedy, that is, an action or writ, by which in some court of ordinary justice, he might recover it. And in the case of right or liberty of person, if there were not a remedy in the law for regaining it when it is restrained it were of no purpose to speak of laws that ordain it should not be restrained.²⁹

²⁷ John Selden, *Table Talk*, p. 37. A slightly different version ('If our fathers *had* lost their liberty ...', emphasis added) is quoted by Richard Tuck, 'Grotius and Selden', in *The Cambridge History of Political Thought 1450–1700*, ed. J. H. Burns, pp. 499–529 (p. 528). As Tuck makes clear, Selden's argument on this point is identical with Grotius's in *De iure belli*, I.III.VIII (*Rights*, pp. 261–2).

²⁸ See Hobbes, *Leviathan*, pp. 88–90. Tuck points out that Francis Bacon had endorsed 'the view ascribed by Plato to Clinias in *The Laws* that "humanity is in a condition of public war of every man against every man"', and conjectures that Hobbes may have drafted Bacon's *Considerations Touching a War with Spain* (1624): Tuck, *The Rights of War and Peace*, pp. 126–7.

²⁹ *Commons Debates, 1628*, ed. Robert C. Johnson, Mary Frear Keeler, Maija Jansson Cole and William B. Bidwell (New Haven: Yale University Press, 1977–8), ii, 342, cited in Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven: Yale University Press, 1996), pp. 205–6.

Whether it was possible to control those of the king's actions which might be damaging to the subject depended as much on the availability of a remedy as on broad questions as to the nature of the constitution. In the case of arbitrary or irregular imprisonment, the remedy of *habeas corpus* was available — though it was not always effective to secure the release of a prisoner detained without apparent good cause, as is demonstrated by the examples of Selden himself in 1629 and Shaftesbury in 1677.³⁰ When the general property rights of the subject were invoked, it was usually in order to oppose measures in the nature of taxation, and such judicial decisions as *Bate's Case* (1606) and the Ship-Money case, *R. v. Hampden* (1637)³¹ established — in the short term at least — that various methods of raising money without parliamentary approval were open to the king. In the latter case, it was held that the king was entitled by virtue of his prerogative powers to raise money to defend the kingdom when its safety was threatened. The existence and seriousness of the threat were questions to be determined by the king alone. If he concluded that a measure such as ship-money was necessary, the judges did not have authority to look behind his determination. So, at least, the majority of the judges in *R. v. Hampden* decided.

These cases show two things. First, it does not follow that because the king was immune from suit that there were no procedures by which his actions could be challenged. A writ of *habeas corpus*, for example, was directed to the jailer who, in a case where the prisoner was detained on the king's orders, would defend the imprisonment by saying it was authorized by the royal warrant. The court could then rule

³⁰ David Sandler Berkowitz, *John Selden's Formative Years: Politics and Society in Early Seventeenth-Century England* (Washington, London and Toronto: Folger Books, 1988), pp. 243–4, 251–9. K.H.D. Haley, *The First Earl of Shaftesbury*, (Oxford: Clarendon Press, 1968), pp. 428–30; see also Marvell, *Account*, pp. 371–2 and below, p. 221. Shaftesbury was imprisoned by order of the House of Lords rather than on the king's authority; however, the Attorney General accepted (Haley, p. 429) that he could be released at the king's pleasure, without reference to the Lords.

³¹ William Cobbett, *Cobbett's Complete Collection of State Trials*, (London: R. Bagshaw, 1809), III, cols. 825–1316.

on the validity and efficacy of the warrant. Hampden's case came before the Court of Exchequer when proceedings were taken to recover the sum of 20s. that had been assessed against him. Formally, then, many of the king's actions were justiciable. There is a striking illustration of what this meant in the minority judgment of the Chief Baron, Sir Humphry Davenport, in *Hampden*. He agreed with the majority that the king had power to raise money when it was required for the defence of the kingdom, and that the king's determination of this question was final. He nevertheless held that the ship-money writs were unlawful on a number of grounds, two of which are particularly significant. First, in purporting to confer a power on the sheriff to assess the sums due, they attempted to make him a judge in his own cause. Second, a writ of *scire facias* issued in the name of the king, could not be effective to enforce a payment that, on the king's own case, was not due to him as a tax would have been.³² The Lord Chief Justice of the King's Bench, Sir John Brampton, agreed with the majority on every point except that relating to the effectiveness of the *scire facias*, but in his judgment that point was decisive in Hampden's favour.³³ In other words, two of the judges, admittedly in the minority, were prepared to hold that, even while exercising his absolute prerogative in a matter affecting the *salus populi*, the king could be defeated by defective pleading,³⁴ while one of those additionally held that he was bound by the rules of natural justice.

The second thing that these cases show is that, while aspects of the prerogative might be justiciable, important questions were often in practice decided against the subject and in favour of the king. In the cases mentioned, the king had his own way:

³² Cobbett, *State Trials*, iii, cols. 1202–16, esp. at cols. 1210–11 as to the sheriff's power of assessment and 1212–13 as to the effectiveness of the *scire facias*. See Conrad Russell, 'The Ship Money Judgments of Brampton and Davenport', *EHR* 77 (1962), pp. 312–18, on the second of these grounds.

³³ Cobbett, *State Trials*, iii, cols. 1250–51.

³⁴ As Russell points out, this was not a mere technicality, but arose from the king's attempt to enforce the payment as if it were a tax payable to him while characterizing it as a service, i.e. the provision of a ship, and not as a tax, which would have required the approval of parliament: Russell, 'The Ship Money Judgments', pp. 315–6.

the courts permitted him to act as he had wished to, but in the very process of doing so, determined that he was acting lawfully, not extralegally. Was he above the law, or was the law flexible and accommodating enough to permit him to act as he pleased while remaining within it? It is clear that there was neither a general rule providing that the king was obliged to comply with the law in all respects nor one to the effect that he was free to disregard it in any way he saw fit.

There seems little room for doubt that, so far as the law was concerned, notwithstanding his immunity from suit and his position as the source from which justice flowed, the king was not an absolute monarch. Not everybody agreed with the lawyers, however, and in the early Stuart period the ranks of those who disagreed were likely to include influential clergymen and the monarch himself.³⁵ An aggrieved subject, who believed him- or herself to be the victim of injustice on the king's part, might have a prospect of obtaining redress, or might not, depending on whether the case could be brought before a court by means, for example, of *habeas corpus*. However, because not all controversies were justiciable and because, even in those that were, the law often allowed the king a wide discretion, there were significant areas in which there was no effective means of restraining the king from acting in a manner detrimental to the interests or welfare of the subject, should he wish to do so. Burgess insists, however, that it does not follow that because the king is *irresistible*, he is an absolute monarch. There are other constraints on his actions besides the possibility of legitimate resistance. In particular, there are his duty to God, and the terms of his coronation oath.

³⁵ Burgess argues that some of the apparently absolutist pronouncements of James I are consistent with a legalist position, for example, in his argument with Coke, leading to the latter's dismissal as Chief Justice of the King's Bench, in 1616. Here, according to Burgess, the king was merely concerned to ensure that the prerogative should not be 'indirectly impaired', that is to say that limits should not be placed on the king's powers in proceedings between private parties, in which the Crown was not represented: *Absolute Monarchy and the Stuart Constitution*, pp. 154–5.

Absolute and ordinary prerogatives

The king's discretion mainly operated in the area of his prerogative powers. One pronouncement which has been discussed by most of the writers on this subject at greater or lesser length is the judgment of Sir Thomas Fleming in *Bate's Case* (1606). This case concerned the king's right to impose duties on the importation of currants. It was a forerunner of the Ship-Money case, establishing that the king had a discretionary power to impose duties in the nature of taxes without parliamentary consent in certain circumstances (in *Bate's Case*, where foreign trade was concerned and, in the Ship-Money case, for the defence of the kingdom). The Chief Baron said that the prerogative powers were of two kinds, ordinary and absolute. The exercise of the ordinary prerogative was regulated by law. It was, according to Fleming, 'for the profit of particular subjects, for the execution of civil justice, the determining of *meum*'. The absolute prerogative was free of such regulation, and 'is only that which is applied to the general benefit of the people and is *salus populi*'. Fleming's definition does not make it clear what falls within the scope of each branch of the prerogative, but he confines the absolute prerogative to matters which affect the safety and wellbeing of the realm.³⁶ The absolute prerogative does not appear to be concerned with doing justice in individual cases (though presumably it may override the requirements of individual justice where necessary) but 'is most properly named policy and government'.

Fleming resorted to the absolute/ordinary distinction in two other judgments, the *Case of Monopolies* (1601) and *Calvin's Case* (i.e. the case of the post nati) (1608). The latter case has cast some doubt on whether, in *Bate's Case*, Fleming said that the exercise of the absolute prerogative is 'guided by the rules which direct only at

³⁶ On the distinction between the ordinary and absolute prerogatives, see Weston and Greenberg, *Subjects and Sovereigns*, pp. 11–17. Weston and Greenberg cite and discuss Fleming's judgment in *Bate's Case* at p. 14, as does Burgess, *Absolute Monarchy and the Stuart Constitution*, pp. 80–1, from where the preceding extracts from Fleming's judgement are quoted.

common law' or whether that phrase was preceded by a 'not' which has been omitted from the report: in *Calvin's Case*, he said that the king's 'absolute power hathe no law to dyrecte him'.³⁷ Perhaps he is making a distinction between direction and guidance: the exercise of the ordinary prerogative is directed by the law, that of the absolute is merely guided by it. It seems clear at any rate that Fleming is positing the existence of a (none too precisely defined) province of 'policy and government' where the king's discretion is unfettered.

The monopolies case is perhaps Fleming's most suggestive and revealing discussion of the prerogatives. It is in the nature of a monopoly that it benefits an individual and has a direct impact on the interests both of that individual and others. On the face of it, such a grant would seem to fall squarely within Fleming's idea of the ordinary prerogative, and therefore to be governed by the common law. Fleming, however, treats the grant in this case as an exercise of the absolute prerogative because it has an impact on trade with other nations, something peculiarly within the monarch's discretion.³⁸ Fleming declared that privileges 'merelie contrarie to the lawe or [which] doe wholly contradict or crosse the law ... are not good' and added that generally 'the K[ing] cannot grante a benefitt to the Iniurie of another personne'.³⁹ The implication is that considerations falling within the ambit of the absolute prerogative, such as the regulation of foreign trade, could justify actions that would otherwise be illegal.

The king's power to dispense with particular laws, though it would often be used 'for the profit of particular subjects', seems clearly to fall within the ambit of his absolute prerogatives, in that the exercise of the king's discretion could not be controlled. As Weston and Greenberg explain:

³⁷ Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 82.

³⁸ Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 83.

³⁹ Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 85, citing S.P. 12/286/47, fols. 1b-

Since the rationale of a royal discretionary authority was that the king as supreme governor must have a reserve of power with which to govern, he might on occasion disregard positive law. The primary weapon in such situations was the dispensing power by which statute law was set aside whenever this course was, in his judgment, dictated by equity or the public welfare.⁴⁰

Because of this, exercise of the power could not be controlled by parliament, and *The Sheriff's Case* (1487) established that a statutory provision intended to exclude the use of the dispensing power could itself be dispensed with.⁴¹ This particular aspect of the prerogative was of considerable practical importance and the result of its exercise was, as Weston and Greenberg put it, 'a very real and concrete authority of the king over statute law'.⁴²

The ambiguity of the king's prerogatives generally is encapsulated in the fact that, while his authority over statute law was real and concrete, it was not unlimited. Not all statutes could be dispensed with in all circumstances. Those directed against a public nuisance lay outside its scope (the king could pardon a nuisance that had already occurred, but not so as to permit its being continued), as did enactments that vested rights in individuals. Where the activity proscribed by a statute was conceived as being *malum in se* as opposed to *malum prohibitum* (wrong by its very nature rather than wrong merely because the law forbade it), a dispensation was not allowed by law.⁴³ Whether a prohibited action was inherently wrong was a question on which king, courts and parliament might sincerely disagree, but it is likely that the category represented a potentially large gap in the king's power to render statute law nugatory.⁴⁴ In effect, then, there were areas of public life where the king's authority

⁴⁰ Weston and Greenberg, *Subjects and Sovereigns*, p. 15.

⁴¹ Weston and Greenberg, *Subjects and Sovereigns*, pp. 23–4.

⁴² Weston and Greenberg, *Subjects and Sovereigns*, p. 32.

⁴³ Weston and Greenberg, *Subjects and Sovereigns*, pp. 23–5; see also Cromartie, *The Constitutionalist Revolution*, pp. 213–14.

⁴⁴ This may be something of an oversimplification. Coke suggested that anything that is *malum in se* is necessarily proscribed by the common law, leaving things that are *mala prohibita* to be the peculiar province of statute: 4 *Inst.*, 63, cited by Burgess, *Absolute Monarchy and the Stuart Constitution*, p. 172. However, he also recognized that many statutes were declaratory of the common law. Such statutes would be outside the scope of the dispensing power.

was wholly unconstrained, but there were others where he had little discretionary power.

The growth of arbitrary government: Marvell in 1677

The legal limits of the prerogative could not be known with certainty until they were tested, as they were in *R. v. Hampden*, for example. If, as happened in that case and in some of the *habeas corpus* cases already mentioned, the disputed questions were generally resolved in the king's favour, it might be concluded that the king was *effectively* free of the law, even while formally subject to its terms. At any rate, the constraints upon his actions did not operate in all areas, and not at all when the safety of the kingdom was in question. How, then, could the king be stopped from abusing his power, if he had a mind to do so?

Marvell answered this question in two rather different ways, in works that were published a little more than four years apart. In the later of the two, *An Account of the Growth of Popery, and Arbitrary Government in England* (1677), he asserts that the king's capacity to act to the detriment of his subjects is severely circumscribed, and he appears to imply that if the ordinary courts cannot prevent the king from exceeding his legitimate powers, then parliament ought to be able to. In *The Rehearsall Transpros'd: The Second Part* (1673) — which unusually for a work of his (and uniquely among his controversial writings) appeared under his own name during his lifetime — he had given a more moderate and traditional answer to the question. Though an assertion that either of these books was written in order to set out a constitutional doctrine would be implausible,⁴⁵ it could be said that the king's powers, and the defence of the subject from their abuse, are central to both. The 1673 work was written partly to defend its author against several hostile replies to the first part of the *Rehearsal Transpros'd* (1672), including Parker's *Reproof to the Rehearsal*

⁴⁵ See page 209 below.

Transposed (1673), and partly by way of general rejoinder to the *Reproof*, in which Parker claimed, among other things, that Marvell had misrepresented his views.⁴⁶ In *The Rehearsal Transpros'd*, Marvell had ridiculed Parker's doctrine *That it is absolutely necessary to the peace and government of the World, that the supream Magistrate of every Commonwealth should be vested with a power to govern and conduct the Consciences of Subjects, in affairs of Religion.*⁴⁷ In the *Account*, however, the question of the king's powers is even more central, and more urgent, and Marvell engages with it from the start. His second paragraph begins:

For if first we consider the State, the Kings of England Rule not upon the same terms with those of our neighbour Nations, who, having by force or by address usurped that due share which their people had in the Government, are now for some Ages in possession of an Arbitrary Power (which yet no prescription can make Legal) and exercise it over their persons and estates in a most Tyrannical manner. But here the Subjects retain their proportion in the Legislature; the very meanest Commoner of England is represented in *Parliament*, and is a party to those Laws by which the Prince is sworn to Govern himself and his people. (p. 225)

The degree of power that the kings of 'our neighbour Nations' are said to exercise over their people is not something that derives of necessity from the nature of the relationship of monarch and subject: on the contrary, it has been usurped and, however long may be the period during which it is exercised, it cannot be rendered legitimate. The rights of the people are, to use a term from a later period of constitutional history, imprescriptible. According to Marvell, a like usurpation has not occurred in England, though (he has said in his first paragraph), there has been for a number of years a 'design' that it should. By implication, if such a design were to succeed, the result would be equally illegal in England as it is in other monarchies.

⁴⁶ See *The Second Part (Prose Works, I, 367)* on the necessity for a rejoinder to the *Reproof*: 'Is here again no Reference so much as to one passage, no shadow of proof? Gentle Reader, What shall we do with this Man, that puts us continuously upon such tedious tasks in things so notorious?' In addition to the *Reproof* and to Henry Stubbe's *Rosemary and Bayes* (1672) which is critical of both Parker and Marvell, the hostile replies to *The Rehearsal Transpros'd* included *A Common-place-Book out of the Rehearsal Transpros'd* (1673), Richard Leigh, *The Transproser Rehears'd* (1673), *S'too him Bayes* (1673) and Edmund Hiceringill, *Gregory, father-greybeard, with his vizard off* (1673)

⁴⁷ *Rehearsal Transpros'd (Prose Works, I, 92)* quoting Samuel Parker, *Discourse of Ecclesiastical Polity* (1669), p. 28.

Marvell follows this with an extraordinary list of things that the king *cannot* do:

No money is to be levied but by the common consent. No man is for life, limb, goods or liberty at the Sovereigns discretion: but we have the same Right (modestly understood) in our Propriety that the Prince hath in his Regality; and in all Cases where the King is concerned, we have our just remedy as against any private person of the neighbourhood, in the Courts of Westminster Hall, or in the High Court of *Parliament*. His very Prerogative is no more than what the Law has determined. His Broad Seal, which is the Legitimate stamp of his pleasure, yet is no longer currant, than upon the Tryal it is found to be Legal. He cannot commit any person by his particular warrant. (pp. 225–6)

Annabel Patterson describes this litany as ‘an astonishing series of negative propositions which must have given Charles, if he read them, rather a start.’⁴⁸ It is remarkable, too, that the list is not balanced by any comparable recital of the things the king *does* have power to do (though later in the *Account* there will be a discussion of one of these things: the conclusion of treaties and alliances with other countries). On the contrary, even the king’s prerogative is mentioned in such a way as to emphasize its limitations rather than its extent: it is ‘no more than what the Law has determined’. This formulation does not necessarily amount to a denial that the king enjoyed an absolute as well as an ordinary prerogative. As we have seen, it could be argued that, in *R. v. Hampden*, the judges determined, or set the boundaries of, the absolute prerogative so widely that the king could effectively do what he liked. As against that, it could be objected that such wide boundaries are really no boundaries at all. Whichever view one takes, Marvell emphasizes that the prerogative is subject to and defined by the law and his use of ‘determined’ certainly implies the fixing of limits, particularly in the context of his emphasis on the restrictions on the king’s actions.

In place of the balancing positive list of powers that might have been expected, Marvell gives us a description of the benefits that the king derives from his monarchy: his person is sacred and inviolable, and no personal blame is imputed to

⁴⁸ Annabel Patterson, *Marvell: The Writer in Public Life* (Harlow, Essex: Longman, 2000), p. 146.

him for 'whatsoever excesses are committed against so high a trust'. He enjoys a vast revenue and more money is readily forthcoming if he should have extraordinary occasion for it. There are 'so many profitable Offices' at his disposal that it is surprising that the nation can provide enough honest men to fill them (p. 226). The ironies in this passage are obvious. Not the least of them is the implication that, restricted though the king's powers might be, it remained possible that the high trust placed in him could be abused (even if the blame for that abuse would not attach to the king personally but to his ministers). As to the country's readiness to supply the king's extraordinary occasions, much of the later part of the *Account* tells how parliament resisted being rushed into voting extra money, until it could be sure that the king intended to ally the country with Holland against France, rather than the other way around.

