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ADAM SMITH ON LAW

NEIL MACCORMICK*

PROLOGUE

So firm has been the grip of Bentham and Austin on the British juristic imagination that jurists have all too rarely considered their predecessors. From Bentham's and Austin's mixture of rigorous conceptual analysis and implausibly simplistic utilitarianism, we have sifted out the analytical element and our dominant jurisprudential tradition has concentrated on perfecting and re-arguing analytical schemes. That is not to be regretted in itself, since rigorous analysis is an essential groundwork for any worthwhile philosophical effort. It should, however, be deplored that we have failed to give adequate attention to what went before Bentham in eighteenth century legal theory. In particular, the writings of the Scottish enlightenment and the later seventeenth century—by jurists such as Stair, Erskine, Bankton, Kames, and John Millar and by philosophers such as Francis Hutcheson, David Hume, Adam Ferguson, Thomas Reid and Dugald Stewart—elaborate themes which should have been developed, not neglected.

The disputes over natural law and rationality in ethics among the Scottish moralists were carried on at a level to which Benthamite moralizing on the basis of a merely asserted principle of utility never aspired; and the attempts of the Scottish moralists to account for the historical development of legal orders within theories of economy and society has been altogether too much neglected since then—it has been left to sociologists such as William C. Lehmann to renew our interests in their theories.

It is within that general intellectual context that we must place Adam Smith as a theorist of law. Smith succeeded Francis Hutcheson as professor of moral philosophy at Glasgow in 1750 at the age of twenty-seven. He followed the contemporary understanding of the tasks of his office by giving a series of lectures on natural theology, ethics, jurisprudence, and political economy. His course on ethics was worked up for publication in 1759 under the title of *The Theory of Moral Sentiments*. The work on political economy led to the publication of *The Wealth of Nations* in 1776, thirteen years after his resignation from the Glasgow chair. He continued working on other

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themes, but shortly before his death in 1790, he gave orders for the destruction of all of his manuscripts save a few essays entrusted to his executors for publication.

In 1896, however, Professor Edwin Cannan discovered and edited a remarkably full set of student's notes from Smith's "Lectures on Justice, Police, Revenue and Arms," being none other than the lectures on jurisprudence—of which presumably the more developed manuscript by Smith had been destroyed in 1790. Almost twenty years ago, Professor Lothian of Aberdeen discovered another more complete set of notes from the same course of lectures, apparently belonging to an earlier year. The recent publication of this version of Smith's *Lectures on Jurisprudence*, under the joint editorship of Professors R.L. Meek, D.D. Raphael and P.G. Stein, will doubtless occasion a revival of interest in this aspect of Smith's work—together, it may be hoped, with a revival of interest in the legal theories of the eighteenth century generally.

It was from the topics covered in those parts of the lectures dealing with police, revenue, and arms that the themes of *The Wealth of Nations* derived. The relevance of "revenue" is obvious, but it needs to be recalled that for Smith "police" had nothing much to do with the gentlemen in blue. "Police," Smith said, "is the second general division of jurisprudence. The name is French and is originally derived from the Greek *politeia*, which, though properly signifying the policy of civil government, came to mean only the regulation of the inferior parts of government, *viz.*, cleanliness, security, and cheapness or plenty. Smith dealt with cleanliness and security fairly summarily before proceeding to the theme of cheapness or plenty in Division II of Part II of the lectures. There we find much of the theorizing of *The Wealth of Nations* already present in embryo. "Arms" were dealt with in *The Wealth of Nations* under "Expenses of the Sovereign."¹

In these days of interdisciplinary endeavour, it is pleasing to discover that the origins of economics were so firmly located by the inventor of the dismal science within the second general division of jurisprudence, namely, "police." It is time now for jurists to inquire and discover what economics has now to offer for the understanding of law. Where would be a better place to start than by an inquiry into what Adam Smith himself had to offer?

1. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, bk. V. ch. I, pt. I (Glasgow ed. 1976) (1st ed. 1776).

In what follows I lay no claim to originality; I have been much influenced by works of colleagues such as Professor T.D. Campbell,² Professor Andrew Skinner,³ Professor P.G. Stein,⁴ and Mr. G.L. Davidson.⁵ In particular, my account of what Smith has to say owes a great deal to Skinner's essay, *Adam Smith on Law and Government*. To some extent, one is faced with the task of reconstructing themes out of lectures which he had hoped would never be published. In that, I merely follow where others have led.

NATURAL RIGHTS AND POSITIVE LAW

One of the most fascinating things about Adam Smith is the way in which he combined, as the basic elements of the economy of different forms of human society, a theory of natural rights with a theory of the social development of laws and legal institutions. His lectures on justice begin with the confident assertion that "[t]he end of justice is to secure from injury."⁶ Human beings may be injured in several respects; namely, as human beings simpliciter, as members of families, and as members of states. Taking the first of these categories as the principal one, which indeed it was for Smith, he tells us that a human being "may be injured in his body reputation or estate."⁷ Smith draws an important distinction between injuries to body and reputation and injuries to estate. "These rights which a man has to the preservation of his body and reputation from injury are called natural, or as the civilians express them *iura hominum naturalia*."⁸ Injuries to a person's estate are different, in the sense that "his rights to his estate are called acquired or *iura adventitia*, and are of two kinds, real and personal."⁹

2. T.D. CAMPBELL, *ADAM'S SMITH'S SCIENCE OF MORALS* (1971).

3. Skinner, *Adam Smith on Law and Government*, PERSPECTIVES IN JURISPRUDENCE (E. Attwooll ed. 1977).

4. P. Stein, *Law and Society in 18th Century Scottish Thought*, SCOTLAND AND THE AGE OF IMPROVEMENT (1970); P. Stein, *The General Notions of Contract and Property in 18th Century Scottish Thought*, 1963 JUR. REV. 1; P. Stein, *Legal Thought in 18th Century Scotland*, 1957 JUR. REV. 1; P. Stein, Rights and Relativism in Adam Smith (unpublished paper read to 1975 Conference for the Association for Legal and Social Philosophy).

