

Law and Self-Interest

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Summary:

- Self-interest in the case-law before c 1830
- Hobbes: competitive and mutual interests
- Will and interest theories of rights
- Hegel: self-interest and self-consciousness
- Adam Smith's Invisible and Visible Hands: naïve and self-aware interest in market and state
- Classical utilitarianism; the Coasean mutation; the Rights Theorists' response; modern analysis of agent rationality
- Adam Smith's Impartial Spectator and reflective conscience
- The four juristic consciences: i. belief, ii. command, iii. knowledge, iv. presumption of honesty
- "*Honeste vivere*" and unconscionable conduct in court

1.

Self-interest is not historically a term of art in English law. There are only a handful of occasions where 'self-interest' is even mentioned in the law reports before the high Victorian age. The phrase 'self-interest' is used by Lord Chancellor Macclesfield as a synonym for 'knavery' and 'dishonesty' in 1721¹ – and this was a judge who knew of what he spoke. He was impeached for bribe-taking and corrupt sale of offices by Parliament four years later. Counsel in a case of 1774 likened self-interest to 'malice'.² In 1810 the great Admiralty judge Sir William Scott defined self-interest as 'improper bias' as he tested the motives behind declaration of the military status of a captured port.³ This was within the constitutional principle enunciated by Chief Justice Coke in 1610 in *Doctor Bonham's Case* prohibiting a judge from deciding in his own cause, itself likely a transference of the Roman quasi-delictual action against the 'judge who makes the case his own'.⁴ In 1830 the Court of Common Pleas

¹ *Frederick v Frederick* (1721) 1 Peere Williams 710, 716; 24 ER 582, 584 (Ch).

² *Cojamaul v Verelst* (1774) 4 Brown 407; 2 ER 276 (HL).

³ '*Progress*' – *Barker* (1810) Edwards 210; 165 ER 1085 (Adm).

⁴ (1610) 8 Co Rep 113, 118; 77 ER 646 at 652. Coke's *ius commune* sources are explored in RH Helmholz, 'Bonham's Case, Judicial Review, and the Law of Nature' (2009) 1 Journal of Legal

characterized fraud as a ‘sordid regard to self interest’. In that case liability attached for untruths spoken with a view to gain, whether it was intended to deceive or not.⁵ An interesting usage occurs in the next year in the House of Lords in a case where a broker chose securities on the advice of a trusted financial dealer who secretly profited from the trades by churning his own stock.⁶ The dealer, none other than Nathan Mayer Rothschild, was made to account for undisclosed gains derived from a relationship of ‘trust and confidence’. In substance if not in name this was a fiduciary relationship, where, in Lord Wynford’s judgment, the entrusted person is ‘not to raise the slightest suspicion of self-interest’. It is in fiduciary cases that the notion of proscribed self-interest plays out in later law. However, a search through the law reports shows a rival usage appearing from the middle of the nineteenth century, whereby self-interest is equated with rational behaviour in the use of legal powers so as to reach individual ends effectively.⁷ This latter idea, that self-interest is rational rather than improper, helps explain why English law excluded any doctrine of abuse of rights,⁸ and has maintained a narrow doctrine of good faith.⁹ It is forbidden to deceive or to mislead or to exploit incapacity, but beyond that the law refuses to require parties to take into account the interests of others as they wield their legal rights and powers, unless those other interests are themselves protected by some specific right or immunity. Where we do find general proscriptions of self-interest, as in fiduciary relationships and close contracts such as those regulating insurance and joint ventures, these restraints can themselves be tied back to rational self-interest. The parties can be taken to have agreed to make full disclosures and avoid conflicted interests in order better to price the risks and structure the discretions of their relationship. Here, the parties themselves surrender their freedom of action and submit to court supervision of their discretions in order to prevent short-term or tactical defection in the course of their relationship. Good faith becomes a subset of the basic principle ‘*pacta sunt servanda*’, the commitment that agreements ought to be kept: good faith operates where the terms of the agreement cannot fully be specified.

Analysis 325; for the classical Roman background on judges’ liability see E Descheemaeker, ‘Obligations *quasi ex delicto* and Strict Liability in Roman Law’ (2010) 31 *Journal of Legal History* 1.

⁵ *Foster v Charles* (1830) 7 Bingham 105, 108; 131 ER 40, 42 (CP) per Gaselee J.

⁶ *Rothschild v Brookman* (1831) 2 Dow and Clark 188, 198; 6 ER 699, 702 (HL).