Having enumerated on the one hand the limitations on the king's powers and, on the other, the benefits that go with his office, Marvell summarizes the situation of English monarchs as being 'in nothing inferiour to other Princes, save in being more abridged from injuring their own subjects'. The king 'enjoys a capacity of doing all the good imaginable to mankind, under a disability to all that is evil' (pp. 226–7). 'Disability' is pointed, in that the term was generally applied to persons who, because of their status, were placed by law under certain restrictions (*OED* sense 2). John Rastell defines the term as 'when a man by any act or thing, by himself or his Ancestor done or committed, or for any other cause, is disabled or made incapable to do, to inherit, or to take benefit or advantage of a thing, which otherwise he might have had or done'.⁴⁹ The examples he gives of persons under a disability include those attainted of treason or felony and their descendants, and aliens, who are disabled from suing in the king's courts. The application of the term to the king implied that he was someone

⁴⁹ [John Rastell,] *Les termes de la ley or Certain difficult and obscure words of the common lawes and statutes of this realme now in use, expounded and explained* (London: J. Streater, 1659), p. 118.

who, by virtue of his position, lacked some of the capacity enjoyed by most of his subjects. The suggestion was not lost on Roger L'Estrange, who wrote in the Preface to *The Parallel, or an Account of the Growth of Knavery*:

For the main *drift* and *bent* of his *Discourse* is only *the paring of the Kings nails, clipping the wings of his Prerogative*, advancing a *pretended Sovereignty* in the *people*, and cutting his Majesty off from the most essential *privileges* of all *Government*⁵⁰

and in the pamphlet itself:

he [the author] employes his Utmost Skill to represent his Majesty only *Passive* in all his *Administrations*, and so to lessen the Indubitable Fame of his Royal Prudence, and Courage among his People.⁵¹

What Marvell has put forward is a version of the maxim that 'the king can do no wrong', a flexible and ambiguous principle that usually carried the implication that, as other persons have no enforceable rights against the king, his actions, however damaging, will not constitute an injury to anybody who suffers as a result of them. The phrase could be used rather differently, as a basis for preferring the less harmful of two possible interpretations of an action on the king's part.⁵² Marvell's sense is that the king lacks the *capacity* to do harm — it is not that it is *impossible* for the king to injure the subject but rather that it is *unlawful* for him to do so. Marvell, indeed, quotes the maxim, but qualified in such a way as almost to reverse the accepted meaning: 'Nothing is left to the Kings will, but all is subjected to his Authority: by which means it follows that he can do no wrong, nor can he receive wrong' (p. 226). The last clause is rather a non sequitur — if it is true that the king has no capacity to injure his subjects, that does not necessarily imply that he cannot himself suffer

⁵⁰ Roger L'Estrange, *The Parallel or, An Account of the Growth of Knavery, Under the Pretext of Arbitrary Government and Popery. With Some Observations upon a Pamphlet Entitled An Account of the Growth of Popery, etc.* (1679), sig. A2.

⁵¹ L'Estrange, *The Parallel*, p. 9.

⁵² Sir George Crooke, one of the judges in the minority, uses it in this way in his ship-money judgment. conceiving the writs to be 'much to the prejudice of the subjects', he treats them not as the acts of the king but rather the results of 'misinformation': Cobbett, *State Trials*, iii, col. 1136. On the other side, the Solicitor General, Sir Edward Littleton, used the phrase in his argument that the king must be exempt from the general rule that nobody should be a judge in his own cause: *State Trials*, iii, col. 944.

injury. L'Estrange objects to the doctrine that a distinction can be made between the king's person and his authority. As a person, the king is 'lyable to Wounds, Distempers, Emprisonment, and Death';⁵³ the author of the *Account* is seeking to persuade his readers that an injury done to this vulnerable person is not done to the 'the king' — whose authority remains inviolable — but merely to the holder of the office for the time being. Such attempts to separate the individual from the office were highly objectionable to royalists, because they recalled arguments from the Civil War, in which the king's 'authority' was used to legitimate attacks on his person.⁵⁴

L'Estrange's suspicions as to the intent of the author of the *Account* would appear to be confirmed by the latter's treatment of the Test Bill of 1675. The proposal was for an oath to be taken by all holders of public office, including members of parliament, by which they would be required to swear that 'I do abhorre that Traiterous position, of taking Armes by his Authority against his Person, or against those that are Commissioned by him in pursuance of such Commission' (p. 281). This proposal was lost when parliament was prorogued,⁵⁵ but Marvell makes it clear that he would have regarded its adoption⁵⁶ as a disaster both in point of principle and in practical terms. He argues that

... it were difficult to instance a Law in this or other Country, but that a private Man, if any king in Christendom assault him, may having retreated to the Wall, stand upon his Guard ... (p. 283)

Here, Marvell adopts a position that is perhaps surprisingly close to Hobbes (but also

⁵³ L'Estrange, *The Parallel*, p. 9.

⁵⁴ Heylyn accused the Presbyterians of having adopted, during the civil war, the ridiculous position that it was possible to 'destroy Charles Stuart, without hurting the king': Peter Heylyn, *Aerius redivivus, or, The History of the Presbyterians* (1670), p. 447, cited by Weston and Greenberg, *Subjects and Sovereigns*, p. 47. The *Account's* association of the maxim that the king could do no wrong with the distinction between his person and his authority, recalls John Sadler's claim that it was only when acting in accordance with law that the king could do no wrong: see Cromartie, *The Constitutionalist Revolution*, p. 277, citing John Sadler, *Rights of the Kingdom; or, Customs of Our Ancestors* (1649). Cromartie discusses Sadler as an influence on John Locke.

⁵⁵ *Prose Works*, II, 281, n. 295.

⁵⁶ As he points out, the same oath was already required of nonconformist ministers by the Five Mile Act (p. 281).

to Grotius), namely that our duty not to resist the sovereign cannot extend so far as to deprive us of our most basic right, that of self-preservation.⁵⁷ He immediately goes further, however, in accusing the Lord Chancellor (the future Lord Nottingham, Heneage Finch) of bad faith when he rejects ‘that ill meant distinction between the [king’s] Natural and [his] Politique Capacity’. Finch, he says, ‘is too well read to be ignorant that without this Distinction there would be no Law nor Reason of Law left in England’ (p. 283). Marvell is being understandably oblique here, as these are dangerous grounds to venture on even in an anonymous pamphlet. He does not make it clear why English law and ‘Reason of Law’ are dependent on this distinction. However, the implication must surely be that the king is resistible if and when he acts outside the law, even if his unlawful actions do not entail an immediate threat to the survival of the resisting subject: that is to say, that his authority or more precisely the authority of the law will legitimize resistance to his person.

Marvell quickly passes on to the next aspect of his objection to the test oath, namely that the pledge not to resist those who hold the king’s commission is an absolute one, and would prevent the oath-taker from resisting in any circumstances, however illegal, unreasonable or arbitrary the actions purportedly taken on foot of the commission.⁵⁸ This, it is suggested, is Marvell’s strongest argument against the oath (in the sense that it is most likely to command agreement among a wide range of readers), and it is interesting that he does not let it stand alone but introduces in parallel the clearly more controversial question of the separation of the king’s authority from his person.

⁵⁷ See Tuck, *Natural Rights Theories*, pp. 124–5 as to Hobbes. In *De iure belli*, I.IV.VII (*Rights*, p. 358) Grotius questions whether ‘those who first entered into civil Society, from whom the Power of Sovereigns is originally derived[,] ... pretended to impose on all Citizens the hard Necessity of dying, rather than to take up Arms in any Case, to defend themselves against the higher Powers’. He is inclined to presume that they did not, though as a general rule ‘those invested with the sovereign Power, cannot lawfully be resisted’ (*Rights*, p. 372).

⁵⁸ That the king’s immunity from legal process did not extend to those acting illegally on foot of his ‘commission’ had important implications for the legal control of governmental fiat: Sommerville, *Politics and Ideology in England, 1603–1640*, pp. 101–2.

It might also be said that he confuses the issue by prefacing his discussion with a reference to Walter Tyrell, who is reported to have killed William II by accident. By mentioning this story, he must be taken to imply that the proposed oath would prevent a subject from raising the defence of accident if he were unfortunate enough to cause the death of his monarch. This, surely, is a red herring: the point at issue is not accidental slaying but conscious resistance, and the test oath could hardly be thought to include an undertaking not to be the cause of an accident. At any rate, the reference to Sir Walter, in the context of taking arms against the king's person, makes it clear that the author envisages his death (albeit unintentional) as a possible outcome.

It would appear that Marvell goes out of his way here, even to the point of making his argument seem less compelling than it needs to, to include the suggestion that the king may legitimately be resisted in appropriate circumstances. (The fact that the test legislation had, on this occasion, already been lost may have meant that he thought it more urgent to make the point about resistance, however obliquely, than to present the most persuasive argument possible against the test.)

What Marvell has offered, then, is a description of the relations of government in which the monarch is relegated to a restricted and relatively powerless role. To L'Estrange, this idea is republican in tenor: 'And it is no wonder, that the *Secretary* to a *Common-wealth* should write with the *Spirit* of a *Re-publican*'. The remainder of the *Account* bears out L'Estrange's assessment that the author's aim is '*the paring of the Kings nails, clipping the wings of his Prerogative*'.⁵⁹

Marvell reports⁶⁰ that in May 1677, the Commons resolved to make an address to the king in which they humbly besought him:

⁵⁹ L'Estrange, *The Parallel*, sig. A2.

⁶⁰ The passages quoted in the following paragraph are taken from part of the *Account* that 'lightly rewrites a summary' of the parliamentary debates, 'of which other copies survive in British Library, Add. MS 72603, fols. 48–59, and Stowe MS 182, fols. 56–66': Nicholas von Maltzahn, 'Introduction', *Prose Works*, II, 212.

To enter into a League offensive and defensive with the States General of the United Provinces, against the growth and power of the French King, and for the preservation of the Spanish Netherlands, and to make such other Alliances, with such other of the Confederates, as your Majesty shall think fit and useful to that end (p. 356)

In spite of the objections of some members, the Commons voted against the removal from the address of the reference to the proposed treaty with the Dutch (p. 365). The king had no doubt that an attempt was being made to encroach on his exclusive sphere of competence. In his speech in reply to the address, he said

Should I suffer this fundamental Power of making Peace and War to be so far invaded (though but once) as to have the manner and circumstances of Leagues prescribed to Me by Parliament its plain that no Prince or State would any longer believe that the Sovereignie of England rests in the Crown (pp. 367–8)

Having delivered his speech, he immediately told them that they should adjourn until 16 July and, in spite of several members' 'offering ... modestly to have spoken,' the Speaker declared the House adjourned.

Marvell, in keeping with his pose as the 'Relator' of a 'naked Narrative'⁶¹ (or perhaps because reticence is the only way he can avoid explicit criticism of the king), does not reveal his own view as to whether parliament's address constituted an encroachment on the king's exclusive powers. He does, however, make it clear what he thinks of the Speaker's actions. It had always been the case, he says, that adjournments had been made either on the House's own authority or by special commission under the king's broad seal (p. 368). In this case, where the adjournment had followed the king's merely signifying his pleasure, all the members were 'astonished at so unheard of a violation of their inherent Privilege and Constitution' (p. 369). Writing anonymously, Marvell does not identify himself as one of the members so astonished, but he does present the violation of the House's privilege and constitution as a matter of fact rather than one of opinion. The contrast between his apparent indignation at the actual infringement of the Common's rights and his equanimity at

⁶¹ *Prose Works*, II, 241; see below, p. 215.

the alleged infringement of the king's leaves little room for doubt as to his views.

'The rigor of that Power': Marvell in 1673

The position adopted by Marvell in 1677, which L'Estrange could describe as manifesting 'the *Spirit of a Re-publican*', is quite different from a description of the king's powers that he had offered only four years earlier, in *The Rehearsall Transpros'd: The Second Part*. There he summarizes what he calls 'mine own opinion in this matter of the Magistrate and Government' in the following terms:

The Power of the Magistrate does most certainly issue from the Divine Authority. The Obedience due to that Power is by Divine Command; and Subjects are bound both as Men and as Christians to obey the Magistrate Actively in all things where their Duty to God intercedes not, and however Passively, that is either by leaving their Countrey, or if they cannot do that (the Magistrate or the reason of their own occasions hindring them) then by suffering patiently at home, without giving the least publick disturbance.⁶²

This denies any right of resistance in the subject⁶³ (something that, if Burgess is correct, should hardly surprise us), but goes further than that in denying *any* temporal restrictions on the absolute power of the king; Marvell subsequently speaks of 'the rigor of that Power which no man can deny him'. However, he deftly changes the terms of the debate. What the king *may* do ought to be beyond dispute, since it is certain that his power 'is founded upon his Commission from God' (p. 324). What he *should* do, which Marvell terms 'the modester Question', is a more appropriate subject of debate among ordinary mortals, though by entering on it they may still be 'medling with matters above them'. Human laws are powerless to impede the king from acting as he wishes, but it does not follow that, in a sense wider than the legal one, he has a right to do so.

But whoever shall cast his eye thorow the History of all Ages, will find that nothing has always succeeded better with Princes then the Clemency of Government: and that those, on the contrary, who have taken the sanguinary

⁶² Marvell, *The Rehearsal Transpros'd The Second Part*, in *Prose Works*, II, 324.

⁶³ Later in *The Second Part*, Marvell expressly excludes such a right: 'But for the Magistrate, it is surely sufficient, that God has fortified him with a Divine Law, that he may not be resisted ...' (p. 342).

course, have been unfortunate to themselves and the people, the consequences not being separable. ... The wealth of a Shepherd depends upon the multitude of his flock, the goodness of their Pasture, and the Quietness of their feeding; and Princes, whose dominion over Mankind resembles in some measure that of man over other creatures, cannot expect any considerable increase to themselves, if by continual terrour they amaze, shatter, and hare their People, driving them into Woods, and running them upon Precipices. ... A Prince that goes to the Top of his Power is like him that goes⁶⁴ to the Bottom of his Treasure. And therefore it is very unadvisable however to put a great stress upon the little things, and where the Obedience will not counter-vail the Experiment (pp. 325–6)

Marvell, then, argues forcefully and at length that a prince who inflicts hardship on his subjects is acting unadvisedly and to his own as well as to their detriment. The argument is, in a sense, reminiscent of Grotius's in *De iure belli* II.XXIV⁶⁵ that, even where one has a just cause of war, the question whether one ought to act upon it needs to be considered separately and the answer will often be no. Rights are not always to be insisted upon. However, the analogy between Marvell's argument and Grotius's is not exact: for Marvell, the absence of a remedy in the subject is *not* to be equated with the existence of a right in the king:

[Princes] are responsible to him that gave them their Commission for the happiness or infelicity of their Subjects during the term of their Government (p. 325).

In other words, a monarch who injures his subjects is not merely behaving foolishly but is also in breach of his duty. That duty is owed, not directly to the subjects themselves, or to any earthly authority, but to God, from whom the monarch holds his 'Commission'. People who are governed arbitrarily are not themselves entitled to take any steps to remedy the situation, apart from leaving the country, but this does not mean that the arbitrary ruler acts with impunity. To say that the king has a 'Power which no man can deny him' is not to say that he has an equally unlimited *right*. On at least one potential reader of *The Second Part*, the point is unlikely to have been lost.

⁶⁴ Marvell replaced 'shall go' with 'goes' in the second edition (1674): see *Prose Works*, II, 217–8.

⁶⁵ 'Circumstances too may sometimes fall out so, that it may not only be laudable, but an Obligation in us to forbear claiming our Right, on account of that Charity which we owe to all Men, even tho' our Enemies': *De iure belli*, II.XXIV.II (*Rights*, p. 1136).

The relationship between the question of placing limits on the king's powers and that of a right of resistance is a complicated one. Glenn Burgess has argued strongly that, in the early Stuart period (that is, up to the Civil War), there was a consensus among Englishmen (with relatively few dissentients, notably Robert Filmer) to the effect *both* that the king's powers were limited *and* that there was no right to resist him should he exceed those powers. According to Burgess, the idea that without a right of resistance there was no effective limitation on the king's powers is a product of what he calls the parliamentary hermeneutic, something that developed only at the time of the Long Parliament.⁶⁶ In effect, Burgess argues that prior to the personal rule of Charles I and the reactions to it, few people would seriously have considered that a right of resistance was necessary to prevent the king from exceeding his legal authority.⁶⁷

Certainly, if Burgess's consensus existed, the Civil War and subsequent events broke it, and changed — in ways that are complex and difficult to trace — the English view as to limitations on monarchical power. It seems clear, however, that it remained possible after the Restoration to hold that the king was obliged to act in accordance with law, without, at the same time, going so far as to suggest that the subject could ultimately resort to a right of resistance if the king failed to meet this obligation. Weston and Greenberg say that one of the foundations of the Restoration settlement was the recognition that the king's power to make laws could be exercised only coordinately with the two houses of parliament. Whatever had been the position before, after 1660 the English monarchy was in some senses limited, though the existence of a right to enforce that limitation by resistance was not widely accepted.

⁶⁶ Burgess, *Absolute Monarchy and the Stuart Constitution*, pp. 18–28.

⁶⁷ Sommerville, on the other hand, argues that the supposed 'consensus' was not nearly as widely subscribed to as Burgess believes and that, in particular, it did not extend to the Court: J. P. Sommerville, 'The Ancient Constitution Reassessed: the Common Law, the Court and the Languages of Politics in Early Modern England', in *The Stuart Court and Europe: Essays in Politics and Political Culture*, R. Malcolm Smuts (Cambridge: Cambridge University Press, 1996), pp. 39–64.

Indeed, the position that Marvell adopts in *The Second Part* could be characterized in these terms. While he says that ‘no man’ (in which expression he evidently includes all the judges and substantial majorities in both houses of parliament) can deny the king the power to act as he thinks fit, and while he seems to include the exercise of this unfettered power in the category of things the king *may* do, he nevertheless implies that the restrictions placed on the king by the terms of his ‘commission’ from God are, in ordinary circumstances, effective. (As Burgess points out, we should not underestimate the significance of an oath — and that includes the king’s coronation oath — for a seventeenth-century Christian.⁶⁸)

It seems, therefore, that a primary difference between the two parts of *The Rehearsal Transpros’d* on the one hand and *The Account* on the other is that, while they both propose that the king’s freedom to act is subject to constraints, only in the later work are those constraints seen to be a matter of human (which is to say, in this case, English) law. That distinction has implications for the *kind* of action the king may take: acts that do not offend against the divine will may nevertheless amount to a serious infraction of the ordinary law. That the two works have different conceptions of what the king may legitimately do is demonstrated by the different conclusions they reach as to the legitimacy of the Declaration of Indulgence (1672). In *The Rehearsal Transpros’d*, Marvell argues in favour of the Declaration: the king’s original declaration of his intention to indulge tender consciences, made at Breda before the restoration, is partly the result ‘of his own consummate Prudence and natural Benignity’; and his Declaration of March 1672 is praised on the ground that ‘to royal and generous minds no stipulations are so binding as their own voluntary promises: nor is it to be wondred if they hold those Conditions that they put upon themselves the most inviolable’ (p. 90). This, however, takes it for granted that it was within the king’s power to make the Declaration, since he could hardly confer a power on

⁶⁸ Burgess, *Absolute Monarchy and the Stuart Constitution*, pp. 19, 153.

himself simply by promising to do something that he had otherwise no right to do.⁶⁹

It is probable that Marvell's main purpose in writing *The Rehearsal Transpros'd* was to encourage the king to persist with the Declaration of Indulgence in the teeth of ecclesiastical and parliamentary attempts (eventually successful) to get him to drop it.⁷⁰ By the time that *The Second Part* appeared, the Declaration had been abandoned, but Marvell continued to make use of it to ridicule Parker's self-contradictory position: that the king had an 'unhoopable' power over religious worship, but that he *must* not exercise that power in favour of toleration, because to do so would supposedly be damaging to the church. In short, the approach to the Declaration in *The Second Part* is consistent with that in the first pamphlet, notwithstanding the fact that the Declaration itself was no longer a live issue.⁷¹

What Marvell has to say in the *Account* on this subject is at best ambiguous, and in some respects clearly hostile to the Declaration. In the first place, he does not attribute its introduction to the king personally, but instead describes it as part of the 'hellish Conspiracy' (p. 256) — the same one whose aim is to change the lawful government into an absolute tyranny and the established religion to downright Popery. However, when immediately afterwards he describes the Declaration's effect, he does so with a sarcasm that seems to mock the parliament's opposition to the provision:

Hereby all the Penal *Laws* against *Papists*, for which former *Parliaments* had given so many *Supplies*, and against *Nonconformists*, for which this *Parliament* had payed more largely, were at one Instant Suspended, in order to defraud the Nation of all that *Religion* which they had so dearly purchased, and for which they ought at least, the Bargain being broke, to have been

⁶⁹ It might be argued, though Marvell does not do so explicitly, that by restoring the king, parliament (among other things) assented to the terms of the declaration of Breda.

⁷⁰ 'In satirizing Parker, Marvell sought to reinforce the gulf which had opened between Charles (the intended audience for the piece) and the clerical "politicians" of the Church of England': Jon Parkin, 'Liberty Transpros'd: Andrew Marvell and Samuel Parker', in *Marvell and Liberty*, ed. Chernaik and Dzelzainis, pp. 269–289 (p. 270).

⁷¹ In *The Second Part*, Marvell writes of the king as having 'ever since pursued' the Declaration of Breda (p. 375, and see n. 777). He thereby implies that, with the withdrawal of the Declaration of Indulgence, Charles has been forced into what he hopes is just a temporary retreat.

reimbursed (p. 257).

Further, he immediately goes on to affirm that toleration in itself is both enjoined by the tenets of religion and necessary to the survival of the church.