5. G. Davidson, *Adam Smith's Lecture on Justice* (1974) (unpublished dissertation written for LL.B. at Cambridge University).

6. A. SMITH, LECTURES ON JURISPRUDENCE 397-99 (Glasgow ed. 1978) (also found in A. SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS 3-4 (E. Cannan ed. 1896)).

7. *Id.*

8. *Id.*

9. *Id.*

In drawing these distinctions, Smith was, of course, anything but original. As befitted a professor of moral philosophy giving lectures on justice, police, revenue and arms, he was simply expounding some distinctions common among civilian writers of the period. It was no doubt his good fortune to have been reared in the civilian tradition of the Scottish universities, a tradition which by contrast to that prevailing in contemporary English legal education secured a systematic and principled approach to tasks of legal description and analysis. But if the schema was unoriginal, the use to which Smith put it was far from unoriginal. Looking to his moral philosophy as expressed in the *Theory of Moral Sentiments*,¹⁰ we find a particularly interesting account of what constitutes an injury; if we look to his political economy, which was already developing in the lectures on justice, police, revenue, and arms, we find one of the most interesting expositions anywhere of the correlations between conceptions of injury and forms of society.

First, I shall deal briefly with his general notion of injury. As is well known, Smith's general account of our moral perceptions advanced in the *Theory of Moral Sentiments* is based on the idea of the "impartial spectator."¹¹ Of the actions which human beings may take in relation to each other, some cause pain and distress. The person who suffers pain, distress or other harm from the action of another human being has a natural inclination to resent it, all the more so if he sees that the harmful act was intentional, and was intended to be harmful. Human beings have the capacity for sympathy (or as we might say, empathy) with each other. Someone who observes a harmful act intentionally being done by one person to another, can enter by sympathy into the feelings of the victim, and can in some degree, though not as acutely as the victim, share in the sense of resentment. But of course, this depends equally on being able to enter into and understand the motives of the attacker. If, for example, it should turn out that the attacker is retaliating against harm previously done, this may lead the spectator to share in the resentment of the attacker and to regard the attack as justified rather than to enter sympathetically into the resentment of the victim. Of course, if the spectator happens to be someone who is already "on the side of" either the attacker or the victim, this will

10. A. SMITH, *THE THEORY OF MORAL SENTIMENTS* (Glasgow ed. 1976) (1st ed. London and Edinburgh 1759).

11. *Id.* at pt. II, § III, ch. 1; see T.D. CAMPBELL, *supra* note 2; Skinner, *supra* note 3.

render his approbation or disapprobation of the action no less partial than that of the party whose side he takes.

Since morality is based on a common sense of propriety and impropriety among human beings, the common position can be found only by reference to the position of an impartial spectator; that is, one who is not predisposed to take the side of either of the parties. What is more, the worth of an impartial spectator's judgment is dependent on the degree of his knowledge, and we can never have perfect knowledge of the actions, intentions, and motivations of other human beings. We can, however, have or acquire a relatively good understanding of our own intentions and motivations. The extent to which human beings possess a fully developed moral judgment depends on their, as it were, constructing within their breast an ideal impartial spectator who is genuinely impartial in relation to themselves and those with whom they deal, but who is fully informed of the intentions and motivations of the agent, because the impartial spectator shares them. So for each of us, our moral judgments are framed by a reference to this ideal impartial spectator, this "man within the breast" with whom we can enter into dialogue in moral matters.

Rough and crude as that explanation is, it enables one to understand Smith's idea of an injury. When a person suffers harm that he resents, as the result of the act of another person, and when the impartial spectator can enter into and fully share in the ensuing resentment in degree and kind, or rather, to the extent that the impartial spectator can enter into that resentment, we may say that the harm causing act was an injury. From the impartial spectator's point of view, an appropriate act of retaliation is then justified, and indeed constitutes a just punishment for the injury. Thence we derive our basic notion of injury, and our notion of justice as the punishment or other correction of injuries. We may observe that this leads to a theory of justice in which justice is necessarily conceived of as being corrective rather than distributive.

In turn, we can make sense of the idea that there are natural rights; there are natural rights to the extent that there are natural injuries. Natural injuries are those which people can suffer, inflict, and rightly resent in any social setting whatsoever. When one person hurts another in his body or his reputation, I do not need to know anything more about the social or economic background in order to know that a wrong or an injury has been done. Though different cultures may take different actions in repression of, retalia-

tion for, or correction of the wrongdoing, we need postulate no substantial degree of cultural relativity in the recognition that a wrong has been done.