⁷ See eg *Mogul Steamship Co Ltd v McGregor, Gow, & Co* (1888) 21 QBD 544; *Holliday v Mayor of Wakefield* [1891] AC 81 (HL).

⁸ M Taggart, *Private Property and Abuse of Rights in Victorian England* (Oxford, 2002).

⁹ But cf *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

This evening my goal is to stand back from modern law and reflect upon how theorists and lawyers have understood the legal control of self-interest, concentrating on the long eighteenth century and in particular looking at Adam Smith's models of individualism in morality and political economy. I will look rather swiftly at adjacent models of self-interest, from Hobbes, Hegel and classical utilitarianism through to modern rights theory, economic analysis of law, and behavioural microeconomics. I will then return to Adam Smith's theories of reflective morality and discover a strong family resemblance to English juristic theories of conscience that emerged in new forms in mid-eighteenth century England. All this leaves us with an interesting chicken and egg argument – who intellectually led whom? Or is it a case of independent discovery by theorists and lawyers? We may end up suspecting that famous theorists, who imagine themselves immune from the influence of practical men, have sometimes distilled their frenzy from the ideas of long-forgotten lawyers.

2.

Thomas Hobbes' political philosophy rested on the premise of competitive self-interest as the driver of humanity. For Hobbes, State and law existed as much to enforce contracts as to repress mutual violence. He was concerned to the point of obsession with the problem of explaining how any pact could be upheld by self-seeking persons who might be expected rationally to defect if this would win advantage – or to forestall the defection of the counterparty. We betray in order to get in first:

If a covenant be made wherein neither of the parties perform presently, but trust one another, in the condition of mere nature (which is a condition of war of every man against every man) upon any reasonable suspicion, it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void. For he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal, and judges of the justness of their own fears, cannot possibly be supposed.¹⁰

¹⁰ T Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1651) ch xiv.



Law, for Hobbes, is therefore essential to stop rival self-interests nullifying each other. With the constitutional covenants we make to erect the law-making sovereign, we create a force that protects persons, property and pacts by positive law, and beyond that self-enforces the legal order itself. Thus in the state we have the highest creation of self-interest. Kant (echoing Locke) was to vary the theory by seeing the state as the objective enforcer of rights that men in the state of nature would otherwise observe, but too imperfectly, let down by their partiality as

distinct individuals with varying rational judgments. For Hobbes the state makes it possible to create rights; for Kant the state makes it practical to enforce rights.

The law does not frame itself with Hobbes' or Kant's superb logic – why should it? – but much of the law can be assimilated to a covenantal model of rules imposed to uphold mutual self-interest; for example the nuisance rule *sic utere*, 'so use your own as not to injure that of another'; or indeed all of the law of wrongs. More intriguing is the relative absence in English law of rules or standards enforcing altruistic behaviour *within* the scope or exercise of extant rights. I have noted how English law has rejected the solutions of other legal systems, which have general norms enforcing good faith and restraining abuse of rights. It is interesting to ask if this is something more than a policy choice. The very concept of a *right* in legal discourse – that is, a Hohfeldian claim-right imposing duties on others to act or forbear – may have embedded within its scope privileges of self-seeking behaviour. Indeed some theorists see legal rights in conceptual terms as zones of untrammelled will or choice, where the interests of others need not be taken into account in the exercise of a claim. Hart famously argued that the right holder is a 'little sovereign' in control of the duty performance. Constraints of selfish exercise must be remapped as the resultant of conflicting rights and immunities of others that curb the privileges and powers of the first right holder.¹¹ Opposed to this model are the interest theorists, from Bentham to Raz and MacCormick, who show how a wide extent of rights are ascribed to persons who have no relevant will, but operate independently of choice, where the correlative duty benefits the right-holder in some way. Rights as embodiments of interests must then be defined externally to the self-will of the claimant. It is entirely plausible that both will- and interest-based rights should be accommodated to the claims of others; theorists including Honore, Epstein, and the very early Hart, describe this as a process of 'defeasibility of rights', a style of contingent moral reasoning deeply familiar to lawyers in their everyday practice. The late Jim Harris overleapt these controversies by defining a right more thinly as an interest bestowing standing to insist or demand in some legal forum, with the content of rights being conditional commands defined by legal authority including convention.¹² Whichever one of these contending models of rights we favour, it is unclear that the juristic notion of a right can yield any *a priori* position on the role of self-interest in governing legal relations.