For it appears at the first sight, that men ought to enjoy the same Propriety and Protection in their Consciences, which they have in their Lives, Liberties, and Estates: But that to take away these in Penalty for the other, is merely a more Legal and Gentile way of Padding upon the Road of Heaven, and that it is only for want of Money and for want of Religion that men take those desperate Courses.

Nor can it be denied that the *Original Law* upon which Christianity at the first was founded, does indeed expressly provide against all such severity; And it was by the Humility, Meekness, Love, Forbearance and Patience which were part of that excellent Doctrine, that it became at last the Universal Religion, and can no more by any other means be preserved, than it is possible for another Soul to animate the same Body. (pp. 257–8)

However, while toleration itself might be a desirable end, the manner in which the king (or the conspirators) sought to introduce it was not legitimate, since it meant the illegal abrogation by an insufficient authority of properly constituted laws:

Nevertheless because Mankind must be governed some way and be held up to one Law or other, either of Christs or their own making, the vigour of such Human Constitutions is to be preserved until the same Authority shall upon better reason revoke them; and as in the mean time no privat Man may without the guilt of Sedition or Rebellion resist, so neither by the Nature of the English Foundation can any publick Person suspend them without committing an Error which is not the less for wanting a legal name to express it. But it was the *Master-piece* therefore of boldness and contrivance in these Conspirators to issue this Declaration, and it is hard to say wherein they took the greater felicity, whither in suspending hereby all the Statutes against Popery, that it might thence forward passe like current *Money* over the Nation, and no man dare to refuse it, or whether gaining by this a President to suspend as well all other Laws that respect the Subjects Propriety, and by the same power to abrogate and at last inact what they pleased, till there should be no further use for the Consent of the *People in Parliament*. (p. 259)

The requirement that laws must remain in force until repealed by *the same Authority* that made them, together with the implication that the king himself did not have that power, locates the *Account* clearly on the side of those who argued that the king's authority was coordinate with that of the two houses of parliament and that the sovereign power resided not in the king alone but in him and the two houses

together. As Weston and Greenberg have shown, this position was generally accepted after the Restoration, when the Cavalier Parliament passed ‘An Act for the Preservation of the King’ (13 Car. 2, c. 1) which made it clear that the king could neither be excluded from the law-making process nor compelled to grant his assent to measures passed by the two houses of parliament, but also tacitly accepted that those two houses shared in the legislative power.⁷² According to Weston and Greenberg, this was a significant concession. Before 1642, they say, the dominant constitutional theory had been that the king was sovereign and that, while he may have had no power to make laws except in parliament, it was his assent, rather than anything else that happened in parliament, that gave the laws their validity. This was the view of Sir Matthew Hale, the dating of whose writings poses some difficulty.⁷³

It may well be that formulations such as Hale’s have been taken too much at face value and that the idea of the king as sole exerciser of the legislative power is a fiction of the same kind as the one that holds that the blame for any wrongful acts carried out in his name should not be laid at his door but instead at those of his wicked or misguided ministers. That is to say, it may have been intended merely to glorify the king without necessarily giving an accurate picture of how the lawmaking process worked. In effect, each house had a veto and a real influence over the content of legislation, even if, as a matter of constitutional form, the king alone was described as the legislator.⁷⁴ Francis Bacon had regarded the two houses as having an established (though *not* constitutionally entrenched) role in the law-making process:

⁷² Weston and Greenberg, *Subjects and Sovereigns*, pp. 150–1.

⁷³ Hale wrote: ‘In him resides the Power of making Laws. The Laws are his Laws enacted by him.’ Only the king could ‘make Laws oblidging the Subjects of this Realme’. There was a further requirement, however, ‘the advice and assent of the two houses of Parliament, *without which no Law can be made*’: Corinne Comstock Weston, ‘Legal Sovereignty in the Brady Controversy’, *Historical Journal* 15,3 (1972), pp. 409–31 (p. 410), emphasis added. See also Weston and Greenberg, *Subjects and Sovereigns*, pp. 204–5.

⁷⁴ For a brief critique of the views of Weston and Greenberg on the related question of the identification of the ‘three estates’, see Sommerville, *Politics and Ideology in England, 1603–1640*, p. 174–5.

[I]f the parliament should enact in the nature of the ancient *lex regia*, that there should be no more parliaments held but the king should have the authority of the parliament, or, e converso, if the King by Parliament were to enact to alter the state and to translate it from a monarchy to any other form; both these acts were good.⁷⁵

According to Bacon, there was no fundamental law preventing the removal of parliament's legislative role but, precisely because of that role, the removal could take place only with its own consent.

Weston and Greenberg take the view that the theory, which did not survive the Commonwealth and Protectorate, that the legislative function belonged solely to the king, could easily accommodate the king's power to dispense with statutes. If it is true that the king was the lawmaker, there was no contradiction in his being able to order that a law should not apply in particular cases or to particular classes of people.⁷⁶ Once the coordination principle was accepted, the dispensing power became a constitutional anomaly.

It is not in itself remarkable, then, that Marvell, a member of parliament, writing sixteen years after the passage of the Act for the Preservation of the King, should have denied that the king has any power to suspend laws. It is remarkable, if at all, only because four years earlier, he had argued forcefully and persuasively for the existence of such a power, at least in relation to the laws against religious nonconformity and recusancy.⁷⁷ It is clear, too, that the different positions that Marvell adopted as regards the suspension of the laws are consistent with the positions he adopted on the broader question of the king's powers generally.

It was mentioned in passing above (p. 188) that one of the recognized limita-

⁷⁵ Francis Bacon, *Maxims of the Law in the Works of Francis Bacon*, ed. James Spedding, Robert Leslie Ellis and Douglas Denon Heath, VII, 370, cited by Burgess, *The Politics of the Ancient Constitution*, pp. 22–3.

⁷⁶ Weston and Greenberg, *Subjects and Sovereigns*, p. 163.

⁷⁷ Nicholas von Maltzahn suggests that after 'the failed attempt at Comprehension in 1667–68 ... Marvell moved from hoping for a parliamentary means of enlarging the national church ... to an extraparliamentary one after the bishops had forestalled the agreement then in the works': Nicholas von Maltzahn, 'Andrew Marvell and the Prehistory of Whiggism', in *Cultures of Whiggism: New Essays on English Literature and Culture in the Long Eighteenth Century*, ed. David Womersley and others (Newark: University of Delaware Press, 2005), pp. 31–61 (p. 48).

tions on the king's dispensing power was that statutes aimed at preventing a nuisance fell outside its scope. It was with this in mind that, in 1666–67, the Commons (with the support of Buckingham and the future Lord Shaftesbury in the upper house) had attempted to render the Irish Cattle Act unsusceptible to dispensation by including in it a declaration that the import of cattle from Ireland was a nuisance.⁷⁸ Marvell refers to this in *Mr. Smirke* (1676), when he rejects Turner's claim that parliament had made the holding of conventicles tantamount to sedition:

Truly, (as far as a man can comprehend by comparing that with other Acts of this Parliament,) they did onely appoint that the Penalty of Sedition should lye against those that frequent such Meetings: as in the Act against Irish Cattle, if it be not in itself a Nuisance, no Law-givers can make it so. Nor can any Legislators make that to be *Sedition* which is not *Sedition* in its own nature. (*Prose Works*, II, 99)

Here, Marvell expresses a sense of muted outrage that parliament should have imposed the same penalties as for sedition on meetings intended for religious worship. However, the passage also seems to indicate a tacit acceptance that the dispensing power is in accordance with law and that it is not within parliament's power to circumvent it by declaring that things are otherwise than they are.

Despite the ambiguity of tone, the overall conclusion of the *Account* as to the Declaration of Indulgence is clear. The author may be said to be in favour of indulgence, but against the declaration: he takes a side-swipe at parliament for its own hostility to toleration, while condemning, as the work of conspirators who intend to undermine the lawful form of government, the machinery which the king had used in 1672. It would certainly be easier to adopt this approach — endorsing the end while execrating the means — in 1677, when the declaration had for several years been a dead letter, than it would have been in 1672, when it provided the best hope that toleration might be extended.

This is not to say, however, that the inconsistencies between *The Second Part*

⁷⁸ Weston and Greenberg, *Subjects and Sovereigns*, pp. 177–9.

and the *Account* are all easily explicable on the ground of changing political circumstances. For example, by insisting that only the legislative body has the power to suspend or revoke existing laws, Marvell has moved some distance from the opinion he expressed in the earlier work:

And therefore it is very usual to make at first Probationary Laws, and for some term of years only; that both the Law-giver and the Subject may see at leisure how proper they are and suitable to the effect for which they were intended. And indeed all Laws however are but Probationers of time; and, though meant for perpetuity, yet, when unprofitable, do, as they were made by common consent, so expire by universal neglect, and without Repeal grow Obsolete. (pp. 343–4)

There is no readily apparent source for this passage, particularly in a common law context.⁷⁹ It is clear, both because Marvell says that ‘*all* Laws however are but Probationers of time’ (emphasis added), and because he has suggested that any reasonable Magistrate, having made such probationary laws, would be ‘glad to abrogate them when he finds them pernicious to his Government’ (p. 343) that he *includes* statutory laws among those that can through desuetude become ineffective, without having been formally repealed. This is an unusual position for a parliamentarian to adopt and is clearly opposed to the principle stated in the *Account*, that only the law-making authority can remove the binding force of a law.

Marvell’s adoption of the earlier position is noteworthy also because it is not essential to his argument against Parker. The context in which the passage occurs is his taking issue with Parker’s insistence that the breach of any law is a sin as well as a crime or civil wrong — in effect that God can always be called on to deploy the threat of damnation in aid of the temporal power. Marvell emphasizes the absurdity of this claim in part by pointing out that human laws typically carry varying degrees of

⁷⁹ A fairly close analogue is to be found in Lord Ellesmere’s speech in the *Post-Nati* case (1608), where he said: ‘some lawes, as well Statute Law, as common Law, are obsolete and worne out of use: for all humane Lawes are but Leges temporis: And the wisdome of the Judges found them to be unmeete for the time they lived in, although very good and necessary for the time wherein they were made.’ Louis A. Knafla, *Law and Politics in Jacobean England* (Cambridge: Cambridge University Press, 1977), pp. 202–53 (p. 223).

penalty, and that the penalty may change over time, so that an offence that once carried the death penalty may later attract only a fine. If the breach of any such law entails damnation, then human lawmakers must be capable of achieving a gradation of penalties that eludes heaven (*The Rehearsall Transpros'd: The Second Part*, p. 344). The *manner* in which the change of law has come about does not affect the force of Marvell's argument. The inclusion of the 'Probationers of time' passage reinforces our impression that both parts of *The Rehearsal Transpros'd* are directed as much against the enemies of the Declaration of Indulgence in general, as against Parker in particular. Weston and Greenberg cite two members of parliament, Colonel Giles Strangeways and Sir Thomas Lee, both opponents of the Declaration, who accepted that there might be a problem with obsolete laws, but maintained that repeal by parliament was the only correct way to deal with this problem.⁸⁰ The passage cited above from *The Second Part* reads like a direct engagement with this type of argument.

It will be seen, then, that the constitutional implications of what Marvell says in *The Second Part* are at odds with the more explicit constitutional description that he gives in the *Account*. In the earlier work, he argues that 'no man can deny' the king the power, under his commission from God, to act just as he sees fit. If he causes his subjects to suffer, the king will be answerable, but only to God. In the *Account*, on the contrary, the king's powers are strictly limited, controllable by courts or parliament, and he is 'under a disability' to harm his subjects. The inconsistency should not surprise us greatly. Quentin Skinner has warned against an approach to the history of ideas that relies, in the first place, on a mythology of doctrines — 'converting some scattered or quite incidental remarks by a classic theorist into his "doctrine" on one of the mandatory themes' — and, in the second, on a mythology of coherence — 'giv[ing] the thoughts of various classic writers a coherence, and an air generally of a

⁸⁰ Weston and Greenberg, *Subjects and Sovereigns*, pp. 166–7

closed system, that they may never have attained or even been meant to attain.⁸¹ It would certainly be a mistake to suppose that, in the works being discussed, Marvell was attempting to enunciate a coherent doctrine of the English constitution insofar as it regulated the powers of the monarch.

It does not follow, though, that because a certain incoherence in the opinions expressed by Marvell in 1673 and 1677 is to be expected, that no attempt should be made to explain the discrepancies between them. The two parts of *The Rehearsal Transpros'd* together constitute a delicate balance. On the one hand, Marvell is seeking to persuade the king, and this requires him to use a vocabulary and write within a framework of ideas that would avoid alienating the monarch. On the other, this attempt at persuasion was necessarily carried on in public, and by the time Marvell came to write *The Second Part*, it was clear that the first had been a publishing success. To oversimplify somewhat, Marvell was faced with the task of writing in language that would appeal to a believer in relatively untrammelled royal power (even, perhaps, in absolutism), without at the same time persuading the remainder of his readership that such trammels as existed should be removed. We have already seen — in the Cromwell poems and in ‘Upon Appleton House’ — Marvell undertake the sensitive task of attempting delicately to guide a powerful man in a direction that he considered particularly advisable. It is a feature of his earlier attempts that Marvell’s achievement in these works, while it justly drew the admiration of readers three centuries later, generally did not extend to the attainment of his immediate political aims: Fairfax did not resume a leadership role, Cromwell dissolved the ‘senate free’, his son Richard failed to hold on to the Protectorship.

Similarly, *The Rehearsal Transpros'd* did not bring about the revival of the Declaration of Indulgence. For all its lack of success in political terms, *The Rehearsal*

⁸¹ Quentin Skinner, ‘Meaning and Understanding in the History of Ideas’, in *Meaning and Context: Quentin Skinner and his Critics*, ed. James Tully (Princeton: Princeton University Press, 1988), pp. 29–67, 32, 39 (originally published in *History and Theory*, 8 (1969), 3–53).

Transpros'd is a remarkable exercise in appealing to a readership that spans an ideological (in Sommerville's sense) chasm. It accomplishes this by playing down the relative importance of constitutional questions. What Marvell terms 'the modester Question' is really nothing of the sort, but rather the more fundamental one, in that it has more far-reaching implications for the king's behaviour. The legal relationship between monarch and subject is not to be considered in isolation. His rights are, for the most part, a matter of (human) law; his duties, while not belonging to the arena of human law, are in no sense of secondary importance on that account.

For Marvell, at least according to what he says in *The Second Part*, monarchy is the product of an interaction of divine will and human law:

I say, with submission still to better Judgements, and especially to Superiors, that I conceive the Magistrate, as in Scripture described, is the Ordinance of God constituting him, and the Ordinance of Man assenting to his Dominion. For there is not now any express Revelation, no Inspiration of a Prophet, nor Uction of that Nature, as to the declaring of that particular person that is to govern. Only God hath in general commanded and disposed men to be Governed; and the particular person reigns according to that right, more or less, respectively, which under Gods Providence, he or his Predecessors have lawfully acquired over the Subject. Therefore I take the Magistrates Power to be from God, only in a Providential Constitution; and the nature of which is very well and reverently expressed by Princes themselves, *By the Grace of God, King of, &c.* but I do not understand that God has thereby imparted and devolved to the Magistrate his Divine Jurisdiction. (p. 342)

This passage forms part of his argument against Parker's notion that all disobedience to the law is necessarily sinful, but it is informative as to Marvell's view (in 1673) on 'constitutional' questions. According to him, God commands us to submit to a government. In the usual case, where (by divine providence) there is a government in place, we must submit to that. But God prescribes neither the form of government, nor the identity of the persons who are to exercise it. So, where no government exists, as at the beginning of political society, it is the assent of the people, in obedience to

God's will, that constitutes the government.⁸² In an earlier passage, Marvell has suggested that, where the people are oppressed by a bad king, they are likely to revolt. Even though the revolt is not justified, either in the eyes of the law or in those of God, it can nevertheless be regarded as providential punishment of the bad king, and the succeeding government can claim a legitimacy based on divine providence. This line of argument recalls the Civil War claims that victory, as a manifestation of the divine will, entailed legitimacy.⁸³ In the present context, it constitutes also a warning to Charles, couched in the form of well meaning advice, that a 'sanguinary course' will lead to punishment — which could possibly take place in this world, at the hands of a populace acting unlawfully, but under provocation.

Patterson and Dzelzainis point out that Marvell's admonition that 'the Arms of the church are Prayers and Tears' is a shrewd quotation of the *Eikon Basilike*.⁸⁴ Taken together with the phrase immediately following, 'the Arms of the Subjects are Patience and Petitions', the passage also echoes the speech to parliament of James I of 21 May 1610:

If you have a good king you are to thank God, if an ill king he is a curse to the people but preces et lachrimae were ever their arms. But may you therefore bridle him?⁸⁵

By these allusions, Marvell suggests that his views on monarchical restraint are compatible with the theories of such staunch defenders of the rights of monarchs as the first two Stuart kings of England. Indeed, his picture of kings answerable to no human authority, yet nonetheless bound by a duty to govern in accordance with the

⁸² This places Marvell closer to those contractualists who held that power was originally vested in the people than to those (like Sir John Davies) who asserted that it had originally been the king's alone. It was suggested above that the former were more likely to expect any exceptions and reservations to favour the people rather than the king.

⁸³ See John M. Wallace, *Destiny his Choice: The Loyalty of Andrew Marvell* (Cambridge: Cambridge University Press, 1968), pp. 27–8.

⁸⁴ *Prose Works*, I, 192, n. 836.

⁸⁵ Christianson, 'Ancient Constitutions in the Age of Sir Edward Coke and John Selden', p. 96, citing Elizabeth Read Foster, ed., *Proceedings in Parliament 1610*, 2 vols. (New Haven: Yale University Press, 1966), II, 104–5.

will of 'him that gave them their Commission' may well be a subtle corrective to James's model of a 'constitutional monarchy created by kings' (to use Christianson's phrase). Whereas James's view was that an originally all-powerful monarch had voluntarily assumed the obligation to govern in accordance with law, for Marvell the requirement of legality had always been inherent in the people's submission, in accordance with the divine will, to government. Marvell's revision of James might be seen as an attempt to reconstruct, in the 1670s, the early Stuart consensus identified by Burgess.

We should not, then, make too much of the differences between Marvell's 'constitutional' position in 1673 and that of 1677–78. His views as to what the king might justifiably do had not changed very much: it was the source and nature of the justification that he came to see very differently. We should not make too little of them either. The Marvell of 1678 was unambiguously a constitutionalist; earlier, he appears to have been less concerned with governmental structures than with the outcomes resulting from such structures. It is quite possible that Marvell became interested in constitutional questions only after *The Second Part* had been published.

A factor which may help to explain why the question of a constitution had become an urgent one for Marvell is the likelihood that he had become much more suspicious of the king's motives in making the Declaration of Indulgence than he had been in 1672 and 1673.⁸⁶ Such considerations may well account for the similar distance travelled by the Earl of Shaftesbury, who as Lord Chancellor had urged Charles to stick to his guns and who had defended in the Lords the principle that the prerogative included the power to dispense with penal laws in ecclesiastical matters.⁸⁷

⁸⁶ See Lamont, 'The Religion of Andrew Marvell', p. 150: '... the change in Marvell's attitude to the King a few years later in *An Account of the Growth of Popery* ... is the difference in approach to a King who, however suspect his motives, seemed to be offering to his subjects, with the Declaration of Indulgence, an advance in religious freedom ... and on the other hand to a King who, because of the exposure of those motives, now seemed to offer to his subjects — by way of the secret Treaty of Dover — nothing less than 'French' tyranny.'

⁸⁷ Weston and Greenberg, *Subjects and Sovereigns*, pp. 170–71.

In *A Letter from a Person of Quality to his Friend in the Country*,⁸⁸ Shaftesbury had changed his position considerably, still contending that a power to dispense with statutes was necessary, but conceding that the king could exercise it *only* when parliament was not sitting. According to his argument,

a Government could not be supposed whether *Monarchical*, of any other sort, without a standing Supreme Executive power, fully enabled to Mitigate, or wholly to suspend the Execution of any penal Law, in the Intervalls of the *Legislative*, which then assembled, there was no doubt that but wherever there lies a *Negative* in passing of a Law, there the address or sense known of either of them to the contrary, (as for instance of either of our two Houses of *Parliament England*) to determine that Indulgence, and restore the Law to its full execution: For without this, the Laws were to no purpose made, if the Prince could annul them at pleasure; and so on the other, without a Power always in being of dispensing upon occasion, was to suppose a constitution extremely imperfect and impracticable, and to cure those with a *Legislative* always in being, is, when considered, no other than a perfect Tyranny. (pp. 3–4)

Shaftesbury's attitude to the dispensing power has been described as 'nothing if not inconsistent',⁸⁹ but his shifts of position in relation to the Declaration of Indulgence are by no means inexplicable. Though he was one of the king's leading ministers, he had been kept in the dark about the existence of the secret treaty of Dover, by which Charles had committed himself to declaring his Catholicism at an unspecified future time.⁹⁰ It would seem that the discovery of this circumstance led Shaftesbury to reconsider both the king's motives in issuing the Declaration and the limits of the dispensing power. Buckingham, who had likewise been kept in ignorance of the secret treaty, had made a similar move from government to vociferous opposition. As has already been discussed in chapter 3, recent scholarship has tended to show that

⁸⁸ *A Letter from a person of Quality to his Friend in the Country* (1675). This anonymous pamphlet has at different times been attributed to Locke and to Shaftesbury himself. It is now thought to have been the work of both of them: Annabel Patterson and Martin Dzelzainis, 'Marvell and the Earl of Anglesey: A Chapter in the History of Reading', *Historical Journal* 44, 3 (2001), pp. 703–726 (p. 720), citing Maurice Cranston, *John Locke: a Biography* (1957), Richard Ashcroft, *Revolutionary Politics and Locke's 'Two Treatises of Government'* (1986), pp. 105–8 and John Marshall, *John Locke: Resistance, Religion and Responsibility* (1994), pp. 74–6.