In some respects also, Smith is prepared to treat some basic elements of adventitious rights as being in the same sense natural. For example, if someone has taken possession of an ownerless thing, as by killing a wild animal, invasion by another of that possession would be resented, and the resentment would attract the sympathy of the impartial spectator.¹² The same is true for voluntary obligations. If someone knowingly puts another person in a position of relying on him for performance of some act, which for Smith is the essence of promising, then subsequent disappointment of the person who has that reasonable expectation is a wrong in the view of the impartial spectator.¹³ Nevertheless, in general terms, although adventitious rights may have in such ways "natural" foundations, their protection and enforcement, and indeed in some measure their institution, are matters regulated by positive law. Further, they are matters that positive law regulates in various ways according to the circumstances, with the regulations being determined chiefly by the mode of economy of a society. This will sufficiently appear in due course. What presently has to be observed is the relationship between Smith's basic theory of positive law and his notion of injury.

So far as concerns the nature of positive law, Smith subscribes to the standard voluntarist notion, later adopted by Benthamite and Austinian "positivists," that the actual positive law of a state is to be identified with the command of the sovereign.¹⁴ Positive law, as such, emanates from organized institutions of government. But as to its function, the aim of positive law is to secure justice, in the sense of the prevention and repression of injuries.¹⁵ It is not a substitute for what is morally right, but a reinforcement of it. There are at least some circumstances in which people in society will exhibit a tendency to unjustly invade each other's rights, and in which there will not be proper security for the enjoyment of rights. In these circumstances there must be positive law, not to define, but to secure

12. See A. SMITH, *supra* note 6, at 459 (Cannan ed. at 107-09).

13. *Id.* at 472 (Cannan ed. at 130-31).

14. See A. SMITH, *supra* note 10, at pt. III, ch. 5, ¶ 6, p. 165. "All general rules are commonly denominated laws . . . [for example,] laws of motion. But those general rules which our moral faculties observe . . . may more justly be denominated such. They have a much greater resemblance to what are properly called laws, those general rules which the sovereign lays down to direct the conduct of his subjects." *Id.*

15. See A. SMITH, *supra* note 10, at pt. II, § II, ch. 1, p. 78-82.

justice among people. It is when we consider what in Smith's view these circumstances are that require positive law, we hit upon the sociologically innovative aspect of his theorizing about law.

LAW AND ECONOMY IN GENERAL

At this point we must return to the theme of acquired rights. A person's estate is composed of the sum total of his acquired rights.¹⁶ These Smith divides into the standard categories of real rights and personal rights. Real rights he subdivides into four kinds, of which the first three are standard: property, servitudes, pledges, and exclusive privileges. Property, Smith analyzes in terms of the right to exclusive possession of a thing, together with the power to recover the thing owned from any other possessor whatsoever. Servitudes and pledges (in which term Smith includes mortgages) he analyzes in a quite standard way. An exclusive privilege, says Smith, is like "that of a bookseller to vend a book for a certain number of years, and to hinder any other person from doing it during that period."¹⁷ I do not know whether Smith's use of the concept of "exclusive privilege" in this context is original; certainly, it is a brilliant way of characterizing various forms of "incorporeal property" which have become much more common since Smith's time. Copyright obviously fits the category; as would patents and various forms of statutory monopoly, and even perhaps such things as equity shares. Smith also includes in "exclusive privilege" the right of an heir who has not yet entered on the inheritance, and suggests that there might be "natural" rights by way of exclusive privileges; for example where a hunter has started a hare and pursued her for some time and has thus, in Smith's view, a right against all comers to pursue her to the final kill.¹⁸ The identification of this category of rights that are real but incorporeal is clearly of some importance; certainly for Smith, in light of his political economy, given his views on the undesirable quality of monopolies, the category was important.

Rights under contracts and the right to reparation of damage done by delinquency also belong to the category of acquired rights. Smith would certainly have been anxious to deny in both cases the fashionable contemporary thesis that such rights have no moral foundation; and it is submitted that he would be entirely correct. But he is surely right in also saying that even if the basic right to performance

16. See A. SMITH, *supra* note 6, at 399-401 (Cannan ed. at 6-8).

17. *Id.* at 400 (Cannon ed. at 7).

18. *Id.*

of a promise, or to be free from harm, are in a sense natural, nevertheless the remedial right to compensation for contracts broken or harm done is a creature of positive law.

"Acquired rights such as property require more explanation [than natural rights]. Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government."¹⁹ It is this basic thesis of Smith's—that property and civil government, and therefore positive law (which is the creature of civil government), are closely intertwined—which is of the greatest interest to us. He put the same point another way: "Till there be property there can be no government, the very end of which is to secure wealth and to defend the rich from the poor."²⁰ These words, taken from the lectures, are echoed in the section of *The Wealth of Nations* dealing with "The Expense of Justice."²¹ It was a fundamental tenet of Smith's, which nowadays most people wrongly ascribe to Karl Marx, that forms of government and property relations are mutually interdependent. Positive law is shaped, according to Smith, by the mode of economy of a society. People have not always lived in societies subjected to formal institutionalized magistracies or governments.

Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days' labour; so there is seldom any established magistrate, or any regular administration of justice. Men who have no property, can injure one another only in their persons or reputations. But when one man kills, wounds, beats or defames another, though he to whom the injury is done suffers, he who does it receives no benefit. It is otherwise with the injuries to property. The benefit of the person who does the injury is often equal to the loss of him who suffers it. Envy, malice, or resentment, are the only passions which can prompt one man to injure another in his person or reputation. But the greater part of men are not very frequently under the influence of these passions; and the very worst of men are so only occasionally.²²

19. *Id.* at 401 (Cannan ed. at 8).