¹¹ R Stevens, 'The Conflict of Rights', in A Robertson and TH Wu (eds), *The Goals of Private Law* (Oxford, 2009) 139.

¹² JW Harris, 'Human Rights and Mythical Beasts' (2004) 120 *Law Quarterly Review* 428.

We may continue by looking at self-interest in isolation from the law. What is self-interest? And what does self-interest do? For Hobbes it was simply the maximizing drive to ‘[c]ontinual success in obtaining those things which a man from time to time desireth’.¹³ Other theorists of self-interest have given less mechanical answers that might give us more insights into the law.

3.

In 1807 Georg Hegel wrote about the ‘way of the world’, the new individualism of his time, in these terms:

The individuality of the way of the world may well think it acts merely *for itself*, that is, in *its own self-interest*, but it is better than it thinks; its activity is at the same time a *universal* activity which exists *in-itself*. However much it acts in its own self-interest, it simply does not know what it is doing, and however much it affirms that all men act in their own self-interest, still it merely asserts that all men are not really aware of what acting really amounts to. – However much it acts *for itself*, still what this does precisely is to bring forth into actuality what exists-*in-itself* ... – Its empty cleverness, as well as its finely tuned explanations which know how to point out that self-interest surfaces everywhere, have likewise themselves all vanished, just as the purpose of the *in-itself* and its fancy oratory have also done.¹⁴

Here, in the *Phenomenology of Spirit*, beneath the marvellous obscurity, lies one of Hegel’s great paradoxes. He is arguing that pursuit of self-interest creates meaning and identity, but that modern agents who lack critical self-consciousness can only create an order of competing wills each struggling against the other for expression and recognition in the world; and that these self-seekers end up annihilating each other’s individuality through their naïve, purblind interactions:

We have here the *way of the world*, the mere semblance of an ongoing course of events, a *fancied universal*, but whose content is merely the essenceless game of establishing and then dissolving these individualities.¹⁵

¹³ Hobbes, *Leviathan*, ch vi.

¹⁴ GWF Hegel, *Phenomenology of Spirit* (1807, trans Terry Pinkard, 2010) §392.

¹⁵ Hegel, *Phenomenology of Spirit*, §379.

System
der
Wissenschaft

von

Ge. Wilh. Fr. Hegel

D. u. Professor der Philosophie zu Jena,
der Herzogl. Mineralog. Sozietät daselbst Assessor
und anderer gelehrten Gesellschaften Mitglied.

Erster Theil,

die

Phänomenologie des Geistes.

Bamberg und Würzburg,
bey Joseph Anton Goebhardt,
1807.

The atomistic coalescence of self-interested wills for Hegel led to a 'path of despair'. He opposes to this a higher rationality whereby self-conscious individuals critically observe their own wills whilst simultaneously recognizing the will of others, in order to join in a shared ethical order. Hegel here drew extensively from Goethe's philosophy of perception to argue

that the individual's physical as well as moral sense of the world will be incomplete without grasp of some shared or 'archetypal' phenomena.¹⁶

Were the prosaic British even further down the path of purblind individualism than Hegel's uncritical egoists? In material terms, Britain across the long eighteenth century was perhaps three times as urbanized as Germany and owned a far more developed capitalist and commercial economy than decentralized and agrarian Germany.¹⁷ Certainly thinkers in England and Scotland, observing the rise of a polite and commercial society around them, were fascinated by the force of self-interest at least as much as the romantic Germans, but the evaluation here is generally more positive.

I will take one theorist as emblematic since his writings sums up streams of Enlightenment thought and encompasses the ethics, economics and law of his time.¹⁸ Adam Smith writes in 1759 in *The Theory of Moral Sentiments* of how the shallowest self-seeking can benefit society.