⁸⁹ Weston and Greenberg, *Subjects and Sovereigns*, p. 178.

⁹⁰ Haley, *The First Earl of Shaftesbury*, p. 281.

there existed at this time between Buckingham and Marvell the relationship of patron and client.⁹¹

At the time of the indulgence crisis, Buckingham, like Shaftesbury, was working to promote the Declaration. Another peer apparently cooperating with Shaftesbury on this issue was the Earl of Anglesey. Annabel Patterson and Martin Dzelzainis have shown that Anglesey's library is the likeliest place for Marvell to have found most of the works cited by him in the two parts of the *Rehearsal*.⁹² It was Anglesey who put pressure on Roger L'Estrange to license the publication of *The Rehearsal Transpros'd*.⁹³ The *Account* praises both Shaftesbury and Buckingham, and aligns itself with the latter's current political objectives, specifically with the call for a new parliament.⁹⁴ It is likely, then, that the shifts in Marvell's position between 1673 and 1677 approximate to those of Buckingham and his allies — though the *Account* appears to go further than Shaftesbury in that it would deny that the king alone may exercise a dispensing power in *any* circumstances, whereas the *Letter from a Person of Quality* would merely limit the exercise of that power to times when parliament was not sitting.

The place of the Account in the context of Marvell's other prose

The differences between the *Account* and the two parts of *The Rehearsal Transpros'd* are not limited to their divergent treatment of the question of the king's powers. Many readers have been struck by a dissimilarity in tone between the *Account* and

⁹¹ See, in particular, Derek Hirst and Steven Zwicker, 'High Summer at Nun Appleton, 1651: Andrew Marvell and Lord Fairfax's Occasions', *Historical Journal* 36, 2 (1993) 247–269 (p. 265): 'Service and patronage were surely critical in the unfolding of Marvell's whole career. ... when Fairfax removed himself from the stage, Marvell seems to have transferred his loyalties to Fairfax's son-in-law, Buckingham.'

⁹² Patterson and Dzelzainis, 'Marvell and the Earl of Anglesey'.

⁹³ Andrew Marvell, *The Rehearsal Transpros'd and The Rehearsal Trnspros'd, The Second Part*, ed. D. I. B. Smith (Oxford: Oxford University Press, 1971), p. xxii, citing HMC, *Report 7*, p. 518a.

⁹⁴ See *Account* pp. 51–2, 71–2, 152.

Marvell's earlier works.⁹⁵ Despite the seriousness of their subject-matter, the tone of both parts of *The Rehearsal Transpros'd* can best be described as 'facetious'. Marvell tells his opponent that he intends to 'treat him betwixt Jest and Earnest' (*The Second Part*, p. 268), while he has concluded the first part with the observation that it demonstrates the possibility of being 'merry and angry as long a time as I have been writing, without profaning and violating those things which are and ought to be most sacred' (p. 203).

In contrast, the style of the *Account* is direct and its predominant tone serious. The author, who describes himself as a 'Relator', announces that his 'intention is only to write a naked Narrative of some the most considerable passages in the meeting of *Parliament* the 15. of Feb. 1676' (p. 241). The phrase 'naked Narrative' may be understood to imply a claim of objectivity and detachment that is unlikely to be taken at face value — Conal Condren, for example, writes that 'Marvell is obliged to anticipate scepticism [and] to display his credentials of disinterested fairness ... His statements of modest intention; his disarming praise of old cavaliers and recusants and veneration of the King leave a markedly disingenuous air ...'⁹⁶ — but if we leave out of account the question of the author's sincerity, as a description of the *style* of the work, 'naked Narrative' at first appears remarkably apt. The author reports, in chronological order, the various messages passing between the king and the Commons, summarizing both sides of the debates in the house, and preserving documents — including the remarkable Bishops' Bill which is mocked in what is probably the most effective way possible, by reproducing its text in full (pp. 313–23) — that would otherwise remain hidden from the reading public.

According to John Wallace, the change in Marvell's style was occasioned by

⁹⁵ The views of two such readers, John M. Wallace and Annabel Patterson, will be mentioned briefly below.

⁹⁶ Conal Condren, 'Andrew Marvell as Polemicist: His *Account of the Growth of Popery, and Arbitrary Government*', in *The Political Identity of Andrew Marvell*, ed. Condren and Cousins, pp. 157–87 (p. 162).

the urgency of the crisis that the *Account* addressed, and the need to be as unambiguous as possible as to the true state of affairs:

What the country needed was not fuel for its anxieties but a spokesman for its convictions, and *The Growth of Popery* is first and foremost a speaking-out, an attempt to be completely explicit about the dangers and suspicions that had already been canvassed individually. ... Earnestness, not to say a passionate intensity is written into every paragraph of Marvell's argument; it marks the end of his raillery, and virtually the end of his patience. The jokes and the wit have disappeared, and in place of satire is a total seriousness. Things must be said in such a way that there could be no possibility of misunderstanding them ...⁹⁷

Annabel Patterson offers a similar explanation for the change in style — that the threat confronting the country could now be seen to be too serious to be tackled effectively using satire:

the country now faced, Marvell believed, a well-organized, highly coordinated threat to its most cherished institutions, in both church and state; and in place of the isolated targets ... there was now a powerful group of unknown size, with a coherent strategy of muzzling both press and Parliament, of destroying history as they gained control over its media. What was needed, therefore, was not satirical attack, the weapon of minority opinion, but a style and genre that could be readily identified with the constitutional principles and public institutions that were now at stake.⁹⁸

Marvell had made one previous attempt at a straightforward historical narrative in *A Short Historical Essay touching General Councils, Creeds, and Imposition in Religion* (1676), which was printed with *Mr Smirke*. Here, dealing with a subject as serious and important as the perversion of Christianity by bishops, he 'could not help mixing levity with gravity',⁹⁹ in the manner of his other works. Insofar as the *Account* demonstrates that he was able to resist the admixture of levity, it seems to set itself apart from his earlier works.

The impression may be misleading, however. The later part of the *Account* (from about page 310 onwards in the Yale edition) is indeed largely lacking in Marvell's characteristic humour, but the earlier part is not. This question has been

⁹⁷ Wallace, *Destiny his Choice*, p. 211.

⁹⁸ Patterson, *Marvell: The Writer in Public Life*, pp. 142–3.

⁹⁹ Patterson, *Marvell: The Writer in Public Life*, p. 139.

illuminated by the publication of *The Prose Works of Andrew Marvell* (2003), containing the first scholarly edition of the *Account*. The *Account's* editor, Nicholas von Maltzahn, makes it clear that that work is, to a much greater extent than had been previously appreciated, an 'assembled text'. It has always been apparent that the *Account* incorporates the texts of a bill, parliamentary speeches and other documents that already existed. Von Maltzahn tells us that the pamphlet also reproduces material which is also to be found in two manuscript narratives.¹⁰⁰ These are journals that recount the proceedings in parliament in the detailed and factual manner that one might expect of a 'naked Narrative'. However, the earlier part of the work, amounting to more than half its length, is much more consistent with Marvell's habitual tone and style, as well as exhibiting certain continuities of theme (including the theme of justice) with some of his earlier works.

We have seen that the author derides parliament's intolerance (treating compulsory religious conformity as a property right for which they have paid dearly), even at the expense of weakening the force of his criticism of the 'conspirators' for the timing and method of their attempt to introduce indulgence for tender consciences. The commencement of the third Anglo-Dutch war provides the opportunity for some well-judged sarcasm at the expense of the conspirators and the court, bearing a family resemblance to the attacks on the court in *The last Instructions*. Marvell recounts how a lone 'sorry *Yatch*' (p. 253) had been sent among the Dutch fleet, in the expectation that the Dutch would fail to salute the English flag and so provide a fair quarrel that could be carefully preserved in order to justify a war when the time was right:

The *Yatch* having thus acquitted it self, returned, fraught with the Quarrel she was sent for, which yet was for several moneths passed over here in silence without any Complaint or demand of satisfaction, but to be improved afterwards when occasion grew riper. ... They had now started the dispute about

¹⁰⁰ The manuscripts are British Library, Add. MS 35865, fols. 135r–56v and Add. MS 72603, fols. 48–59 (which is substantially the same as Stowe MS 182, fols. 56–66): *Prose Works*, II, 211–2.

the Flag upon occasion of the Yatch, and begun the discourse of *Surinam*, and from somewhat of *Pictures* and *Medalls*, but they handled these matters so nicely as men not less afraid of receiving all satisfaction therein from the Hollanders, then of giving them any umbrage of arming against them upon those pretences (pp. 253–5).

This carefully contrived *casus belli* is used to justify a surprise attack on a convoy of Dutch merchantmen. The advantage of surprise notwithstanding, the attack is much less profitable than the conspirators had hoped, yielding barely enough to pay the surgeons and carpenters. The conspirators are not discouraged, however.

It was now high time to Declare the War, after they had begun it; and therefore by a *Manifesto* of the seventeenth of March 1672, the pretended Causes were made publick which were, The not having Vailed Bonnet to the Yatch: though the Dutch had all along, both at home and here as carefully endeavoured to give, as the English Minister avoid the receiving of all satisfaction, or letting them understand what would do it, and the Council Clock was on purpose set forward, lest their utmost Compliance in the Flag at the hour appointed, should prevent the Declaration of War by some minutes. (pp. 259–60)

As well as exhibiting a Marvellian sense of satire, these passages are consistent with what Marvell has written elsewhere on the same topics (the intolerance of the Commons and the bad faith of the court in matters of war and peace with Holland). In a letter to his nephew of 21 March 1669/70, for example, Marvell describes the ‘terrible Bill against Conventicles’ in the form in which it had been passed by the Commons — where he had spoken against it — as ‘the Quintessence of arbitrary Malice’,¹⁰¹ while *The last Instructions* shows the court behaving unconscionably in its conduct of the second Anglo-Dutch war.¹⁰²

In a long passage reminiscent in its theme of parts of *The last Instructions*, Marvell shows the English court taking its cue, in terms of perfidy and bad faith, from France, while completely failing to follow the French example in using this dishonourable behaviour to further their own national interest. As in the poem of a

¹⁰¹ *Poems and Letters*, II, 314; John Milward notes that Marvell opposed the Conventicles Bill on 30 March 1668, citing Caroline Robbins, ed. *The Diary of John Milward, Esq.* (Cambridge: Cambridge University Press, 1938), p. 238.

¹⁰² See chapter 2 above, pp. 112–13.

decade earlier, we have ‘English Plenipotentiaries’ (p. 263), the circumscription of whose authority mocks their designation,¹⁰³ and who may have secret instructions to avoid an accommodation, however amenable they may find the Dutch (pp. 266–7). By insisting that the French demands must be met as a condition of peace with England, the ambassadors (who included Marvell’s apparent patron, the Duke of Buckingham,¹⁰⁴ and whom ‘for their honour’ he does not name) forgo an opportunity to reach an agreement that would have been advantageous to England. In short, he depicts the Court as being a dupe or tool of the French king, disregarding its treaty obligations to Holland and Sweden, but doing so to the benefit of France rather than of England.

Marvell’s concern with the requirement to honour one’s freely assumed obligations is again evident in his discussion of the second marriage of the Duke of York. The Duke had married the Catholic Princess Mary of Modena by proxy and, as Marvell relates, the Commons had petitioned the king to avoid the marriage. (Marvell implies that the ‘Conspirators’ had provoked this parliamentary reaction by demanding a supply ‘with much more importunity and assurance than ever before.’) Marvell highlights the irony inherent in the parliamentary position by pointing out that the marriage had already taken place (though by proxy) and that ‘unless the Parliament had been Pope, and Claimed a power of Dispensation, it was now too late to avoid it’ (p. 273).

He implicitly criticizes the Commons for proceeding ‘Summarily within themselves’ against Buckingham instead of impeaching him. Impeachment would have meant making a complaint which would have been heard by the House of Lords, ‘whereby the Crimes might have been brought to Examination, Proof and Judgment’ (p. 275). The implication is that the Commons’ reliance on the notoriety of

¹⁰³ Marvell sardonically refers to their being ‘intrusted with a fuller Authority, and the deeper Secret’, and regrets that they were not ‘as full of Resolution as of Power’ (p. 266).

¹⁰⁴ *Prose Works*, II, 263, n. 229.

the ministers' 'ill Character' is a poor substitute for the hearing of evidence and for the determination of the complaint by a different body than the one making it. Marvell therefore implies that fair procedures should be followed in the cases of ministers to whom the Commons object. This is not to say, however, that Marvell dissents from what he takes to be the aim of the lower house: to withhold money in order that 'A Peace would in due time follow' (p. 275).

After the peace has been concluded, and the king has assumed the role of mediator between France and Holland, the conspirators, in order 'that such an absurdity as the ordering of Affairs abroad, according to the interest of our Nation might be avoided' (p. 278), ensure that the French forces continue to be augmented with English, Scottish and Irish soldiers. In doing so, Marvell suggests, they prevent the king from behaving in a way that is consistent with either his role as a mediator — which clearly requires some degree of evenhandedness — or his newly confirmed treaty obligations to Holland.

The opposition in the Lords to the proposed test oath (see above, page 194) is presented in terms of a heroic battle, reminiscent of the parliamentary struggle over the Excise in *The last Instructions*:

They fought it out under all the disadvantages imaginable: They were overlaid by Numbers, the noise of the House, like the Wind was against them, and if not the Sun, the Fireside was always in their Faces; nor being so few, could they, as their Adversaries, withdraw to refresh themselves in a whole days Engagement (p. 285).

Narrating events that occurred during the prorogation following the jurisdictional dispute over *Shirley v. Fagg*, Marvell refers to the appointment of five new judges, two each to the King's Bench and Exchequer and one to the Common Pleas. All, according to their letters patent, are to hold their offices 'Durante Bene Placito, bound as it were to their Good Behaviour' (p. 291). The question had been raised at least as early as Sir Edward Coke's arguments with James I, whether judges who were removable at

the will of the sovereign could be regarded as independent in the performance of their judicial functions, given that they could be dismissed if they were to give a decision unsatisfactory to the crown.¹⁰⁵ It can be seen, then, that the issue of judicial independence is closely bound up with that as to whether the king is answerable to the laws on the one hand, or antecedent or superior to them on the other. Marvell is far from heartened by the appointment of these new judges. He complains that ‘the Wisdom and Probity of the Law went of[f] for the most part with good Sir Matthew Hales, and Justice is made a meer property’ (p. 291). This judgment as to the judiciary’s lack of independence is later confirmed when Shaftesbury applies for *habeas corpus* in an attempt to end his imprisonment for contempt of the House of Lords: the judges of the King’s Bench are found to be ‘more true to their Pattents then their Jurisdiction’ (p. 372) and refuse to order his release.

Marvell relates a number of instances of the Commons’ unjust treatment of individuals. A Doctor Cary was imprisoned in the Tower ‘under that new Notion of Contempt, when no other Crime would do it’ (p. 306), and one John Harrington was similarly committed when Sir Joseph Williamson ‘insisted upon [Harrington’s] strange demeanour toward his Majesty, deciphered his very looks’, although the general impression was that ‘his looks might have past any where but with a man of Sir Josephs delicacy’ (p. 308).

We have seen that a significant part of the narrative of *An Account of the Growth of Popery* (from the beginning to about page 310 in the Yale edition and thus amounting to roughly 56% of the text) is characteristic of Marvell both in its themes and in the kind of humour employed. After page 310, a shift in tone occurs so that the overall impression that the work leaves on the reader is of one that goes out of its

¹⁰⁵ See Burgess, *Absolute Monarchy and the Stuart Constitution*, p.153–4, esp. n. 119. According to Burgess, in the early Stuart period the king shared in ‘a consensus on the value of impartiality’ notwithstanding the absence of judicial security of tenure. In Burgess’s view, James I was not concerned to control the judges so much as to ensure that the prerogative did not go undefended in cases to which the crown was not a party.

way to eschew humour, even when it might seem particularly appropriate. The seriousness of tone is evident in the account of the imprisonment of the four lords, Wharton, Salisbury, Buckingham and Shaftesbury, for their ‘contempt of parliament’:

That Contempt, was their refusing to recant their Opinion [that the effect of the long prorogation had been to dissolve parliament], and ask pardon of the King, and the House of Lords. Thus a *Prorogation* without President, was to be warranted by an Imprisonment without Example. A sad Instance and whereby the Dignity of Parliaments, and especially of the House of Peers, did at present much suffer, and may probably more for the future; For nothing but Parliament can destroy Parliament, If a House shall once be Felon of it self and stop its own breath, taking away that Liberty of speech, which the King verbally, and of course allows them, (as now they had done in both Houses) to what purpose is it coming thither? (pp. 297–8)

Marvell is quite properly incensed at the arbitrary incarceration for something that had not previously been considered an offence, and at the setback for the principle of freedom of speech in parliament. He had been similarly incensed at many of Samuel Parker’s pronouncements on church government, but had found it effective to use ridicule to express his outrage as, indeed, he had ridiculed the intolerance of the Commons, earlier in the *Account* itself.

The passage on the four lords’ punishment for contempt comes before the first of the extensive passages of already existing material to be incorporated into the text. Its tone of somewhat po-faced outrage may suggest that, by this time, Marvell was less inclined than he had previously been to use humour as his main weapon, so that the later incorporation of the narrative material does not distort the overall tone quite so much as one might expect. The fact remains, however, that most of the first half of the work occupies Marvell’s characteristic position, ‘betwixt jest and earnest’.

Marvell, it has been said, is ‘not at all an easy writer to see whole’.¹⁰⁶ It may be that the controversial prose works are less likely to encompass divergent points of view than is his oeuvre taken together. Nevertheless, as we have seen, the *Account*, both in terms of its less humorous tone and its much more restrictive view of the

¹⁰⁶ Everett, ‘Poetry and Politics in Andrew Marvell’, p. 32.

king's powers, stands somewhat apart from the other prose works, notably *The Rehearsal Transpros'd* (and particularly *The Second Part*). While an attempt to reconcile these works might be misguided, it is surely worthwhile to try to trace the greater or lesser degrees of continuity between them. The effort is worthwhile because the *Account* constitutes strong evidence that Marvell had at the end of his life adopted a Whig (or, as L'Estrange would have it, republican) position, one in which the king's role was limited and his powers subject to legal control. It has been suggested in this chapter that Marvell's movement towards in that direction went in tandem with an increasing interest in constitutional questions, indeed with an increasing recognition that a constitution was a necessity, if the king was to be restrained from misusing his powers.

Chapter 5. Marvell and Equity: 'In rescue of the Banquiers Banquerout'?

Edward Nelthorpe and his creditors

The Chancery records that Fred S. Tupper discovered in 1938 — and from which he deduced that the woman who claimed to be Marvell's widow was in fact an impostor¹ — raise at least one intriguing question about the justice of Marvell's behaviour; and a second, if we conclude that Tupper was wrong in his deduction. The question that undoubtedly arises is primarily one of law, but of law in the wide sense, encompassing Equity at least as much as the Common Law. The second potential question is one of personal morality and has to do with Marvell's treatment of the wife whom, if Tupper is right, he did not have. The second question arises only if we conclude that Tupper read a lot more into the Chancery records than they were capable of supporting.

It is evident that, between June 1677 and Marvell's death in August 1678, he helped a bankrupt merchant named Edward Nelthorpe to hide from the latter's creditors. Some commentators have thought it likely that he went further than this, and knowingly helped Nelthorpe to conceal not merely his person but some of his assets. Whether the evidence in fact indicates that Marvell assisted in or connived at a fraud on Nelthorpe's creditors is a question that, surprisingly perhaps, has not been directly considered. Some of those scholars and critics who have mentioned the possibility have simply assumed that he would have been justified in helping Nelthorpe, on the grounds that the treatment by their creditors of Nelthorpe and his bankrupt partners was itself unjust.