20. *Id.* at 404 (Cannan ed. at 15); cf. A. SMITH, *supra* note 1, bk. V, chap. I, pt.

II.

21. A. SMITH, *supra* note 1, at bk. V, ch. I, pt. II.

22. *Id.*

Smith subscribed to and gave his own version of, though he did not invent, the theory of the "four stages" of human society.²³ That is, that in the evolution of human societies four main stages are discernible, in terms of the basic features of their economy. There are societies of hunters and fishermen, societies of shepherds, societies of agriculturalists and commercial societies. In the first of these stages people would own no permanent property; and for that reason, said Smith, they would not require institutionalized magistracies or positive laws. The corollary, which Smith regards as obvious, is that in societies that recognize private property and thus inequality of possessions, there are and must also be laws and regular systems of law enforcement. For once inequality of possession exists, there is the possibility of envy and resentment by the poor of the rich, who accordingly have to secure by some means their possessions against the depredations which are a permanent danger in such circumstances. Not merely does the establishment of property give rise to the risk of invasions of possessions, but it also gives rise to motives for interpersonal violence, assaults on reputation, and all those other wrongs which, as he assures us, would be relatively uncommon among nations of hunters. Governments and positive laws evolve as a means to secure the position of property owners and check the other modes of wrongdoing that are occasioned by the very existence of property regimes.

Thus it appears that in societies that have evolved beyond the stage of hunting and gathering, positive law is not so much a separate phenomenon brought into existence by the political economy as it is an intrinsic element of such economy. The development of a pastoral economy dependent for its subsistence on the produce of herds leads to an allocation of domesticated animals to individuals or families, and a protection of that allocation by means of enforced laws securing to "owners" possession of their beasts, their produce and their progeny. It would not be true to say that the development of a pastoral economy causes the existence of enforced laws of property; rather, the development of a pastoral economy is a development in which an intrinsic part is the recognition and protection of property rights in those things that to such a society represent the essentials of wealth; namely, herds.

A necessary feature of such a development is the existence of

23. See A. SMITH, *supra* note 6, at 14-15, 459-60 (Cannan ed. at 107). Mr. G.L. Davidson has pointed out to me a passage in Montesquieu's *Esprit des Loix* which is perhaps the original source of this idea, which was common among writers of the period. See MONTESQUIEU, *ESPRIT DES LOIS* bk. 18, ch. 8.

inequalities in the possession of the animals that increasingly represent exclusive necessities of life; the population grows beyond the point at which sustenance by hunting and fishing is a possibility, and the pasturage of herds in itself tends to diminish the numbers of wild animals available for hunting by those who would thus choose to subsist. Here we find an explanation of the origins of the subordination of one human being to another; the "origin of the distinction of ranks" as Smith²⁴ and his pupil John Millar²⁵ called it. Those who have not, become dependent on those who have; those who have, can do nothing with their excess produce other than maintain a train of dependents, over whom their power tends to the absolute, since they control the means of life of their dependents. The wealth of those who have gives them authority by giving others reason to accept that authority.

Pasturage itself may give way in turn, albeit extremely gradually, to the development of a settled agricultural system, which again is capable of sustaining a larger population on the same area of ground as a pastoral system. The development of settled agriculture replaces the nomadic system of pasturing when the agriculturists appropriate the pastures of the nomads. Again, the need for force to protect the land that is held is obvious; also obvious are the intrinsically necessary legal developments. Legal recognition must now be given to the possibility of the ownership of land as well as to the ownership of moveables, which hitherto has constituted the only property.

In an agricultural economy as well as in a pastoral economy, control of the land, upon which all depend for their subsistence, confers power upon those who control it over those who do not, and places the latter in a condition of dependence on the former. The landlord is necessarily a lord over the people who depend on the land, as well as over the land itself. The establishment and maintenance of such lordship evidently depends on the organization of sufficient force to sustain the position of those at the top, as indeed the history of European feudalism indicates.

However, the very decentralization of power among great territorial magnates which earlier allodial and later feudal property involved created a permanent tension or rivalry between royal and baronial power. Kings in seeking to establish their position of pri-

24. See A. SMITH, *supra* note 10, at pt. I, § III, ch. 2, pp. 50-61.

25. J. MILLAR, *Of the Origin of the Distinction of Ranks* (4th ed. Edinburgh 1806), reprinted in W.C. LEHMAN, JOHN MILLAR OF GLASGOW (1960).

macy over the territorial lords, who (after the introduction to feudal tenure in place of allodial) were theoretically their vassals, naturally looked for allies in that struggle. In Europe, said Smith, kings found such allies in the cities.²⁶ By strengthening the independent rights of the cities, granting monopolies to their tradesmen's and merchants' guilds, kings secured a powerful source of support in the perennial struggles within feudalism. The burgesses, through taxation and other means, in return for their privileges, provided revenue for the King which increasingly enabled him to organize his own armed forces independently of the feudal host and so to transcend his original role as, essentially, *primus inter pares*.