¹ Fred S. Tupper, 'Mary Palmer, Alias Mrs. Andrew Marvell', *PMLA*, 53 (1938), pp. 367–92.

Edward Nelthorpe was a friend and, most likely, a relative of Andrew Marvell's.² He and Richard Thompson, both merchants from Hull, entered into a partnership with two London merchants, John Farrington and Edmund Page, in 1671 and carried on the business of merchant bankers. The business survived until 1675, when the bankers found that they were not able to meet their obligations as they fell due and asked their creditors for time to pay. According to the account published in the name of the partnership,³ most of the creditors were prepared to agree to this request but an intransigent minority prevented them from concluding the agreement. Eventually, a commission in bankruptcy was issued against the bankers.

A commission in bankruptcy was appointed by the Lord Chancellor, sitting in Chancery, on the petition of some or all of the creditors.⁴ Such a commission had power to transfer the property in the assets of the bankrupt, and it was usual to assign these to an assignee in bankruptcy who would then liquidate them so that the proceeds could be distributed proportionately among the creditors. The main purpose of the bankruptcy procedure was to ensure an equitable distribution of the available funds among the creditors. The law was designed for the protection, not of the debtor from the creditors, but of the creditors from each other; without it the particularly active, aggressive or simply fortunate creditor would be likely to obtain preferential treatment, at the expense of his fellows. According to Holdsworth, there was not yet any statutory provision for discharge from bankruptcy, 'except to the extent to which the creditors had been paid'.⁵

² Tupper, 'Mary Palmer, Alias Mrs. Andrew Marvell', p. 363, n. 8, citing Chancery pleadings C6/276/48 and C7/589/82, which are discussed below.

³ *The Case of Richard Thompson and Company: With Relation to their Creditors. Published for Better Information* (London: 1678); Public Record Office SP 30 G.

⁴ On the appointment, powers and functions of commissions in bankruptcy, see Sir William Holdsworth, *A History of English Law* 17 vols. (London: Methuen, 1903–1966) VIII, 238–241.

⁵ Holdsworth, *History of English Law* VIII, 240,

The defence published in the name of the bankers claimed that the hostile creditors procured the supersession (or rescission, in later terminology⁶) of the initial commission in bankruptcy and the appointment of a second, because they were not satisfied that the original commission was doing a good enough job of unearthing the bankers' assets. For the same reason, the second commission was also superseded and a third appointed. At some point, probably in the first half of 1677, Edward Nelthorpe 'absconded', 'withdrew himself' or 'left his house and trade.'⁷ That is to say he went into hiding.

Before June 1677, according to Mary Marvell,⁸ she and Marvell lived in a house in Westminster, he ostensibly as her lodger but in fact as her husband. In that month, Marvell told her that he wanted her to give up the house in Westminster and take one in Great Russell Street, which she did, on a three-year lease. He said that a friend of his would come to live with them there. This friend would pay the rent and housekeeping expenses and would give Mrs. Marvell another £10 a year 'for her Trouble'. Marvell would not at the time tell her the name of this friend, who turned out to be Edward Nelthorpe. Nelthorpe lived in the house until his death in September of the following year, although Mrs. Marvell says that he was out of England at the time of Marvell's death, in August 1678.⁹

At about the same time as Mrs. Marvell was taking the house, on 9 June 1677, Nelthorpe went to the shop of Charles Wallis, who is referred to in several documents as a goldsmith but describes himself in a deposition as a merchant tailor. Wallis says he had had previous dealings with Nelthorpe with whom he was acquainted. Nel-

⁶ Sheila Marriner, 'English Bankruptcy Records and Statistics before 1850', *Economic History Review* 33 (1980), pp. 351–366, 354.

⁷ See the depositions of Thomas Speede, Edmond Portmans, Gershom Prowd and Charles Wallis, now in the Public Record Office, at reference C24/1069 [Part 2, No 36].

⁸ The woman apparently responsible for the publication of *Miscellaneous Poems* in 1681 is named in most of the Chancery documents as Mary Marvell, and is so referred to here. However, she was generally known as Mary Palmer at the material time.

⁹ C6/262/13, answer of Mary Marvell.

thorpe deposited £500 with Wallis and received in return a bill under seal providing for repayment of that sum by 9 December 1677, six months later. In default of payment of the principal and interest by the due date, the amount payable under the bill was to rise to £1,000. The person named as payee was not Edward Nelthorpe, however, but Andrew Marvell. The records discovered by Tupper relate primarily to Chancery proceedings arising, after the deaths of Marvell and Nelthorpe, from a dispute as to which of their personal estates was entitled to this bill. The dispute was decided, after a hearing, in favour of Nelthorpe's estate. There is no doubt that the £500 was Nelthorpe's money and that the transaction with Wallis was a device to hide its existence from the commissioners in bankruptcy. In short, Marvell's name was used in an illegal scheme the aim of which was to defraud Nelthorpe's creditors of £500. For our purposes, the question of immediate importance is whether this was done with Marvell's knowledge or without.

In order to answer this question, it is first necessary to look at the nature of the documents discovered and considered by Tupper. They consist firstly of the bills of complaint exhibited in Chancery by John Farrington, Mary Marvell and Charles Wallis respectively and secondly of the answers made by the various defendants named in those bills: Farrington, Mary Marvell and Wallis, and also John Greene. What I shall call the main bill was exhibited by John Farrington in his capacity as administrator of the personal estate of Edward Nelthorpe. Nelthorpe had left a widow, Mary, who had not been resident in the Great Russell Street house.¹⁰ Shortly after Nelthorpe died, on 18 September 1678, Farrington persuaded Mary Nelthorpe to waive her own rights to administration of her husband's estate and to permit him, Farrington, to become sole administrator. Farrington based his entitlement to the administration on his claim that he had been a creditor of Nelthorpe's. Farrington

¹⁰ She later says (C10/216/74) that she was kept in ignorance of Nelthorpe's whereabouts so that she could not be compelled to disclose it to the bankruptcy commissioners.

and Nelthorpe were both subject to the commissions in bankruptcy that had issued against the partners. By the time of Nelthorpe's death, Farrington was imprisoned for debt — though he was let out nearly every day to conduct his business — and he remained a prisoner throughout the period during which the Chancery proceedings were fought.¹¹

Farrington's claim that Nelthorpe was indebted to him is based on the terms of the partnership agreement. According to Farrington, the agreement provided that the partners were entitled to draw on the bank's funds in order to finance their own trading operations, provided that they left enough funds for the bank to meet its obligations and that none of the partners drew a greater share than any of the others. Farrington claimed that Nelthorpe had drawn much larger amounts than he had and, in 1684, Nelthorpe's widow swore that her husband had admitted to her that this was the case.¹² The Prerogative Court of Canterbury granted letters of administration in October 1678, about six weeks after Nelthorpe's death. Although Marvell had died a month earlier than Nelthorpe, letters of administration of *his* estate did not issue until March 1679, seven months later.¹³ The persons who successfully applied to the Prerogative Court of Canterbury to administer Andrew Marvell's estate were Mary Marvell (as widow) and John Greene (as creditor). Greene was an attorney and an associate of John Farrington's.

Once administration of the two estates had been obtained, and notwithstanding Farrington's haste in the case of Nelthorpe's estate, there is no record of the administrators having taken any further action for about two years. Then, in 1681, the bill that Nelthorpe had obtained from Charles Wallis resurfaced.¹⁴ It will be

¹¹ Tupper, 'Mary Palmer, Alias Mrs. Andrew Marvell', p. 370.

¹² C7/581/73 (complaint of Farrington against Thompson) and C10/216/74 (answer of Mary Nelthorpe to Thompson's complaint). See below, p. 245.

¹³ The record of Marvell's administration is at PROB6/54 fol. 25v. Nelthorpe's is at PROB6/53 fol. 88v.

¹⁴ From this point on, this *bill* will be referred to as a security, to avoid confusion with the various *bills of complaint* in Chancery.

recalled that this security provided for repayment of the capital and interest by 9 December 1677 and for a penalty, equal to the original capital amount, to be incurred on late payment. That the debt should still be outstanding nearly four years later is at least surprising. Nevertheless, in Midsummer 1681, John Greene brought a common law suit against Charles Wallis, claiming that the debt indeed remained unpaid.¹⁵ The proceedings were taken in Greene's own name and in Mary Marvell's, as administrators of Andrew Marvell's estate. Mary Marvell claimed that this was the first she had heard of the security and that her name was being used without her authority. Accordingly, she put a stop to the suit against Wallis. Farrington responded by exhibiting a bill of complaint in Chancery, initiating what I have called the main action.

John Farrington and Mary Marvell in Chancery

The defendants named in Farrington's bill were Mary Marvell, John Greene and Charles Wallis. Farrington claimed that Marvell's name had been used in the security 'in trust for' Nelthorpe and that possession of the security had been retained by Nelthorpe, who had it in his custody at the time of his death. Farrington asked the court to compel Marvell's administrators to allow their names to be used in suing Wallis and to order that the money recovered from Wallis should be paid to Nelthorpe's estate — in other words, to Farrington as Nelthorpe's administrator. Farrington said that he intended to use any money that he recovered to pay his creditors.

Mary Marvell and Greene both made answers to Farrington's bill. Mary Marvell denies that there is any evidence, such as a declaration of trust, that Marvell had held the security in trust for Nelthorpe. Her answer is largely taken up, however, with a narrative in which she alleges that Farrington or persons acting on his behalf

¹⁵ As one would expect, no direct records of the common law suit are extant. The pleadings of Mary Marvell, Greene and Farrington in the Chancery proceedings are in agreement as to the sequence of events.

had taken advantage of her grief at her husband's death and her inexperience in business matters, to persuade her to part with the keys to Marvell's lodgings at Maiden Lane, Covent Garden. She accuses them of having removed from these lodgings various 'Hampers trunks bonds bills & other goods'. In the context of a response to the particular claims made by Farrington in his bill, it is clear that the purpose of this narrative on Mrs. Marvell's part is to attempt to raise an inference that the security had in fact been in Marvell's possession, not in Nelthorpe's. Mrs. Marvell was operating under a disadvantage in that she did not have direct evidence to contradict Farrington's assertion that possession of the security was retained by Nelthorpe. If, as Farrington successfully claimed, Nelthorpe had been at least the beneficial — if not the legal — owner of the security, it is unlikely that he would have parted with it. To have done so would have been dangerous, since it was not made out in his own name and he would have had difficulty in showing title if he had needed to recover possession of it. Farrington's claim was therefore inherently plausible and Mary Marvell lacked the means of proving that it was untrue. Her case must have looked weak from the beginning, and it is likely that she was so advised.

Greene's answer contains an admission that he believed the original £500 to have belonged to Nelthorpe and it declares his willingness to comply with Farrington's requirements. If Wallis made an answer to Farrington's bill, it has not been found. However, like Mary Marvell, he exhibited a cross-bill. In this bill, he alleged that he had repaid his debt to Nelthorpe during the latter's lifetime and, in fact, just a few days after the original transaction had taken place. He says that Nelthorpe had come to him, having 'very great present occasion' for the money and asked to be repaid immediately. Wallis, 'to pleasure him therein did condescend thereunto' and let him have his money back. He did not, however, recover the sealed security from Nelthorpe, who did not have it with him but promised to deliver it

later. So, Wallis was claiming that, although the security remained in the possession of Nelthorpe, the debt that it had secured no longer existed. The credibility of Wallis's account will be discussed below.

Mary Marvell's cross-bill repeats, but in a more embroidered form, the story of Farrington's alleged ransacking of the lodgings in Maiden Lane. She accuses Farrington and Greene of having concealed from her the existence of the Wallis security, in order to cheat Marvell's estate of the benefit of a debt owed to it. She asks the court to order the defendants to disclose on oath what items were removed from Marvell's lodgings and what became of them. Farrington and Greene both made answers in which they deny the main allegations against them. In these answers they also allege for the first time that Mary Marvell was not genuinely the widow of the member of parliament (and so not entitled to administer his estate). In making this claim, they are attempting to counter the charge made by Mrs. Marvell against Greene: that he had no genuine interest in Marvell's administration, and therefore should be treated as acting in trust for her. Farrington repeats his allegation about the Marvell 'marriage' in a further bill of complaint, directed against Mary Marvell and the landlords of the Great Russell Street house, Mr. and Mrs. Morris. However, the main thrust of this second bill of Farrington's is to accuse Mary Marvell and the landlords of having misappropriated some of Nelthorpe's personal belongings after his death.

The documents just outlined constitute the main sources that Tupper considers. He also makes reference to two orders made in the main action and to the pleadings in a number of other Chancery cases involving Farrington. To summarize, the main documents that Tupper discusses and that have a direct or indirect bearing on Marvell's estate are the following:

<i>Item</i>	<i>Date</i>	<i>PRO Reference</i>	<i>Description</i>
1	July 1681	C6/276/48	John Farrington's bill of complaint against Mary Marvell, John Greene and Charles Wallis
2		C6/276/48	Answers of Mary Marvell and John Greene to item 1.
3	November 1681	C6/275/120	Charles Wallis' bill of complaint against John Farrington, Mary Marvell and John Greene
4	November 1681	C6/275/120	John Greene's answer to item 3
5	December 1681	C7/589/82	John Farrington's answer to item 3
6	January 1681/2	C7/589/82	Mary Marvell's answer to item 3
7	January 1681/2	C7/587/95	Mary Marvell's bill of complaint against John Farrington, John Greene and Charles Wallis
8	February 1681/2	C8/252/9	Answers of Farrington and Greene to item 7
9	February 1681/2	C6/242/13	John Farrington's bill against Mary Marvell (there called Palmer) and Mr. and Mrs. Morris
10	April 1682	C6/242/13	Mary Marvell's answer to item 9

As has already been mentioned, these documents are all either bills of complaint, exhibited by parties wishing to initiate Chancery proceedings, or answers sworn by defendants in response to such bills. Documents belonging to these two categories are together known as pleadings. Despite the fact that they can be placed in the same category, however, they are not of equal evidentiary value. The purpose of a bill of complaint was, first, to allege facts which, if true, were sufficient to entitle the

complainant to some equitable remedy against the defendants and, second, to ask the court for the appropriate relief.¹⁶ In order to invoke the court's jurisdiction, the bill almost invariably charged the defendants with some variety of unconscionable behaviour, such as fraud. The relief sought by the complainant practically always included the examination of the defendants on oath as to the truth of the allegations, and as to the state of their consciences. The bill of complaint was to be signed by the complainant's counsel, as confirmation that he believed that the complainant was not acting frivolously or without cause.¹⁷ Apart from this, however, there was no enforceable requirement that the allegations in the bill of complaint should be true.

In contrast, a defendant's answer was expected to be strictly truthful and, except in collusive proceedings, was made on oath. The parties to equity proceedings in Chancery were therefore not on an equal footing, largely as a consequence of the fact that, in the words of D. E. C. Yale, 'the first object of inquiry in Equity is the defendant's conscience, rather than the plaintiff's right.'¹⁸ Since it was a sworn document, the answer ought not to contain anything that the defendant did not know or believe to be true. That is not necessarily to say that perjury by defendants was rare. However, it would be a reckless defendant who, in an answer, made a statement of fact that another party could easily disprove. Perhaps more importantly, where one person makes inconsistent statements in a bill of complaint and in an answer, it will be difficult to rebut the presumption that the statement in the former is untrue. Tupper seems not to have been aware that statements contained in complaints may need to be treated with more caution than those contained in answers.¹⁹

¹⁶ Henry Horwitz, *Chancery Equity Records and Proceedings 1600–1800* (Kew, Surrey: PRO Publications, 1998), pp. 3–4, 12–14.

¹⁷ Horwitz, *Chancery Equity Records and Proceedings*, p. 14.

¹⁸ D. E. C. Yale, *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge: Cambridge University Press, 1965), p. 23.

¹⁹ For example, he cites a complaint of Richard Thompson against Farrington (C6/283/87), saying that Thompson 'testified' as to Farrington's living conditions. While there is no reason to doubt the truth of what Thompson says on this point, it is not testimony but merely an allegation made in a bill of complaint.

It will be seen from the outline of the pleadings above that John Farrington and Mary Marvell each exhibited a bill of complaint and swore an answer, at about the same time and dealing with substantially the same subject matter. This affords the student of this case a valuable opportunity to compare the sworn and unsworn statements of the two principal parties, with a view to testing the credibility of their various allegations. Tupper failed to take advantage of the opportunity, as did William Empson, who attempted to refute Tupper on the question of Marvell's supposed marriage. Indeed, Empson so misunderstood the nature of the documents, that he described them all as 'depositions.'²⁰ In fact, none of the documents that he looked at is a deposition — they are all either pleadings or orders. Depositions were indeed taken in the case but neither Tupper nor Empson knew about them.²¹

As has already been noted, Farrington says in his bill of complaint (item 1) that custody of the Wallis security was retained by Nelthorpe and that it was in his possession when he died. In his answer (item 8) to Mrs. Marvell's complaint, he says:

And this Deft. further saith and doubts not to prove that the said Mr. Nelthorpe tooke a Bill of the said Wallis in the name of the said Andrew Marvell for the said [illegible] had the said Bill in his owne custody till the time of his death & verily beleives that the said Mr. Marvell did not know thereof but if he had knowne thereof this Deft. verily beleives he would have bin soe juste as to have given a Declaration of trust upon request for that purpose ...

So far, what Farrington says on oath is a repetition of what he has already said in his complaint: that the security was in Nelthorpe's possession until his death. Consistently with this, he adds that he does not believe that Marvell knew about the security, even though it was made out in his name. If these statements are reliable, they clearly tend to exonerate Marvell from complicity in the fraud on Nelthorpe's creditors. Moreover, Wallis's bill of complaint (item 3) may be taken as corroboration of this interpretation. If Nelthorpe was the person who brought the £500 to Wallis in the

²⁰ William Empson, *Using Biography* (Chatto & Windus, 1984), p. 43.

²¹ Art Kavanagh, 'Andrew Marvell "in want of money": the Evidence in *John Farrington v. Mary Marvell*, *The Seventeenth Century*, 17 (2002), pp. 202–12

first place (as is established by Wallis's deposition, discussed below) and if he was careful to keep the security in his possession (as Farrington alleges), then it would be necessary to involve Marvell in the scheme *only* if Wallis required his receipt on repayment of the money. But Wallis, it will be remembered, claims that he was prepared to repay the money to Nelthorpe not only without Marvell's receipt, but on a mere promise that the security would be returned to him. On the face of it, then, there would seem to be no grounds for suspicion that Marvell acted unethically in relation to Nelthorpe's assets.

The situation is more complicated than it first appears to be, however. For a start, while Wallis's story of the repayment to Nelthorpe is plausible, that is not necessarily to say that it is truthful. At common law, a covenant under seal to pay a debt was treated as conclusive evidence that the debt was due. A borrower who claimed (as Wallis did in his bill of complaint) that he had paid the debt, but failed to recover possession of the security, had no defence to a suit at common law. As far as the law was concerned, the covenant under seal itself gave rise to the obligation to pay. It is therefore no surprise to learn that complaints such as Wallis's, by debtors who allege that they are being pursued unconscionably for debts that the creditors know to have already been paid, were a regular part of the business of the Equity courts.²² Quite apart from this, if the debt was still outstanding in 1681, it must follow that Wallis — a merchant for whom accepting deposits at interest was apparently part of his regular trade — failed to pay the debt when it fell due and so incurred the liability to pay a penalty of £500, as well as continuing interest. None of the parties offers an explanation of this apparent failure. In short, Wallis's account of Nelthorpe's second visit to his shop appears to be the kind of thing that might well

²² S. F. C. Milsom, *Historical Foundations of the Common Law* 2nd ed. (Butterworths, 1981), pp. 86, 250. In fact, in 1683 Farrington himself was to make a claim of the same kind against James Nelthorpe, one of the creditors of the bank: C10/484/71.

have happened. For all its plausibility, though, there is something suspicious about Wallis's complaint.

As has already been mentioned, no answer by Wallis to Farrington's main bill has been found. This does not necessarily mean that no answer was sworn: it is quite clear that not all of the documents in the case have been discovered and in any case it did not always happen that answers were filed with the bills to which they appertained. The absence of an answer by Wallis may therefore mean either that he was not prepared to state on oath that he had repaid Nelthorpe during his lifetime or that he in fact did so but the document has been lost. However, while it cannot be said with certainty that Wallis did not swear an answer to Farrington's complaint, it is clear that only an unsworn version of his story has survived. *If* Wallis did not swear an answer to Farrington's complaint, then the credibility of the story he tells in his cross-bill is greatly undermined, and the cross-bill may be nothing more than a device to put him in a better negotiating position with Farrington. At any rate, having exhibited his complaint, Wallis does not seem to have taken any further action to pursue it: a search through the order books index up to 1686 reveals no mention of *Wallis v. Farrington and others*.

That is not to say that Wallis played no further part in the case. On 11 July 1682, he was produced as a witness on behalf of John Farrington and swore a deposition.²³ In it, he said that he had considerable dealings and trading with Edward Nelthorpe. On 9 June 1677, which was after Nelthorpe had had to ask his creditors for time to pay, Nelthorpe gave him bills or notes to the value of £500 and requested him to seal a bill (the security) which was already filled out in Nelthorpe's handwriting. The witness believes that this occurred about six months after Nelthorpe

²³ Wallis was one of five witnesses on Farrington's behalf, whose depositions are to be found at PRO reference C24/1069 [Part 2, No 36]. The other witnesses included Nathaniel Ponder, the bookseller of the two parts of *The Rehearsal Transposed*: Kavanagh, 'Andrew Marvell "in want of money"'. Since depositions are indexed by witness name, and not by party, it is only because Wallis filled both roles that the depositions in this case were discovered.

'absconded' (though some of the other witnesses put Nelthorpe's flight nearer to Midsummer 1677). Wallis also says that he was acquainted with Andrew Marvell but did not have any dealings with him, and that Marvell was reputed to be a person of little or no estate. He says nothing about having repaid the £500, to Nelthorpe or anyone else. (Had he done so, his evidence would have been of no use to Farrington, since it would tend to show that the security was valueless and the issue as to its ownership — the whole point of the case — moot.)

The depositions, which (perhaps with exhibits or accounts) comprised the evidence in the case, were sworn statements made by the witnesses in response to interrogatories drawn up by the parties. (An answer, while also made on oath, was binding only on the defendant making it; it did not constitute evidence against anyone else.) It can be seen, then, that Wallis's story to the effect that he repaid the £500 to Nelthorpe is to be found only in a document that was not made on oath, and that when Wallis comes to make the only sworn statement of his that we have, he does not repeat the story. The evidence that Wallis was prepared to repay the money, without obtaining Marvell's receipt, so turns out to be less reliable than it might have appeared on its face. It does not follow, though, that we can be sure that Wallis *would* have insisted on a receipt from Marvell. His deposition makes it clear that he knew the money was Nelthorpe's or the partnership's, that he did not believe that Marvell had £500 available for investment and that he was aware of the circumstances that might lead Nelthorpe to deposit money in someone else's name, as a means of concealment. It was perfectly clear to him that he was dealing with Nelthorpe, not Marvell. Further, he could have protected himself just as effectively by taking back the security as by obtaining a receipt, which would have to be under seal.²⁴ So, whether it would have been possible for Nelthorpe to have recovered the money without involving Marvell must remain an open question.

²⁴ Milsom, *Historical Foundations of the Common Law*, p. 250.

There is a second reason why the inference that appears to arise from Farrington's answer, that Marvell did not know that his name was being used, is not so straightforward as it might appear. Farrington made a second statement on oath which, while not necessarily inconsistent with his claim that the security remained in Nelthorpe's possession at his death, requires further explanation if it is to be wholly reconciled with it. We have already seen that, having quickly persuaded Nelthorpe's widow to permit him to administer the estate, and having then taken out administration within six weeks of the death, Farrington did not take action against Wallis until Midsummer 1681. Greene and Farrington both offer an explanation of part of this delay. In his answer (item 4) to Wallis's bill of complaint, Greene swears that

... he doth not know nor believe that the said John ffarrington did know nor believe that the said Bill was taken in the name of the said Andrew Marvell till above a yeare after letters of Admstracon was granted to the said Mary and this Defendt. ... nor did this Deft. know any thing thereof till above twelve moneth after letters of Admstracon were granted to the said Mary and this Defendt. of the said Andrew Marvell's Estate ... (C6/275/120)

If this is to be believed, Farrington discovered the existence of the security in March 1680 at the earliest. According to Farrington himself, the discovery was made even later — though, remarkably, he too fixes the time by reference to the issue of letters of administration of Marvell's estate. He says, in his answer (item 8) to Mary Marvell's complaint

And this Deft further saith that that he this Deft.did not know of the Bond or bill entred into by the other Defendt Charles Wallis till twenty moneths & more after the said Letters of Admstracon granted to the Complt. and the said John Greene And when this Deft had knowledge thereof & had gott the same into his custody he this Deft <did deliver> the same Bill to the other Deft. John Greene & desired him to putt the same in suite against the other Deft. Charles Wallis (C8/252/9)

Farrington seems to be conscious that there is an apparent discrepancy between his claim that he did not know about the security before November 1680 and the admission that he had his agent involve himself in Marvell's administration more than twenty months earlier. What could be the point of his interest in Marvell's estate,

unless it was to get hold of the security? Farrington explains that, at the time when Marvell's administration was being taken out, he believed that some assets of Nelthorpe's had been placed in Marvell's name but he did not know what those assets were.

Farrington's statements are evasive and unreliable on the question of the security's whereabouts between Nelthorpe's death in September 1678 and the commencement of the common law suit against Wallis in Midsummer 1681. While he says that he learned of its existence more than twenty months after the date of Marvell's administration, and that he then had to get it 'into his custody', he says nothing at all as to how he made the discovery, in whose possession the security then was or what steps he had to take in order to obtain possession of it. These are questions that are obviously relevant, particularly as he had previously sworn baldly that Nelthorpe had retained custody of the security during his lifetime, implying that it had been found among his possessions after his death.

It is probably significant that Greene uses the phrases 'above twelve moneth' and 'above a yeare' when, if Farrington is telling the truth, the period was actually in excess of twenty months. It appears that, apart from the security (which was ultimately determined to have been Nelthorpe's), Marvell's administrators did not find any assets belonging to his estate. Mary Marvell complains (item 7) that the letters of administration were retained by Greene, the lawyer, while she waited to receive some benefit from her husband's estate, but did not hear anything until Greene commenced the suit against Wallis. Farrington was able to produce persuasive evidence to substantiate his claim that at no time in the five years before his death was Marvell worth £100.²⁵ The administrators were required by law to file with the Prerogative Court of Canterbury an inventory of the estate and an account of the

²⁵ Kavanagh, 'Andrew Marvell "in Want of Money"'.

administration.²⁶ The inventory was to be filed by the end of the sixth calendar month after the issue of the letters of administration and the account by the end of the twelfth (that is, in Marvell's case, by 30 September 1679 and 31 March 1680 respectively).²⁷ Very few such returns for the relevant period have survived and those that have do not include any relating to Marvell's estate. It is probable, however, that Greene made a return stating that Marvell left no assets of any value. If so, an admission by Greene that he knew about the security before 31 March 1680 would leave him open to a charge of perjury, at least if it should eventually be decided that the instrument had really been Marvell's property.

Farrington's two different accounts of the history of the security are not necessarily mutually contradictory. It is not impossible that the document was in Nelthorpe's possession on 18 September 1678, *and* that its existence remained concealed from Nelthorpe's administrator for more than two years after that date, and that he then found it necessary to take unspecified steps to recover it. It is clear, however, that Farrington is not, in either of his statements, making a full and frank disclosure of the relevant circumstances. He is holding back relevant information that would make it easier to evaluate the truth of what he says. The assertion, accompanying the first of his statements, of his belief that Marvell was unaware that his name was being used, is of no greater value. In the first place, Farrington is swearing as to his belief; whether that belief was well-founded — or, for that matter, genuinely held — he gives us no means of judging. In the second, Farrington has an obvious self-interested motive for asserting Marvell's ignorance of the scheme. Mary Marvell makes as much as she can

²⁶ Henry Charles Coote, *The Practice of the Ecclesiastical Courts, with forms and Tables of Costs* (Henry Butterworth, 1847), pp. 675–6, citing as authority the Statute of Distribution (22 and 23 Car. 2, c. 10), itself an amendment of an Elizabethan statute.

²⁷ These dates appear in the right-hand margin of the Prerogative Court record of Marvell's administration, PROB6/54 fol. 25v. Tupper, following Margoliouth, took them as referring to the date of *issue* of the administration. As we shall see below, pp. 257–8, this led him to speculate as to the causes of a delay on the part of the intending administrators which in Nelthorpe's case was non-existent and in Marvell's exaggerated.

of the absence of a declaration of trust or other less formal acknowledgement by Marvell that the security in his name represents Nelthorpe's money. It is in response to this argument that Farrington says he does not believe that Marvell knew about the security but, if he had done so, he would have been so just as to have made the required declaration (see above, p. 234). If Farrington could establish Marvell's ignorance as to the use of his name, he would remove the main plank in the administratrix's argument.

A consideration of the various documents appertaining to the Chancery proceedings does not, then, tend to show that Marvell was a conscious participant in the attempt to place some of Nelthorpe's assets beyond the reach of the commissioners in bankruptcy, but neither does it positively exonerate him. It is likely that Nelthorpe kept the security in his own custody, and it is possible that he could have recovered the money without having to produce a receipt signed by Marvell. If both of these conditions are true, there was no need for Marvell to know that his name was being used. If only the first is true, he would not need to know until the time came when Nelthorpe wanted to collect his money (and, on that hypothesis, the time did not come while either Nelthorpe or Marvell was alive). Notwithstanding this, those few scholars and critics who have commented on the case have not examined the question of Marvell's possible complicity but tended to suggest that, *if* he had been involved, then his behaviour may have had some colour of justification. L. N. Wall comments:

Marvell's action in providing a hiding-place for his insolvent friends may well have been taken under the conviction that they were the victims of a persecution provoked by their stand for the religious and civil liberties of the City; and if he connived at the concealment of some part of their personal assets, he may have felt justified by what seemed to him the unreasonable vindictiveness of a minority of creditors. It is even possible that the money which was the subject of the litigation of 1681 was his own, in the sense that he was a creditor of the firm enjoying an illegal preference.²⁸

²⁸ L. N. Wall, 'Marvell's Friends in the City', *Notes & Queries* 204 (1959), pp. 206-07.

Similarly, according to William Empson, ‘Marvell decided, we may fairly suppose, that his friends were political martyrs, and to break the law in their favour was no more than a duty’, adding later that ‘perhaps everyone knew that they [the creditors] were not widows and orphans but rich loyalist bankers trampling upon republican bankers.’²⁹ Legouis takes his lead from Wall, while doubting, on the ground of Marvell’s poverty, the suggestion that he may have had the benefit of an illegal preference.³⁰

This suggestion, at least, can now be discounted, as the evidence shows that Marvell was not a creditor of the partnership. However, Wall’s comment that ‘he may have felt justified’, by the vindictiveness of a minority of the creditors, in conniving at the concealment of assets, requires further examination. Wall’s phrasing implies that, whatever Marvell may have felt, a judicious assessment of the scheme must conclude differently. On the other hand, ‘conniving at’ seems rather to gloss over the level of Marvell’s putative involvement. Either Marvell knew that his name was being used, and did not stop it, or he did not know.³¹ In the first case, he was going beyond connivance, and assisting Nelthorpe in his actions; in the second, no question of involvement arises.

If we assume, for the sake of argument, that Marvell was a willing participant in Nelthorpe’s scheme to conceal the £500, part of our difficulty in assessing the justice of his behaviour results from the fact that we know hardly anything about the creditors: who they were, how much they were owed or even whether they were a large or small group of people. Records of the proceedings of bankruptcy commissions do not survive for the period before 1710 and notices of creditors’ meetings, and of various other events such as the supersession of a commission, were not

²⁹ Empson, *Using Biography*, pp. 46, 61.

³⁰ Legouis, *Andrew Marvell: Poet, Puritan, Patriot* 2nd edition (Oxford: Clarendon Press, 1968), pp. 148–9.

³¹ A third possibility, that Marvell’s name was being used with his knowledge but against his will, is unlikely, in part because of Nelthorpe’s friendship with Marvell.

regularly published in the *London Gazette* until 1684. The collapse of Richard Thompson and Company was an event of major public significance; Wall discusses several references to it that occur in the *Calendar of State Papers, Domestic*.³² However the main source of information about the collapse, and the origin of the idea that a minority of vindictive creditors pursued the partners unfairly, is a pamphlet with the title *The Case of Richard Thompson and Company: with Relation to their Creditors. Published for Better Information* (London: 1678).³³ This pamphlet was evidently published by one or more of the partners, with the aim of influencing the creditors of the firm towards leniency and, to that end, defending the partners against allegations that had been made against them: principally that they had hidden their assets from the commissioners and had failed to hand over their account books, thereby frustrating the collection of debts owed to the firm. The pamphlet was probably not the joint work of the partnership as a whole, since by that time Farrington had fallen out with Thompson and Nelthorpe, whose inexperience as merchants and alleged dishonesty he blamed for the collapse of the business.³⁴

The main theme of the pamphlet is the vindictive and irrationally self-destructive behaviour of a ‘minority’ of the creditors who, when the majority have driven a hard bargain to extract from the partnership all that is possibly to be had, undermine the arrangement by having the partners arrested (thereby hindering them from complying with their agreement), buying up the debts of their more compliant brethren and securing the appointment of ‘no less than *three* several Commissions of Banquerupt ... against us’ (p. 19).

While it is difficult to disagree with Wall’s characterization of the bankruptcy laws of the seventeenth century as harsh, it is far from clear from this presentation of their case that Nelthorpe and his partners were singled out for especially unfair

³² Wall, ‘Marvell’s Friends in the City’, p. 206, citing *CSPD* 1676–7.

³³ Public Record Office, SP 30 G.

³⁴ C7/581/73: complaint of Farrington against Richard Thompson and Dorothy his wife.

treatment. While it makes sense for the pamphleteer to appeal to the reasonableness of the more amenable creditors, it is not necessarily true that the more aggressive ones were therefore acting irrationally. Simply put, an approach that might be damaging to the interests of the creditors as a body might nevertheless make sense from the point of view of particular individuals.

We learn from Holdsworth that the problems for debtors caused by uncooperative minorities of creditors were a common feature of bankruptcy proceedings after 1641. Up to that date, when a majority of creditors agreed to a composition with the debtor, but a small number refused to accept it, the King's Council could effectively override the objections of the minority.³⁵ In 1641, the Council's jurisdiction was abolished, and it became impossible to enforce a composition unless all the creditors agreed. Creditors in the minority were able, not only to withhold their agreement, but to arrest the debtor and take other enforcement measures, so hampering his ability to perform his agreement with the majority. This, indeed, is one of the charges that the author of the pamphlet makes against the vindictive minority in the case of the Thompson partnership. Holdsworth makes it clear, though, that such behaviour by creditors was not at all unusual and the failure of the bankruptcy laws to regulate it one of the obvious flaws in the legislation. Thompson, Nelthorpe and their partners seem to have suffered from the harshness to which recalcitrant debtors were generally subjected, rather than from a vindictiveness directed specifically at them.

There are other reasons to question the pamphlet's account of the history of the partnership, with its emphasis on the vindictive behaviour of the minority of creditors. Farrington, in his complaint against Thompson and his wife (C7/581/73) gives an account that is quite different from the Thompson version.

³⁵ Holdsworth, *History of English Law*, VIII, 233–4, 244–5.

Farrington's persistence

Again, one must be cautious about accepting without question the truth of Farrington's statements. In the first place, they are made in a bill of complaint the immediate aim of which was to secure the examination on oath of Richard Thompson and his wife Dorothy. In order to achieve this aim, it was necessary that the bill should allege that they had behaved in a manner contrary to conscience and equity. In the second place, we have already seen that Farrington is capable of being an evasive and unreliable witness and that he had his agent Greene pose as a creditor of Marvell's in order to obtain administration of his estate.

In his complaint against the Thompsons, Farrington blames Nelthorpe's adventurousness and Thompson's negligence for the failure of the bank. While the former withdrew large amounts of the depositors' funds to finance 'Woollen & silke manufactures in the most uncultivated parts of Ireland', a factory in Moscow, and other risky and expensive undertakings, the latter 'was dayly at Coffee houses and other publick places & that he spent his time in publick matters & in heareing & telling news' while he was supposed to be managing the business (C7/581/73).

Farrington's version of events is supported, on oath, by Nelthorpe's widow, Mary. At about the same time as Farrington brought his bill of complaint against Thompson, the latter brought a bill in which Farrington, Greene and Mary Nelthorpe were named as codefendants.³⁶ Thompson complained that Mary Nelthorpe had wrongfully agreed to Farrington's becoming Nelthorpe's administrator, without Thompson's consent. Mrs. Nelthorpe replied that she permitted Farrington to take out the administration because she had heard her husband admit that he had drawn out much more money from the bank than had Farrington. She had trusted Thompson at first, and believed that he intended to deal honestly with her because, for about

³⁶ Thompson's bill is at C6/283/87. Farrington and Mary Nelthorpe tried to avoid answering on the grounds of Thompson's outlawry but this plea was evidently unsuccessful. The substantive answer of Mary Nelthorpe is to be found at C10/216/74.

three years after Nelthorpe's death he paid her quarterly sums for her children's maintenance, amounting to about £600 in total. However, she was advised that she might be in trouble for meddling with money from Nelthorpe's estate, which was insolvent, and paid this money to Farrington as her husband's administrator, for distribution among the creditors.

It is worth noting in passing that Mary Nelthorpe's answer is cited by William Empson as evidence that Farrington had tricked Mary Nelthorpe into granting him the administration of her husband's estate.³⁷ In fact, it tends to show something altogether inconsistent with this: that Mrs. Nelthorpe understood quite well, and approved, the basis on which Farrington claimed to be a creditor of her husband's, and that Farrington still retained her confidence six years later. Empson's error is partly based on his misinterpretation of Mrs. Nelthorpe's statement 'for that the Complainant being a Bankrupt & a prisoner in the Kings Bench hath exhibited the said Bill agt this Deft to vex and torment this Deft and to extort from this Deft some considerable sume of moneys as this Deft doth verily believe'. Empson takes 'the Complainant' to mean Farrington but in this context the phrase refers to Richard Thompson, by then a prisoner in the Rules of the King's Bench; Farrington, in contrast, is Mrs. Nelthorpe's fellow defendant. Empson's misconstruction of Mary Nelthorpe's answer leads him to form an inaccurate impression of her relation to the other parties. He suggests, for example, that Mary Marvell changed her mind and decided to claim the Wallis security for Marvell's estate because she intended that Mrs. Nelthorpe, rather than Farrington and the creditors, should have the benefit of it.³⁸

Mary Nelthorpe's answer concludes by saying that has been informed — she does not say by whom — that Thompson has taken a house in the Rules of the King's

³⁷ Empson, *Using Biography*, pp. 60–61.

³⁸ Empson, *Using Biography*, p. 61.

Bench for himself and his family and has declared that he will not pay a penny to the creditors. She believes that the books, bonds, bills and securities belonging to her husband's particular estate as well as the books of the bank have been and still are in the custody or power of Thompson or his wife. She believes that Thompson intends to remain a prisoner for the rest of his life, and to defraud her late husband's creditors.

One further question remains to be considered, the answer to which might tend to mitigate, if not to justify, Nelthorpe's behaviour. In comparison with more than £100,000 that the firm claimed to have paid out between November 1675 and the beginning of 1677, the sum of £500 is relatively insignificant and so the fraud on the creditors was arguably too minor to attract serious censure. The obvious objection to this line of defence is that there may have been more than the £500 involved. Empson, commenting that 'it would seem pathetic to fight so long over £500 after losing £60,000', assumes that there must have been other concealed assets, and that the proceedings brought by Farrington were a test case, on the outcome of which the disposal of those other assets depended.³⁹ While this is a plausible assumption, there is no direct evidence to support it. Nobody — not Farrington, not Wallis, not Mrs. Marvell, all of whom have divergent interests — gives any hint that ownership of anything more than the single security for £500 was at issue. At the same time, Farrington and Greene insist that the former intends to use the money, should he recover it, to 'comply with his Creditors,' which suggests that the amount that might be recovered was such as would make a difference to the creditors, and to whether Farrington remained in prison.

³⁹ Empson, *Using Biography*, p. 47.

At the time when the partners first summoned their creditors, the firm's liabilities were probably about £140,000.⁴⁰ Subsequently, the partners claimed, they paid out almost £50,000. The second of these figures was not supported by production of the partnership's books and can hardly be considered reliable. Nevertheless, it comes from a source that seeks to present the partners' case in the most favourable light possible, so probably does not overstate the extent of the liabilities. It is unlikely that the commissioners in bankruptcy, without access to the account books, can have made a substantial reduction in the amount outstanding. Faced with debts of up to £90,000, then, one wonders what kind of 'compliance' Farrington could have hoped to make with a mere £500 — or, if Wallis could be compelled to pay the penalty due under the security, even with twice that amount.