At the same time, the growth of the cities erodes feudalism in another way. Cities must trade at least with their own hinterland in order to survive. But that process of trade creates, consolidates, and in due course increases a taste for the manufactures of the city. In the earliest stages of feudalism, the tenure of land is necessarily and essentially based on mutual personal services—protection and adjudication by the lord in return from services by the tenant, different in kind accordingly as the tenure is “free” or not; the landlord's interest is best served by maximizing the number of his dependents to the greatest productive capacity for the land. The growth of trade in manufactures gives to the landlord a new outlet for the excess production of his land, namely the purchase of luxury goods. As the taste for these grows, the more there is motivation for a commutation of personal services to money payments. The development of such commutation of services is of course well attested in history. Thus, land holding over time becomes a means of revenue rather than a basis for status relationships based (at least notionally) on mutuality of services. These developments, extended over a long period of time, and proceeding with local differences and at different paces according to local circumstances (the contrasts between lowland and highland Scotland, between Scotland and England, between Britain and the Netherlands were for Smith a source of obvious contemporary contrasts) constitute the gradual evolution of a commercial form of society out of the preceding feudal and agrarian order.²⁷

Such a transformation again, and necessarily, involves or includes a transformation in legal relations. Most obviously, this is

26. A. SMITH, *supra* note 1, at bk. III.

27. I am entirely indebted for the account in this and the preceding five paragraphs to Andrew Skinner's essay, note 4, *supra* which drew to my attention the relevance for this purpose of Book III of THE WEALTH OF NATIONS, note 1 *supra*.

marked in a growth in the importance of contractual relations. People who work for their living do so not on the basis of a status relationship with a feudal superior who supplies land or access to the produce of land in return for personal, manorial, or military services. They do so by entering as free persons into contractual relations with those who have work for them to do, the contract being for service by the workman in return for payment by the master. The workman then takes his wages into the market in order to purchase the necessities of life. Labor and the produce of land are assimilated to the commodities produced by tradesmen and manufacturers, circulating in a market regulated by supply and demand. The alienability of property, rather than the right to its possession for use and enjoyment, becomes a key feature of the right of property. Increasingly land itself becomes subject to freedom of alienation, except where this is inhibited by legal means such as the Scots law on entails, which Smith and many of his associates strongly wanted to abolish.²⁸

I am not a sufficient historian, economist, or sociologist to make an informed judgment on the general argument of Smith's which I have tried to outline here in an admittedly over-compressed form. Nevertheless, it does seem to me to have a certain intrinsic plausibility in broad terms, if not in details. It brings sharply to our attention the way in which laws and legal institutions are an inherent part of the economy of a society and must be understood and explained as such, if we wish to proceed beyond purely formal and structural analysis of legal systems considered in the abstract. In that respect, Smith's work has a clear lesson, even today, for any gathering of jurists and economists: neither group can regard the other's field of work as alien to its own interests and concerns. Economists ought not treat legal relationships either as indifferent to their questions or as mere background data assumed as invariant elements of the economic landscape. Jurists ought not regard economic relationships as existing apart from and indifferent to legal relations, for the latter are indeed an intrinsic part of the former.

RATIONALITY OR DETERMINATION

One question which should be considered is how far Smith's general theory is a deterministic one. In my view, it is not in any

28. Smith said of entails, "Upon the whole nothing can be more absurd than perpetual entails." A. SMITH, *supra* note 6, at 70, 468 (Cannan ed. at 124).

crude or simple sense an instance of economic determinism. As we saw in the quotation from *The Wealth of Nations*, with which the last section commenced, an important question for Smith is what rational motives people can have for various actions in given circumstances. "Where there is no property, or at least none that exceeds the value of two or three days' labor, civil government is not so necessary [as where there is 'valuable and extensive property']"²⁹ This is so because people in these circumstances lack any rational motive to envy or to do violence.

Human beings as rational choosers make choices in given circumstances, and the choices that seem to them rational are genuine choices based on reasons that are genuinely good. It does not follow, of course, that the outcome of individual rational choices, taken in the aggregate, was intended or foreseen by those who made the choices that cumulatively led to the net outcome. Kings may have had (genuinely) good reasons for favoring burgesses; burgesses individually and collectively undoubtedly had good reasons of self interest for accepting royal favors and making appropriate returns therefor. It does not follow that they chose jointly to transform feudal society into commercial. To say this is simply to repeat the old and obvious truth that human actions rationally chosen within a certain compass can have unintended outcomes well beyond that compass. Smith was well aware of that as a general tenet among enlightenment thinkers, and his own "Invisible Hand"³⁰ is, I take it, a particular exemplification of the general idea.

This has important implications for his own work. If Smith was an out-and-out determinist, there would be a more than paradoxical element about much of his own work in *The Wealth of Nations*. If forms of economy necessarily generate their own internal forces that sweep men along regardless of any illusory notions of rationality and choice, there would be little point in writing a book which is not merely descriptive, but is in an important measure prescriptive, advocating legislative and other policies (such as the abolition of statutory monopolies) that are aimed at improving the economic order and producing a more rational basis for a commercial economy.

29. A. SMITH, *supra* note 1, at bk. V, ch. I, pt. II.

30. *Id.* at bk. IV, ch. II, p. 456: "[Every individual in a market] intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention." For a discussion of "invisible hand" explanations, see R. NOZICK, *ANARCHY, STATE AND UTOPIA* 18-22, 336-37 (1974).