The answer is that Farrington really did not know where the money had gone, and was presumably quite disappointed to have achieved so little in his administration of Nelthorpe's estate. He pursued the assets piece by piece as he became aware of them. He appears to have assumed initially that Nelthorpe was the partner who was most likely to be hiding both the books and assets of the partnership, and to have begun to pursue Thompson only after he had extracted such meagre results as were to be had from Nelthorpe's estate. It will be recalled that his first set of proceedings that we know about was the common law suit against Wallis, taken by Greene at Farrington's instigation in 1681. When Mrs. Marvell prevented him from pursuing that action, he resorted to Chancery. Mrs. Marvell brought a cross-bill against him, in which she sought to have him examined on oath as to what assets he had removed from Marvell's lodgings in Maiden Lane, and how he had disposed of them. As well as swearing an answer to this bill, Farrington responded with a further bill of his own, in which he accused Mrs. Marvell and her landlords of making off with Nel-

⁴⁰ At the creditors' meeting, it was noted that the books showed a surplus of £35,000: *The Case of Richard Thompson and Company*, p. 7. The amount of the partners' assets is stated as having been £175,000 at the time of that meeting (p. 30).

thorpe's personal effects. Perhaps the most unfortunate error that Tupper and Empson have made in their consideration of the Chancery material, is their misunderstanding of the nature and purposes of these two bills (items 7 and 9). A correct understanding of Farrington's bill (item 9) will help us to say something about Farrington's state of mind — that is, both the state of his knowledge and what his aims were. This is Tupper's account of item 9:

He presents his charges with an anger that even the sedate formalities of legal phraseology cannot conceal. Mrs. Palmer, he declares, stole property of Nelthorpe's; with the complicity of Morris [her landlord] and his wife, she paid rent at less than the agreed figure and pocketed the difference; she did by 'underhand dealing cause ... Thompson to be arrested by one Collins.' Much of this may be dismissed as Farrington's attempt to sling mud in the hope that a fleck or two would happen to stick. More important is the reiteration of his scepticism regarding the marriage ...⁴¹

In fact, Farrington's bill is both more calculated and more to the purpose than Tupper supposes. The tone of anger that Tupper detects is all the more remarkable given that the bill was drafted and signed by counsel. Admittedly, at first glance the bundle of miscellaneous charges that Farrington prefers seems to be difficult to explain, except on the hypothesis of anger or mudslinging. However, in attempting to assess what Farrington was trying to achieve, Tupper would have done better to examine the relief that he was seeking. Farrington prays the court as follows:

And for that yor. Oratr. cannot discover the truth of the prmises but by the oath of the said confederates whom yor. Oratr. hopes will discover the truth when upon their oaths to the intent therefore that they may true Answer make to all & only the matters before <menconed> ... (C6/242/13)

He goes on to list a series of questions that he wishes to have put to Mary Marvell, to be answered on oath: whether she was not received by Nelthorpe into his service as housekeeper; whether he paid her £10 a year; whether she did not take the lease of the house in Great Russell Street on Nelthorpe's instructions, followed by several other questions about the lease and the rent; whether Nelthorpe did not entrust some

⁴¹ Tupper, 'Mary Palmer, Alias Mrs. Andrew Marvell', p. 379.

of his goods and chattels to her custody and, if he did, what were they and what became of them; whether Marvell did not frequently borrow money from Nelthorpe, and whether or not there is some record of this borrowing in books or papers of Marvell's in her custody or power. He further asks that she set out on oath a list of all the books or papers of Marvell's that she has in her custody, produce them for his perusal, and state whether she has made any alterations to them.

As has already been mentioned, it is usual for the complainant in Chancery proceedings to ask as a matter of course for the examination of the defendant on oath, but the detailed and varied list of questions that Farrington puts forward for the examination of Mary Marvell strongly suggests that his primary aim is to unearth information about what happened to Nelthorpe's property after his death, whether he may have been cheated over the lease of the house, and whether there was evidence that Marvell owed him money. We have already seen that there is a disparity between the positions of the complainant and the defendant in Chancery proceedings, in that the former is in practice permitted to make allegations that need not necessarily be true, whereas the latter is required to answer those allegations truthfully and on oath. One important consequence of the inequality of the parties' positions is that Chancery proceedings were a very flexible instrument in the hands of complainants, and could be used for a number of purposes apart from securing justice in a particular case. Henry Horwitz lists five additional objectives that might motivate complainants, the last two of which are of interest in the present context:

- (4) using Chancery process as a means of making his opponent disclose his own position or situation or putting him under a compulsion to file an answer under oath; and/or
- (5) securing discovery via the taking of depositions that might be used in cases in other courts.⁴²

Farrington's bill reveals that he had very little information about the estate of Edward

⁴² Horwitz, *Chancery Equity Records and Proceedings*, p. 8.

Nelthorpe, which he was supposed to be administering, and his bill is best seen as an attempt to discover such information from the woman who appeared to him to have been Nelthorpe's housekeeper.⁴³ In order to subject Mrs. Marvell to the required examination, he had to make out a case by accusing her of unconscionable behaviour — in this case, of abusing the trust that Nelthorpe had placed in her. It is this circumstance, rather than anger or a desire to sling mud, that accounts for what Tupper perceives as the tone of Farrington's bill.

In much the same way, Mrs. Marvell's bill (item 7) is an attempt to find out more information about the estate which *she* is meant to be administering. This is the bill in which she accuses Farrington of removing Marvell's property from his lodgings at Maiden Lane. She also taxes him with concealing from her the existence of the security for £500, abusing her trust and taking advantage of her 'too easy credulity'. She asks the court for the examination of the defendants on oath 'to ye intent therefore that the sd confederates may sett forth & <discover> ye truth of ye <prmisses> & pticularly what jewells bonds bills writings [interlined: <moneys>] & other goods in pticular were taken away as aforesd out of the lodgings of the said Mr Marvell in Mayden Lane & by whom ...'

The main thing we learn from these two bills, then, is just how much in the dark Farrington and Mrs. Marvell were as to the estates of Nelthorpe and Marvell respectively. Farrington's ignorance, which his bill was designed to relieve, was in part a result of the secrecy in which Nelthorpe had had to operate, to avoid arrest and the seizure of his assets, and in part of the fact that, though they were partners in the failed business, they were not in each other's confidence. Mrs. Marvell's evidently arises from her never having discussed Marvell's financial circumstances with him, something about which more will be said in the final section of this chapter.

⁴³ As we have already seen, Mrs. Marvell answered that it was on Marvell's instructions, not Nelthorpe's, that she had taken the lease, though Nelthorpe was responsible for the rent and housekeeping expenses as well as her £10 a year.

Having gained what he could from the pursuit of Nelthorpe's assets, Farrington then turned his attention to Thompson. In his 1684 complaint, Farrington averred that he

... did by the Assistance of this court recover & receive part thereof [that is, of the partnership property] tho with greate trouble costs & charges all which yor oratr hath iustly divided amongst the said Credits besides yor oratrs owne estate And yor oratr is in pursuit of other part of the said estate by bills in this court & otherwise in which the said Thompson doth give yor oratr all the hindrance he can ...(C7/581/73)

Farrington was obviously persistent, and did not allow his lack of information to prevent him from seeking out money that could be used to pay the creditors and secure his own release. This is the answer to Empson's comment that it would seem pathetic to fight so long over £500, after having paid out £60,000. Farrington believed that there must be more money to be recovered, and was prepared to do his best to find it, and was presumably willing to take as much time as was necessary to recover even such a relatively small sum as £500. There is no reason to accept Empson's theory that *Farrington v. Marvell* was a 'test case' — that there were more bills in Marvell's name of which the parties were aware. There *were* other 'concealed' assets, but the difficulties attending their recovery were not the same as those in the case of the Wallis security. The removal of the partnership books, and of the bonds and securities entered into by debtors, had the effect of obstructing the collection of the debts owed to the bank, thus hiding those debts from the commissioners in bankruptcy. We cannot, in any case, conclude that Nelthorpe's concealment of the £500 was a minor and excusable irregularity, of little consequence in the context of the large amounts that the partners had paid out, and that they still owed.

So, Wall, Empson and Legouis are taking the wrong approach when they argue that Marvell may have believed himself to be justified in furthering Nelthorpe's scheme to hide at least £500 from the commissioners in bankruptcy. If Marvell had in fact taken part in the scheme, it would be difficult to find persuasive arguments

tending to legitimize or excuse his actions. However, any suspicion that persists as to his participation in the fraud is not supported by, for example, the necessity of his cooperation to the success of the scheme. At its strongest, such suspicion is grounded on the inference that might possibly be drawn from his friendship with Nelthorpe, that the latter ‘must have’ told his friend what he was doing, before using his name.

Marvell’s debt to the partnership

Farrington’s Chancery proceedings raise another question as to the justice of Marvell’s behaviour in relation to Nelthorpe, his partners and their creditors. Farrington’s main argument was that the Wallis security did not belong to Marvell’s estate because it secured the deposit of money which was provided by Nelthorpe. To prove that the money could not have been Marvell’s, he produced witnesses — notably the bookseller, Nathaniel Ponder — who swore that they had known Marvell, that he was reputed to be a poor man and that he had not been worth £100, ‘besides his books and furniture’, at any time in the five years before his death.⁴⁴ In addition, Farrington claimed that Marvell was in any case indebted to Nelthorpe for money lent to him out of partnership funds. To prove the debt, he produced three former employees of the business, Edmond Portmans, Thomas Speede and Gershom Prowd. Portmans, in his deposition dated 1 July 1682, when he was aged 59, says that he had been cashier and book-keeper to the partnership in 1675, at the time when Nelthorpe, like the other partners, was ‘declining in his credit’. He says that the partnership’s books showed Andrew Marvell as a debtor in an amount between £100 and £200. Speede’s deposition is dated 24 June 1682, at which time he was 38 years old. He says that he was ‘servant to the sayd Edward Nelthorpe’ in March 1675, when Nelthorpe was ‘declining in his credit’. He adds that Nelthorpe lent Marvell money from time to time and at the time of Nelthorpe’s death, Marvell owed him more than £140

⁴⁴ C24/1069 [Part 2, No 36].

as appeared from Nelthorpe's books shortly before he died. Prowd swore his deposition, in which he is described as a haberdasher, aged 29, on 4 July 1682. According to his deposition, he was a servant to Nelthorpe and his partners in 1675. He says:

That the sd Edward Nelthorpe in ye present Interro named did lend unto [deleted: the sd] Andrew Marvell in ye Interro named money from tyme to tyme and this Dept saith that the sd Andrew Marvell did stand Debtor in ye sd Edward Nelthorpe & ptners bookes at the time when they [deletion: <first>] broke ye sume of one hundred and fifty pounds or thereabouts which sd debt ye sd Edward Nelthorpe did desire might bee taken from ye sd Mr Marvells account & placed to his ye sd Mr Nelthorpes debet which hee did as this Dept beleeves that the sd Andrew Marvell might not receive any trouble from ye Coms of Bankrupt concerning such debt which hee the sd Andrew Marvell soe owed as aforesd to the sd Nelthorpe & ptners ...

Prowd is the only one of the three former employees who mentions this piece of allegedly irregular accounting on Nelthorpe's part but the silence of the others does not necessarily reflect badly on his credibility. Nelthorpe would obviously not want any more witnesses to the kind of actions that Prowd describes than were necessary. While Speede is able to give evidence as to Nelthorpe's declining credit in 1675, his evidence as to Nelthorpe's books relates to the later period, just before his death. Prowd's evidence, then, though uncorroborated, may well be credible. Farrington, on whose behalf Prowd was called as a witness, does not appear to have had any interest in disparaging Marvell's character,⁴⁵ and it is hard to imagine that Prowd himself had any. It is clear in any case that, far from being a creditor enjoying an illegal preference, as Wall suggested, Marvell was a *debtor* and, if Prowd is to be believed, one who was the intended beneficiary of some false accounting on Nelthorpe's part.

On the assumption that Prowd's evidence is credible, it is clear that, whatever may have been Nelthorpe's motives and intentions, Marvell did not especially benefit from this action. Since the books were never produced, it is likely that all or most of the debtors were spared the attentions of the bankruptcy commissioners — though

⁴⁵ On the other hand, he had a clear interest in showing that Nelthorpe or Thompson had assisted debtors in evading their liabilities.

some, like Wallis, found themselves having to deal with Farrington instead. More to the point for our purposes, we have no basis on which to assume that such an attempt to benefit Marvell could have been made only at his instigation or with his knowledge. As in the case of the Wallis transaction, Marvell's name is associated with an action that is both technically illegal and ethically questionable. In each case, the hypothesis of Marvell's complicity is supported neither by evidence nor by its following of necessity from the established facts, but his close friendship with the principal actor, Edward Nelthorpe, means that some suspicion nevertheless attaches to his conduct.

Marvell 'pleased to have the marriage kept private'

Marvell scholarship has reason to be grateful to Fred S. Tupper, for his discovery of the Chancery records that have been the basis of this discussion. It has less reason to be grateful to him for his interpretation of those records which, as we have seen, is based on a misunderstanding of the nature of the documents. He concluded that 'Mary Marvell' was an impostor, who initially made a false claim to be the poet's widow in order to assist Farrington in his attempt to recover the £500, and later fell out with Farrington when she saw that she might be able to keep the money to herself.

If Tupper is wrong about this and Marvell was indeed a married man, a further question arises as to the justice of his behaviour, though this time it is a question of justice in a broader sense than that relating to law and equity. It would seem that, apart from leaving his wife unprovided for, he kept her in the dark as to the state of his affairs, leaving her ill prepared to cope with widowhood. This was an imputation that disturbed Empson: his anxiety to acquit Marvell of failure to consider Mrs. Marvell's future needs is one of the factors that leads him to concoct — on the

basis of no evidence at all — the story of Marvell's annuity.⁴⁶ No doubt some of those who have accepted Tupper's theory of the widow's imposture have done so because it serves to avoid an imputation against Marvell that would otherwise have to be excused. Whether Marvell was married, apart from being of obvious biographical interest, is also relevant to the justice of his behaviour.

Tupper (pp. 384–387) places explicit reliance on four arguments in support of the case against Mrs. Marvell. The first of these is that, some three years after Marvell's death she seemed uncertain as to its precise date (16 August 1678), once wrongly stating that it was 10 August. Such uncertainty as to the date of her bereavement is, according to Tupper, difficult to reconcile with her claim to have been overcome with grief. Second, in a letter of 5 February 1681, to his brother-in-law Major Braman, Robert Thompson referred to her as 'Mrs. Palmer', whereas if she had really been married to Marvell, Thompson would have known it.

Tupper's third argument is both more substantial and more complicated. Mary Marvell knew that the world in general, including Marvell's sisters, Mrs. Blaydes and Mrs. Pople, thought that he had died a bachelor. The sisters, as Marvell's next of kin, must therefore have believed themselves to be the persons first entitled to take out administration of his personal estate.⁴⁷ They might have applied for this at any time, yet Mary Marvell seems to have delayed for several months before taking any steps to protect her interests. In Tupper's account, her belated decision to apply for administration was taken only after Farrington had come to the conclusion that he was going to have to sue Wallis to recover the £500 deposited by Nelthorpe. Before action could be commenced, somebody would have to take out administration of

⁴⁶ Empson, *Using Biography*, pp. 75–6.

⁴⁷ The Prerogative Court of Canterbury had jurisdiction over personal estate only, and references below to the estates of Marvell and Nelthorpe should be taken as including only personal property. Real property (that is, estates in land and buildings other than leaseholds) fell within the jurisdiction of the courts of Common Law and Equity. Marvell and Nelthorpe both died intestate, so any real estate which they may have had would have devolved on their respective heirs at law.

Marvell's estate. A widow, if one could be found, would be the person first entitled. Failing that, the sisters would be next. Farrington's confederate, the attorney John Greene, was willing to make the application as a creditor of Marvell's estate. However a creditor could obtain administration only after citing the persons entitled in priority to him, that is to say, giving them the opportunity to administer the estate first. The inference to be drawn from Mary Marvell's sudden and belated interest in the case, and the coincidence of that with Farrington's need for a cooperative administrator of Marvell's estate, is that Mrs. Marvell first advanced her pretence at Farrington's instance. By taking out administration jointly with Greene, she could provide the attorney with a means of leap-frogging the sisters or other next of kin.

Tupper's fourth reason for disbelieving Mrs. Marvell's claim is the fact that Greene joined her in the administration of Marvell's estate. Greene's answers make it clear that he was acting throughout in Farrington's interest, and that, in so far as any active steps were taken in the administration of Marvell's estate, he was the one who took them. The fact that Mrs. Marvell tolerated such interference shows, Tupper says, that she too was under Farrington's control.

The weightiest of Tupper's four arguments, if taken at face value, is the third, the one relating to the timing of Mrs. Marvell's first allegation of a secret marriage and her first taking steps to secure administration of Marvell's estate. However, Tupper's theory is undermined by the fact that he is mistaken as to the dates on which the letters of administration in both Marvell's and Nelthorpe's estates were taken out. In Marvell's case, he tells us that 'under date of September 30, 1679, and March 31, 1680, more than a year after Marvell's death, the administration was finally granted to Mary Marvell and John Greene ...' (p. 377). Nelthorpe's administration, he says, 'was granted somewhat tardily under the dates of April 30 and October 31, 1679, to Farrington' (p. 375). He does not ask, first, why the letters of administration

should have been dated in this double fashion or, second, why the Prerogative Court of Canterbury should apparently have issued such grants only on the last day of the month.

The two dates that Tupper cites appear in the right-hand margin of the entry in the records of the Prerogative Court.⁴⁸ The month of issue of the grant is not, by contrast, referred to in the entry itself. Nelthorpe's entry, for example, begins 'tricesimo die' (on the thirtieth day) but the month, October, is to be understood, the entries being grouped together by month. The two dates in the right margin, the last days of the sixth and twelfth calendar months *after* the grant, are the dates by which the administrators were to exhibit an inventory and an account respectively of the deceased's estate.⁴⁹ Administration of Nelthorpe's estate, then, was granted to John Farrington as a creditor of the deceased, in October 1678, within six weeks of his death. In a similar way, Tupper dates Marvell's administration more than six months after it in fact issued in March 1679.

When Tupper writes of the letters of administration to Nelthorpe's estate being granted 'somewhat tardily' (p. 375) to Farrington, and speculates as to the reason for the delay, he presents a highly inaccurate picture. To have obtained administration in less than six weeks, for which he needed the cooperation of Nelthorpe's widow, Farrington must have acted with all possible speed. Mrs. Marvell did not act quite so quickly. Seven months, rather than the thirteen suggested by Tupper, elapsed between Marvell's death and the issue to her of letters of administration. However, while Mrs. Marvell's delay was not as long as Tupper thought, it neverthe-

⁴⁸ PROB6/53 fol. 88v. and PROB6/54 fol. 25v. Empson provides an explanation of the double dates that is quite wrong, groundlessly asserting that the grant took effect only six months after it was issued: p. 58). See the Appendix below for copies of the entries.

⁴⁹ Henry Charles Coote, *The Practice of the Ecclesiastical Courts: with Forms and Tables of Costs* (Henry Butterworth, 1847), pp. 712–13, citing the Statute of Distribution (22 and 23 Car. 2, c. 10) as imposing the duty to exhibit the inventory and account in cases of intestacy. See also Miriam Scott, *Prerogative Court of Canterbury: Wills and Other Probate Records*, Public Records Office Readers' Guide No. 15 (Kew, Surrey: PRO Publications, 1997), p. 22, on the interpretation of Probate and administration records.

less requires explanation. The timing of her application suggests that it may have been determined by the expiry of a caveat that had been entered at the Prerogative Court to prevent administration of Marvell's estate being taken out without Farrington's knowledge.⁵⁰

The caveat was entered on Farrington's instructions, but in the name of Marvell's sister, Mrs. Blaydes who, as next of kin, had an obvious interest in his administration. It is clear that Farrington was acting without Mrs. Blaydes's authority, using her name as a cover in order to avoid making public his own interest.⁵¹ Mrs. Marvell alleges as much (item 7), and Farrington fails to deny it, though he does deny that he believed that Mrs. Blaydes had told Mrs. Marvell that she would have the caveat withdrawn (item 8). We do not know exactly what the effect of Farrington's caveat was.⁵² It would have been in the form of a notice, in Latin, to the Prerogative Court of Canterbury, that it should let nothing be done in the goods of Andrew Marvell unknown to the proctor for the caveator.⁵³ We know that by the first half of the nineteenth century, a caveat remained in force for six months, after which it could be renewed. While it was in force, a person applying for administration could not pursue the application without 'warning' the caveator. The warning fixed a date when

⁵⁰ The record of the caveat has not survived. Details are given by Mary Marvell in her bill and John Farrington in his answer (items 8 and 9).