Smith's overall position seems to be in principle a self-consistent one. The more we know and understand of our own circumstances, the more we can make genuinely rational choices guided by a well-founded view of individual or of collective interests. Therefore we ought to seek to understand our circumstances as well as possible, and ought to make those choices which seem most sensible given our necessarily imperfect, but always improvable, understanding of those circumstances. That Smith does not venture any predictions as to what will happen beyond commercial society is a strength rather than a weakness of his approach, since our capacity to foresee the unintended outcomes of what we now do is in practice and in principle bound to be imperfect. I would venture to suggest that it is a weakness and not a strength of Marx's that he observed no such modesty in his pretended capacity to foresee the future; we are still living with the unintended outcomes of that lack of theoretical modesty.

In any event, we have to take account of Smith's qualified rationalism in ethical as well as technical questions. He was by no means an advocate of the pursuit by each person of his own interest at all costs. He certainly held the view that human beings have natural rights, and that each person's pursuit of interests is legitimate only when subject to respect for those rights. At one point in *Theory of Moral Sentiments* he ascribes our knowledge of basic moral rights and duties to the moral norms implanted by God in man's nature.³¹ To that extent he belongs within the natural law and not the utilitarian tradition. That each may pursue his own, and that governments ought to pursue the general utility, is not a single simple and overriding principle with Smith, but one which comes into operation only within the area of indifference of the basic moral code.

There is no doubt that Smith believed that the development and growth of commercial society represented "progress" and that progress was, on the whole, good. First of all, as we have seen, commercial relationships favor the liberty of individuals, and it is right that people be free from bondage. That people who are in bondage will not, in practice, be freed therefrom by their masters on the mere ground of their moral claim to freedom does, however, seem obvious to Smith. It is therefore a merit of the commercial system that it actually gives the slave owner a good motive (whether perceived by him or not) to grant his slaves their freedom. Free

31. A. SMITH, *supra* note 10, at pt. III, ch. 5, ¶ 6, p. 165.

wage laborers present a better deal overall to a capitalist than slaves, who never have any reason to produce more than guarantees their own subsistence. Free wage laborers have a motive to maximize production to increase their own income above subsistence level, which in turn also enhances the profits of their capitalist masters.³² Secondly, and this point follows also from the first, a commercial economy is one which from generation to generation encourages the increase of wealth, and thus the general well-being. People in general are simply better off in commercial rather than in agrarian, pastoral, or hunting and fishing societies, even though there is a necessary inequality in the distribution of the resulting wealth.

Smith was, however, if less acutely than Adam Ferguson, well aware of the countervailing disadvantages of commercial society.³³ The division of labor produces among the lower classes a diminishing range of experience and of interests. The production line maximizes the production of pins at a severe human cost in terms of the restricted life the operatives enjoy. Children become employable at younger and younger ages, and lose the opportunities of education that rural children still enjoyed in the Scottish parish schools. In addition to depressing the education of the poor, this process weakened family structures and parental authority and contributed to drunkenness and disorder in the towns. The martial ardor of the nation and its capacity to defend itself in time of war was diminished by the same processes. A graphic illustration of this was supplied in Smith's own lifetime by the capacity of Charles Edward's Highland army to take practically the whole of Britain by storm until the return of the professional soldiery from the Continental wars.

It is difficult to acquit Smith, with hindsight, of a certain complacency in the blandness of his conclusion that despite all these evident defects, commercial society was on the whole genuinely progressive and good. Nevertheless he reached that conclusion, and advocated the rationalization of the laws and the economic practices of his time in order to promote what he took on the whole to be good. This clearly indicates that he did not pretend that the development of societies was the mere product of blind forces of nature independent of rational moral choices by human agents.

32. On this argument in general, A. SMITH, *supra* note 6, at 453-54 (Cannan ed. at 99-104).

33. *See id.* at 539-40 (Cannan ed. at 255-60); cf. A. FERGUSON, *ESSAY ON THE HISTORY OF CIVIL SOCIETY* (1966).

TWO PARTICULAR AREAS OF SMITH'S JURISPRUDENCE

So far this paper has dealt in relative generalities; in order to bring it to a close, it may be worthwhile to take up two particular points that illustrate how Smith's general account forms a setting for illuminating consideration of more particular matters. Since one purpose of such a collection as the present symposium is, I take it, to stimulate research in cross-disciplinary areas, this may in addition have the merit of suggesting the possible relevance of Smith's ability to draw attention to problems still worthy of consideration. I shall deal very briefly with aspects of contract and of the administration of justice.

Contract

I have already mentioned Smith's general theory of contractual and other voluntary obligations. "A promise is a declaration of your desire that the person for whom you promise should depend on you for the performance of it. Of consequence, the promise produces an obligation, and the breach of it, an injury."³⁴

The foundation of contractual obligation thus explained is not culturally relative. However, according to Smith, the importance of contract as an institution certainly is. "Breach of contract is naturally the slightest of injuries" and in "rude ages" little regard is paid to it.³⁵ In the earliest periods of positive law, enforceable contracts would be those which related to matters of great substance, and which had been undertaken in circumstances of great formality—essential to indicate clearly to all parties, despite the "uncertainty of language," the character of the obligation being undertaken. By tracing the development of Roman law, Smith shows how we can perceive the steady evolution of a less and less formalistic approach to contracting. In contrasting Smith's own commercial society, and "the ancient state of contracts" Smith said, "At present almost anything will make a contract obligatory."³⁶

34. A. SMITH, *supra* note 6, at 87, 472 (Cannan ed. at 131). This view is very similar to Lord Kames. H. Home, Lord Kames, *ESSAYS ON THE PRINCIPLES OF MORALITY AND NATURAL RELIGION* pt. I, essay II, ch. 6 ("The reliance upon us, produced by our own act, constitutes the obligation."). I have suggested elsewhere that this view can be elaborated so as to yield a better account of such obligations than that most commonly accepted among contemporary philosophers. MacCormick, *Voluntary Obligations and Normative Powers*, 46 *ARISTOTELIAN SOC'Y SUPPLEMENTARY VOLUME* 63-78 (1972).

35. A. SMITH, *supra* note 6, at 87, 472 (Cannan ed. at 131).

36. *Id.* at 473 (Cannan ed. at 132).

Why should all this be so? Not, says Smith, because of changes in the basic character of people; rather, it happens because of changes in their social and economic circumstances. In his discussion in the *Lectures* on the influence of commerce on manners he makes the very point that "probity and punctuality" in the keeping of undertakings is an effect rather than a cause of the development of commerce. He says that for fidelity to their word the Dutch are the most outstanding people in Europe, greatly superior to the English who are slightly superior to the Scots, among whom a distinction exists between the commercial and the "remote" parts of the country.

This is not at all to be imputed to national character as some pretend. . . . It is far more reducible to self-interest, that general principle which regulates the actions of every man, and which leads men to act in a certain manner from views of advantage. . . . A dealer is afraid of losing his character and is scrupulous in observing every engagement. When a person makes perhaps twenty contracts in a day, he cannot gain so much by endeavouring to impose on his neighbour, as the very appearance of a cheat would make him lose. When people seldom deal with one another, we find that they are somewhat disposed to cheat, because they can gain more by a smart trick than they can lose by the injury which it does their character.³⁷

As well as neatly and concretely illustrating the point made at the outset about Smith's ability to combine a theory of natural rights with a theory of the social development of laws and legal institutions, this statement points toward an area of interesting research. The trouble is that, at least for the United States, some of it has already been done. But it is surely a mark of Smith's acuteness that he should have so clearly anticipated such works as that of MacAulay³⁸ and Ross,³⁹ in broad outline at least.

The Administration of Justice

On this topic we must look to "Of the Expense of Justice" from the *The Wealth of Nations*.⁴⁰ It is in pastoral societies, says Smith,

37. *Id.* at 538-39 (Cannan ed. at 253).

38. See, e.g., MacAulay, *Noncontractual Relations in Business: Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

39. L. ROSS, *SETTLED OUT OF COURT* (1970). Of course, both Ross and MacAulay have covered enormous tracts of ground not contemplated by Smith, but he seems to me to be the "pointing in the same direction" as that which their much more elaborate studies pursue.

40. A. SMITH, *supra* note 1, at bk. V, ch. I, pt. II.

that we first find the beginnings of institutionalized adjudication, albeit in a rudimentary form in which lesser people look to great chieftains distinguished by wealth and power for determination and remedying of injuries. In addition to his position as a military leader, "his birth and fortune procure him some sort of judicial authority." So far from being a source of expense to him, however, this is in fact a source of revenue, for "those who applied to him for justice were always willing to pay for it."⁴¹ Even in feudal and agrarian societies this persists. As late as the time of Henry II of England, Smith points out, the circuit judges were as much as anything else factors sent out to levy certain types of revenue, and the administration of justice—albeit now through delegates—was as much as anything else a means of procuring revenue. But so long as the giving of "presents" and the risk of amercements were essential adjuncts of litigation, the risk of corruption of justice was inevitably high, and was everywhere realized.⁴²

What led to change in this? Smith's answer is that at some stage in feudal society the expenses of defense become so great that the King could no longer live off his own estates and feudal dues. Taxation becomes a necessity, but the *quid pro quo* generally demanded is that gifts and presents and fees should no longer be accepted or rendered in return for the adjudication of suits. Fixed salaries are appointed to the judges to compensate them for the loss of other income, the salaries being payable out of general revenue from taxation.

This in turn may procure its own mischiefs, for the judges may be unduly exposed to executive pressure. In addition, their income is no longer dependent on their industry and expeditiousness in the conduct of business—unlike the conditions of competition which formerly prevailed, to Smith's characteristic admiration, among the various different royal courts in England. Smith canvasses various ingenious schemes for remedying the former defect, suggesting, by analogy to the then still extant endowment of the Court of Session, that it might be apt to provide courts with certain land or funds, the income of which could sustain them independently of the executive. "The necessary instability of such a fund seems, however, to render it an improper one for the maintenance of an institution which ought to last forever."⁴³

41. *Id.*

42. *Id.*

43. *Id.*

Smith's preferred solution, which he regards as a remedy for both mischiefs, is to find a system of charging fees for court business, which would be administered independently of the executive and of individual judges. The fees would be payable after the relevant work was done and would be apportioned among judges according to their diligence and expeditiousness in the discharge of business. The French *Parlements*, he points out, operate on a similar footing, and they are, if not convenient as courts of justice, neither suspected nor accused of corruption.