⁵¹ It would not have been necessary for him to employ this subterfuge in the eighteenth and nineteenth centuries, when it was normal for caveators to hide their identities behind the fictitious name 'John Thomas': Coote, *Practice of the Ecclesiastical Courts*, pp. 439–40.

⁵² Clerke's *Praxis*, originally published in manuscript in about 1596 and a corrupt copy of which was printed in 1666 as *Praxis Francisci Clarke, Tam jus dicentibus quam alijs omnibus qui in Foro Ecclesiastico versantur apprime utilis* (Dublin: Nathaniel Thompson 1666), is the only practice manual published by a practitioner in the ecclesiastical courts prior to Oughton's *Ordo Judiciorum* (1728): J. H. Baker, *Monuments of Endlesse Labours: English Canonists and their Work, 1300-1900* (London: Hambledon Press with the Ecclesiastical Law Society, 1998), pp. 75–6. Clerke does not mention the caveat procedure.

⁵³ This is the form used in PROB40/1, the caveat book for 1666, which is the only caveat book earlier than 1744 that has not been destroyed.

the caveator and the applicant attended the court with their evidence.⁵⁴ Whether the procedure was similar in 1679 is impossible to say.

However, since neither Mrs. Marvell nor Farrington says that Mrs. Marvell ‘warned’ the caveat, or took any formal step to have it removed, it is likely that she waited until the caveat had expired before she pursued her application. The fact that she waited for about seven months is suggestive, but even if the period for which the caveat was in force was not six months, it is probable that its existence accounts for at least part of her delay. This delay might indicate that she was not able to produce independent evidence of her claimed marriage to Marvell. Equally, however, it is possible that she was unwilling to incur the costs of the contested hearing that would have been necessary if she had insisted on proceeding while the caveat remained in effect.⁵⁵ Although she swore that she believed that Marvell had assets, in the event no assets were found and we now know that Farrington was able to produce persuasive evidence of Marvell’s poverty in the five years before his death.⁵⁶ It follows that the putative assets were not immediately visible and there was no reason for her to think that they would be easily recoverable. In these circumstances, a reluctance on her part to incur expense is to be expected.

While Mrs. Marvell seems to have taken no formal steps to challenge the caveat, she says that she did contact Mrs. Blaydes about it with the aim of having it withdrawn.

Mr. Farrington having some secrett designs privately caused a caveat to be entred in the prerogative Court of Canterbury & other places in the name of one Mrs. Blades sister to the said Andrew Marvell whereof yor. Oratrix informing the said Mrs. Blades shee told yor. sd Oratrix that shee had not

⁵⁴ Coote, *Practice of the Ecclesiastical Courts*, pp. 439–40; Philip William Dodd and George Henry Brooks, *The Law and Practice of the Court of Probate, Contentious and Common Form: with the Rules, Statutes and Forms* (London: V. & R. Stevens, Sons, and Haynes, 1865), pp. 2–4.

⁵⁵ A hearing might not have been very expensive, as all proceedings before the Prerogative Court were summary in form: H[enry] C[onsett], *The Practice of the Spiritual or Ecclesiastical Courts: To which is added, A Brief Discourse of the Structure and Manner of forming the Libel or Declaration* (1685), 23. However, it would inevitably have been more expensive than an uncontested application.

⁵⁶ Kavanagh, ‘Andrew Marvell “in want of money”’, pp. 209–11.

entred nor was there by her ordr. any Caveat entred to hinder yor. Oratrix Admsracon to her husband as aforesd ... (Item 7, C7/587/95).

Tupper (p. 387) is inclined not to believe Mrs. Marvell on this point because she does not offer to produce Mrs. Blaydes's letter, though if it had existed she would surely have appreciated its importance as evidence and preserved it. Once again, though, Tupper is not paying attention to the nature of the documents. Mrs. Marvell makes this claim about Mrs. Blaydes in her bill, which is concerned with allegation rather than proof and where an offer to produce an exhibit would be entirely out of place. Several times in his various answers, Farrington says that he 'doubts not to prove' or 'hopes to prove' some statement the truth of which is not within his direct knowledge. Even then, however, he does not say what evidence he intends to produce. None of the parties uses a similar formula in a bill of complaint and there is no reason why they should be expected to. No conclusion, therefore, can be drawn from the fact that Mrs. Marvell does not offer to produce a letter from Mrs. Blaydes.

Tupper misinterprets the effect that the caveat had on the timing of Mrs. Marvell's application, because he is hopelessly confused about the date when the caveat was entered. He believes that Farrington filed it only *after* he had obtained the administration of Nelthorpe's estate, which by his reckoning was on 30 April 1679. Accordingly, he thinks that there was a window of about eight months, in which Mrs. Marvell could have made an application for administration, unobstructed by a caveat. It is this confusion on Tupper's part that provides the correct explanation of what appears to him to be a contradiction in Farrington's account of events, as to when Mrs. Marvell first claimed to have been married to the poet:

On one occasion Farrington implies that she advanced her claims immediately after Marvell's death ... [cites C6/242/13]. At another time, Farrington declares: 'About the time of the death of the said Andrew Marvell this Deft. understood the Complt. pleaded that the said Andrew Marvell had married her.' [C8/252/9] But twice Farrington quite definitely asserts that Mrs. Palmer did not claim to be Mrs. Marvell until after he had filed the caveat against taking out administration on Marvell's estate ... [cites C6/242/13]. Did Mrs. Palmer first claim to be Mrs. Marvell soon after Marvell's death or months

later, after the caveat had been filed? For the present the question must remain unanswered. (pp. 375–6)

The answer is that it was not ‘months later’ that Farrington filed the caveat; in all likelihood it was shortly after Nelthorpe’s death, and little more than a month after Marvell’s. The second statement by Farrington that Tupper cites reads in full as follows:

But about the time of the Death of the said Andrew Marvell this Deft understood the Complt pntended that the said Andrew Marvell had married her and this Deft beleiveing that the said Mr. Nelthorpe by reason of his greate intimacy with the said Andrew Marvell had taken some bills bonds or notes in the name of the said Andrew Marvell And this Deft being Administrator of the goods & chattels of the said Mr. Nelthorpe he this Deft did cause a caveat to be putt in to pvent the Complt or any other persons takeing Admstracon without this Defts knowledge (Item 8, C8/252/9).

Tupper evidently takes the phrase ‘this Deft being Administrator of the goods & chattels of the said Mr. Nelthorpe’ to mean that Farrington had already secured letters of administration of Nelthorpe’s estate at the time he entered the caveat in Marvell’s. However, Farrington may be using the word ‘Administrator’ in the loose sense of ‘intending administrator’ or ‘person entitled to the administration.’⁵⁷ The Chancery records show that Farrington was aggressive and persistent in defence of his interests. We have seen that he acted very quickly to obtain control of Nelthorpe’s estate. It is not credible that he would for several months have neglected to take the complementary step of entering the caveat in Marvell’s. Empson suggests (p. 47) that both applications could have been made in the course of a single visit to the court.

There is a second element to Tupper’s third argument — that it was only when Farrington realised that he was going to have to sue Wallis that Mrs. Marvell made her application — which also requires further examination. It was not until Midsummer 1681 — nearly two years after he became one of Marvell’s administrators — that Greene commenced suit against Wallis. Greene and Farrington both assert that they

⁵⁷ On the other hand, he may simply have got his dates mixed up: in his complaint in the main action (item 1) Farrington says that Marvell had died in October 1678, about a month after Nelthorpe, instead of a month before. October was, of course, the month in which he officially became Nelthorpe’s administrator.

did not know about the existence of the security at the time that Marvell's administration was taken out. It has to be said that, though these assertions were made on oath, they are highly suspect for the reasons explored above, pages 238 to 240.

We cannot, in short, discount the possibility that notwithstanding his sworn assertion to the contrary, Farrington already had the security in his possession when application was made, at his expense though not in his name, for administration of Marvell's estate. About six months earlier, he had entered the caveat, so that nothing could be done in the administration of Marvell's estate without his knowledge. What could be the point of his actions, unless it was to get hold of the security? We have seen (page 239 above) that Farrington attempted to account for this apparent discrepancy by saying that he suspected that Nelthorpe had placed unspecified assets in Marvell's name. So, even if Farrington did not know in March 1679 exactly what he was pursuing, it is conceivable that he persuaded Marvell's landlady to make a false claim of widowhood, in order to facilitate his gaining control of Marvell's estate. However, Tupper is wrong to say that 'the logic of events clearly demonstrates' that this is what happened. The timing of the application is equally consistent with the proposition that Mrs. Marvell was acting honestly.

So, the third and apparently the weightiest, of Tupper's four arguments does not establish his case with 'a high degree of probability', as Legouis thought.⁵⁸ The other three will have to be dealt with more briefly. First, there is the uncertainty as to the date of her bereavement. Here, as elsewhere, Tupper is not paying attention to the nature of the documents. The answers and bills alike were all settled by counsel and not, as Empson (p. 43) imagines, directly dictated by the parties to court clerks. It would not be surprising if counsel were to take greater care to avoid inaccuracy (and

⁵⁸ Originally, Legouis was evenly balanced on the question of Marvell's marital status. By the time he came to produce his abridged and revised English translation, he had been persuaded by Tupper's researches that Mrs. Marvell was a fraud: Pierre Legouis, *André Marvell: poète, puritain, patriote 1621–1678* (Paris: Henri Didier, 1928), p. 228; Pierre Legouis, *Andrew Marvell: Poet, Puritan, Patriot*, 2nd ed., (Oxford: Oxford University Press, 1968), p. 121.

inadvertent perjury on the part of their clients) when drawing answers than they were when drawing bills. When Mrs. Marvell gives the correct date, 16 August 1678, it is in an answer (item 2); the incorrect one, 10 August, is in her bill (item 8). In other places, she does not specify the precise date. Several of the parties and witnesses in the action are remarkably vague about dates, so Mrs. Marvell's uncertainty is a tenuous ground on which to base any conclusion as to her credibility. Second, there is Robert Thompson's reference to her as Mrs. Palmer. The marriage, if it occurred, was a clandestine one, and she continued to be known by the surname of her previous (or only) husband. Therefore, the inference is surely not warranted that because Thompson called her Mrs. Palmer, he must have known that she was not Mrs. Marvell.

Tupper's fourth and final reason is Mrs. Marvell's acceptance of Greene as her fellow administrator. Greene was Farrington's agent, and was prepared to claim that he was Marvell's creditor when in fact the real creditor was Nelthorpe's estate. Might not his fellow administratrix have been likewise prepared to pose as Marvell's widow, and for the same reasons? The possibility cannot be excluded, but an equally plausible and less discreditable explanation of her cooperation with Greene can be suggested. As we have seen, there were good reasons for Mrs. Marvell's apparent reluctance to bear the expenses of taking out administration. Farrington was prepared to pay her costs, but on the condition that she accept Greene's 'assistance'. That, combined with the slight danger that he might renew the caution, is enough to account for her agreement that Greene should act as joint administrator.

If Tupper fails to provide ultimately persuasive reasons why we should regard Mrs. Marvell as a fraud, it is equally the case that positive evidence for the marriage is lacking. According to her, the marriage took place at Holy Trinity Church, in Little Minories, on 13 May 1667 (item 10, C6/242/13). Holy Trinity claimed to be entitled to conduct marriages without the prior publication of banns or the issue of a licence.

Although such marriages were conducted in breach of the legal formalities, the irregularity did not invalidate them. As a result, the church attracted a truly astonishing amount of marriage business.⁵⁹ While a single volume was enough for all the births that were registered in the parish from 1553 to 1710 and all the burials from 1566 to 1713, the marriages from 1579 to 1713 take up eight surviving volumes (six of those covering the period 1644–1692, when the church was a major centre for clandestine marriages) and several are missing.⁶⁰ The longest gap in the surviving registers is from 8 April 1663 to 26 March 1676. The gap covers the date on which Mrs. Marvell claimed to have been married. Tupper, who did not appreciate just how busy Holy Trinity was, assumed that only one volume of the register had been lost (p. 380). In 1661 and 1662, the last two full years before the hiatus, there were 532 and 397 marriages respectively; in 1676, when the register resumes, there were 759.⁶¹ The surviving volumes are of different sizes, but the largest contains about 1,500 entries. If marriages continued at the previous rate, it is probable that at least three volumes are missing. Unfortunately, we have no way of determining whether these were already missing in 1682, when Mrs. Marvell made her claim.

The evidence, then, is inconclusive but on balance tends to favour Mrs. Marvell. Her sworn answer at C6/242/13 carries more weight than the self-interested allegations of Farrington and Greene. Lies that could be proven to be false would leave her open to a charge of perjury, and the stakes at issue — the security that predictably was determined to belong to Nelthorpe's estate — were too small and uncertain to justify the risk. Then again, if the marriage register for May 1667 was already missing, the risk of getting caught in a lie might have seemed worth taking. For these reasons, and because any attempt to examine whether Marvell treated his

⁵⁹ Edward Murray Tomlinson, *A History of the Minorities* (London: Smith, Elder & Co., 1907), pp. 226–40; R. B. Outhwaite, *Clandestine Marriage in England, 1500–1850* (London and Rio Grande, Ohio: Hambledon Press, 1995), p. 24.

⁶⁰ Tomlinson, *A History of the Minorities*, p. 389.

⁶¹ Tomlinson, *A History of the Minorities*, pp. 232–3.

wife shabbily is complicated if we cannot be sure that he actually had a wife, it will be assumed in the remainder of this section that Mary Marvell was what she claimed to be. There is no need to spend time on Farrington's allegation that she was required to eat her meals separately from the others in the household, like a servant (item 8). Mrs. Marvell denies it on oath, and it is improbable that Farrington was a frequent visitor to Great Russell Street. He was certainly, by this time, not on good terms with Nelthorpe.

The charge against Marvell, insofar as his behaviour towards Mary Marvell is concerned, is that he left her without information as to the state of his affairs and that he failed to make any provision for her after his death. She claims that Nelthorpe told her that Marvell had assets (item 10, C6/242/13). Apart from the trunks of gold and jewels which she alleges were in Marvell's lodgings in Maiden Lane (but which she does not claim to have seen for herself), this is the only substantial ground she can advance for her asserted belief that Marvell had left some personal estate. Evidently, then, Marvell never discussed his circumstances with her. (Alternatively, it is conceivable that he told her the truth — that he had nothing — but that Farrington's interest in the administration of the estate led her to suspect that her husband had exaggerated his impecuniosity.) No doubt, this reflects badly on Marvell but he may have felt that, since there was nothing, there was nothing to discuss. Equally, he may have hoped that his circumstances would improve, and that he would, eventually, leave behind an estate worth the trouble of administration.⁶²

Biographical conclusions

Tupper comments that 'it would not be difficult to derive the impression that

⁶² It may be that, having already been widowed, Mrs. Marvell was well used to fending for herself economically. On 10 June 1681, one Mary Marvell of the Parish of St. Giles in the Fields swore a deposition in the case of *Love v. Jevon* in which she testified that in 1674 the Complainant Love had owed her a debt of £25: Town depositions Bundle 1057. At the time of the deposition, this Mary Marvell was aged about 50. If she is the same woman, she would have been aged 36 (to Marvell's 45) at the date of the claimed marriage.

Thompson and his friends — including Marvell — were unmitigated scoundrels,⁶³ and seeks to correct that potential impression, at least in relation to Thompson, by citing his correspondence with his brother-in-law, Major Braman. This correspondence, Tupper says, reveals Thompson as ‘a person of refinement and insight’. Wall agrees, remarking that the correspondence with Braman shows Thompson to have been ‘a man of great dignity of mind and deep religious feeling.’⁶⁴ Yet, according to what Mary Nelthorpe had been informed, Thompson had resolved to live out his life in relative comfort in the rules of the King’s Bench, while making no effort to discharge his substantial liabilities. Farrington, who ‘was obviously a liar,’⁶⁵ at least appears to have been dogged and untiring in his endeavours to pay off the creditors, if only at the rate of 2s. in the pound.⁶⁶ Obviously, Farrington was motivated by self-interest: he was not content to spend the rest of his life under arrest, even if Thompson was. If it is difficult to determine which of these two was the less blameworthy, Edward Nelthorpe is a still more elusive figure. Farrington accuses him of a combination of fraud and incompetence but — in the same document, C7/581/73 — complains that Thompson’s neglect of his duties in managing the bank had caused additional burdens to fall on Nelthorpe as well as on Farrington. None of the most damaging accusations that Farrington levels at Nelthorpe is made on oath, though it is possible that this is just an accident of pleading (or, perhaps, of the survival of Chancery records). In particular, we do not know whether Nelthorpe managed to hide away a much greater volume of assets than the £500 that he deposited with Charles Wallis.

⁶³ Tupper, ‘Mary Palmer, Alias Mrs. Andrew Marvell’, p. 373, n. 40.

⁶⁴ Wall, ‘Marvell’s Friends in the City’, p. 207.

⁶⁵ Wall, ‘Marvell’s Friends in the City’, p. 207.

⁶⁶ Thompson, in his complaint against Farrington and Mary Nelthorpe, accuses Farrington of settling with some creditors at 2s. in the pound, taking assignment of their bonds, in which Thompson is jointly liable, and then threatening to sue Thompson for the full amount: C6/283/87.

As for Marvell, all the evidence is consistent with the hypothesis that he did no more to help Nelthorpe than to arrange a place for him to live where he could avoid arrest by his creditors and examination by the bankruptcy commissioners. Marvell was partly dependent on Nelthorpe, at least to the extent of living, when he did not stay in Maiden Lane, in the house for which Nelthorpe paid the rent and other expenses. Irrespective of the evidence, then, many will find implausible the proposition that Marvell did not know about the activities of his close associate. Our difficulty arises in part from the fact that we do not know how guilty the associate was. In these circumstances, it is not at all surprising that we should not be able to determine how guilty that makes Marvell, by association.

Conclusion

It was suggested in the Introduction that, when we examine the various treatments of justice in Marvell's poetry and prose, our composite impression is one of ambivalence. This should not be in itself surprising: there are reasons to think that ambivalence is a very widespread response to the idea of justice. A strong feeling that rights should be respected, duties enforced, transgressions punished and damage redressed in a context of fairness (both procedural and substantive) is likely to coexist with a belief that such an ideal state is rarely likely to be achieved; that the necessary balancing act is, for the most part, beyond our abilities as a species. However, while ambivalence about justice may be widespread, it affords a writer of Marvell's skill, subtlety and peculiar characteristics of mind an opportunity to make the commonplace fresh and surprising. If the freshness and surprise cause us to examine our ambivalence and perhaps to dissect it into its conflicting impulses, we may have reason to be grateful.

We have seen that, in a poem that is certainly in some sense an encomium of Cromwell, Marvell shows Justice pleading in vain against one of the general's most significant actions, while the description of him as 'just' comes from a defeated enemy. A few months later, accompanying Marvell's rousing defence of 'the poet's time', we find the shade of Ben Jonson pronouncing an exquisitely just but entirely fanciful sentence on that of Thomas May (chapter 1). The lyric poetry, notably 'The Nymph complaining' and 'Upon the Death of Lord Hastings' explore the contradictions in the concept of justice from differing if complementary perspectives, neither of which leaves the reader feeling sanguine. Here, arguably, scepticism predominates (chapter 3). In contrast, in the prose works (chapter 4) and the longer satires (chapter 2), we encounter anger and raillery at the failure of the Court and of powerful men to act justly, thus implying that justice *ought* to have been attainable. Here too, though,

there is ambivalence: it appears that Marvell's opposition to the religious intolerance of his fellow parliamentarians and of Church leaders prompts him to support, while his suspicion of the king's motives and awareness of the likelihood of abuse prompts him to oppose, the royal power to dispense with statute law.

It is arguably his writings about Grotius and belligerence between the Dutch and the English that best exemplify his ambivalence, however. In 1653, we find him deploying Grotian ideas against the Dutch, while apparently preferring Selden's critique of the doctrine of *Mare liberum* (and thus, by implication, the Englishman's more traditional conception of natural law and the law of nations). Some fourteen years later, however, he seems to be willing to relinquish the claim to English dominion over the sea without much expression of regret. He lacerates the Court of Charles II for its habitual failure to negotiate in good faith but the ground of his criticism seems to shift between dismay at the government's perfidy and anger at the unwillingness or inability to use it to further English interests. It is not, on the basis of his writings, possible to decide with certainty whether it is the injustice of the Court's behaviour or the futility of that injustice that he finds more reprehensible.

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