He has already anticipated the objection that this would be a retrogression from the position in which justice is administered gratis:

Justice . . . never was in reality administered gratis in any country. Lawyers and attorneys, at least, must always be paid by the parties; and if they were not, they would perform their duty still worse than they actually perform it. The fees annually paid, to lawyers and attorneys, amount, in every court, to a much greater sum than the salaries of the judges. The circumstance of those salaries being paid by the crown, can nowhere much diminish the necessary expense of a law suit.⁴⁴

The topicality of Smith's concerns can hardly be doubted in view of the considerable present concern about the quality and distribution of legal services in many jurisdictions. The more we are interested in trying to disseminate legal services—not just judicial services—through the community, the more acutely we face the problem of securing the genuine independence of such services and coupling it with proper efficiency—especially to the extent that lawyers' incomes cease to be dependent on client satisfaction.

Quite apart from that, Smith's penetrating observations about the real total expense of the administration of justice being far greater than the apparent Exchequer cost should prompt reflection. Much legislation is ostensibly cheap, and may indeed involve no immediate identified public expense at all. But ought we not inquire far more closely into its real cost in terms of burdens on court time, and its costs to those who have to employ lawyers to guide them through more and more complicated legal mazes, and all the rest of it? If reflection on Smith's work were to lead us to reflect more on the true overall cost of ostensibly beneficial laws, it would be well

44. *Id.*

worthwhile for that alone. There would be enough research projects concerning this to keep us all busy for a good long time—which seems in this context a good point on which to conclude this paper.

POSTSCRIPT

It is, no doubt, obvious that the writing of this article was prompted more by an interest in the history of legal and moral philosophy in the eighteenth century than by any pretension to economic expertise. At the time at which it was first written,⁴⁵ I was quite unfamiliar with the contemporary "Economic Analysis of Law" (E.A.L. for short) put forward by Richard Posner,⁴⁶ Ronald Coase,⁴⁷ Harold Demsetz⁴⁸ and others.

Having subsequently begun to scratch the surface of that theoretical approach,⁴⁹ I ought to add a brief comment about a significant contrast between Smith's approach and that of E.A.L. The contrast is to Smith's advantage. His theory of "natural rights" is a moral theory independent of and more fundamental than his analysis of the economic consequences of any legal ascription of rights to individuals. A particular example is his theory of promisees' rights, founded, he says, in the injustice of disappointing people in any matter upon which a promisor has intentionally induced them to rely. The enforcement of promissory or other "natural" rights is indeed subject to variation according to the degree of economic development of a society, and in any society it has economic consequences relevant to the desirability of given enforcement systems. But such consequences are not the justifying reason for recognizing or upholding the rights themselves.

By contrast, Posner's thesis holds that a given allocation or distribution of *any* rights whatsoever is justifiable only by the criterion of economic efficiency to the end of wealth-maximization.

45. It was originally written as a paper for a seminar organized in 1977 at the University of York by Professor C.K. Rowley on behalf of the (British) Social Science Research Council.

46. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1974).

47. Coase, *The Problem of Social Cost*, 3 J.L. AND ECON. 1 (1960).

48. Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223 (1972); Demsetz, *WHEN DOES THE RULE OF LIABILITY MATTER?*, 1 J. LEGAL STUD. 13 (1972).

49. My acquaintance was initially formed through Charles Fried's *Right and Wrong*, see C. FRIED, *RIGHT AND WRONG* 86-105 (1978), and an unpublished paper given by Dr. J.M. Finnis in Edinburgh. See also J.W. HARRIS, *LEGAL PHILOSOPHIES* 42-47 (1981) (and references therein).

Moreover, if I understand his and Coase's case correctly, such efficiency is established by reference to the optimal outcome of some ideal bargaining procedure.

In so far as such a supposed bargaining procedure is essential to the theory, it appears incoherent. The concept of a "bargain" requires at least two presuppositions: (a) that a promisee has a right to a promised performance (for otherwise there could be no idea of *binding* bargains, *i.e.*, mutual exchanges of binding promises); and (b) that persons have rights to security from physical and psychological assaults and acts of coercion, respect for which in any bargaining situation is a precondition of the validity of the bargain struck.

If E.A.L. does rest upon ideal bargains, it presupposes at least these "natural" rights. If E.A.L. then claims also to justify *these* rights it commits the fallacy of begging the question. If E.A.L. purports to be a complete theory of law, but fails to include in its explanation the rights which it presupposes, it commits the alternative fallacy of *ignoratio elenchi*. In either case, it is obliged to restrict its pretensions to its performance.⁵⁰

A useful restriction might be a reformulation of E.A.L. as a theory of "adventitious" rights, including the forms of remedial right established by legal systems. This seems conformable to the observation that much of the most striking critical work of the economic analysts has been achieved in the area sketched somewhat amateurishly in the concluding section of my paper.

Be that as it may, Adam Smith's theory of law differs from E.A.L. in that it contains three distinct elements: (a) a theory of justice, that is, a moral theory of the rights the law ought to uphold; (b) an outline of an analytical theory of law, in the unsatisfactory "sovereign command" mode; and (c) a theory of the economic conditions and consequences of various kinds of legal order. Smith did not suppose, nor is there any reason to suppose, that the first of these can be subordinated to or derived from the third.

50. This argument is, in shortened form, essentially the same as Fried's. See C. FRIED, *supra* note 49, at 100-05.