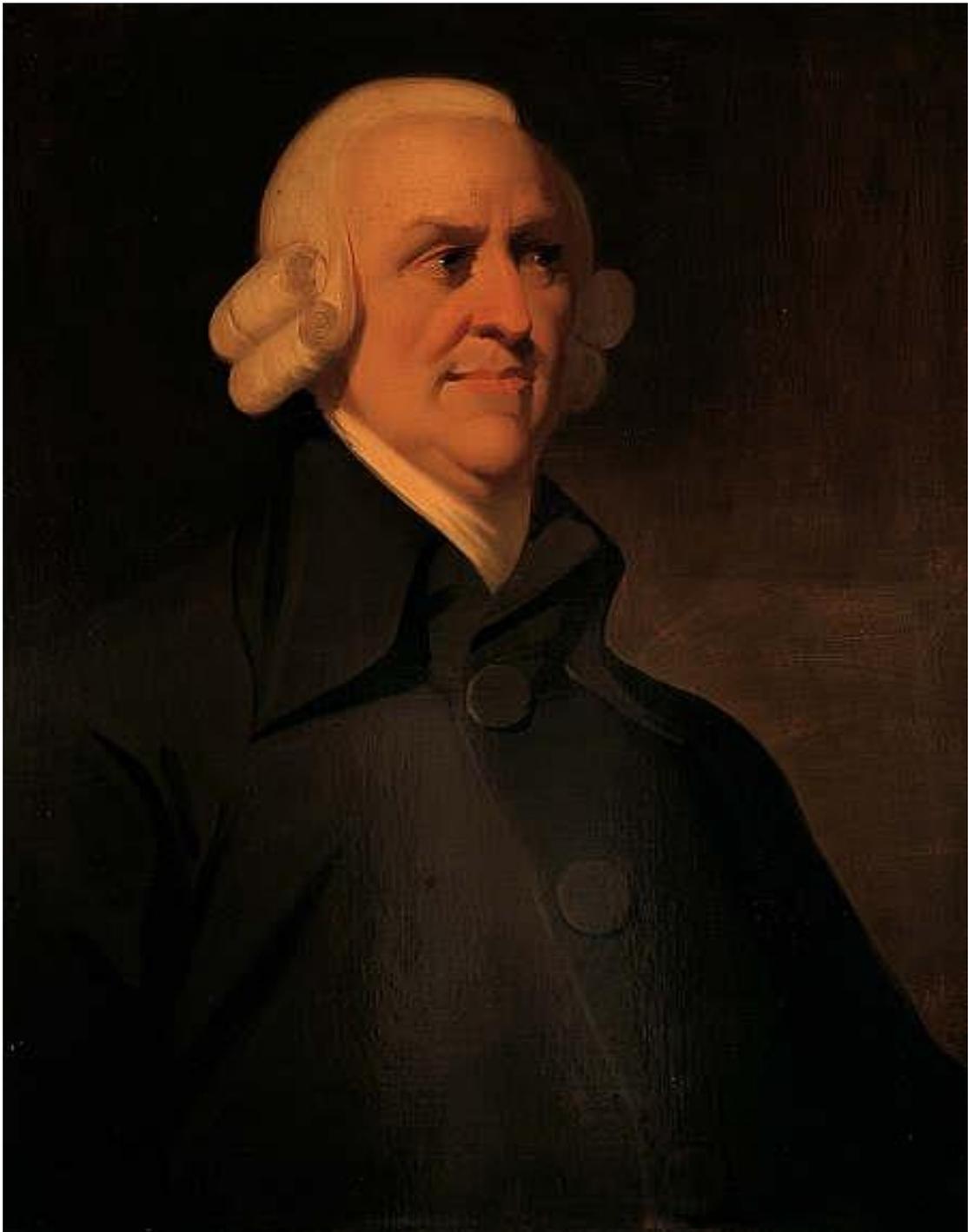
The produce of the soil maintains at all times nearly that number of inhabitants which it is capable of maintaining. The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. *They are led by an invisible hand* to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society...¹⁹

¹⁶ Many years later Hegel wrote to Goethe as follows: 'When I survey the course of my spiritual development, I see you everywhere woven into it and would like to call myself one of your sons; my inward nature has...set its course by your creations as by signal fires' (April 24, 1825). See further RJ Richards, *The Romantic Conception of Life: Science and Philosophy in the Age of Goethe* (Chicago, 2002). Another example of the reworking of Goethe's critique of individualism is found in Max Weber's adaptation of lines from *Faust* in the famous peroration of *The Protestant Ethic and the Spirit of Capitalism* (1904-5, trans T Parsons, New York, 1930) 181.

¹⁷ J De Vries, *European Urbanization 1500-1800* (London, 1984).

¹⁸ DD Raphael, *The Impartial Spectator: Adam Smith's Moral Philosophy* (Oxford, 2009); ML Frazer, *The Enlightenment of Sympathy: Justice and the Moral Sentiments in the Eighteenth Century and Today* (Oxford, 2010).

¹⁹ A Smith, *The Theory of Moral Sentiments* (1759) Part IV ch 1, 304-5 (emphasis added). John Finnis identifies the importance of this passage as an example of moral reasoning about side consequences in



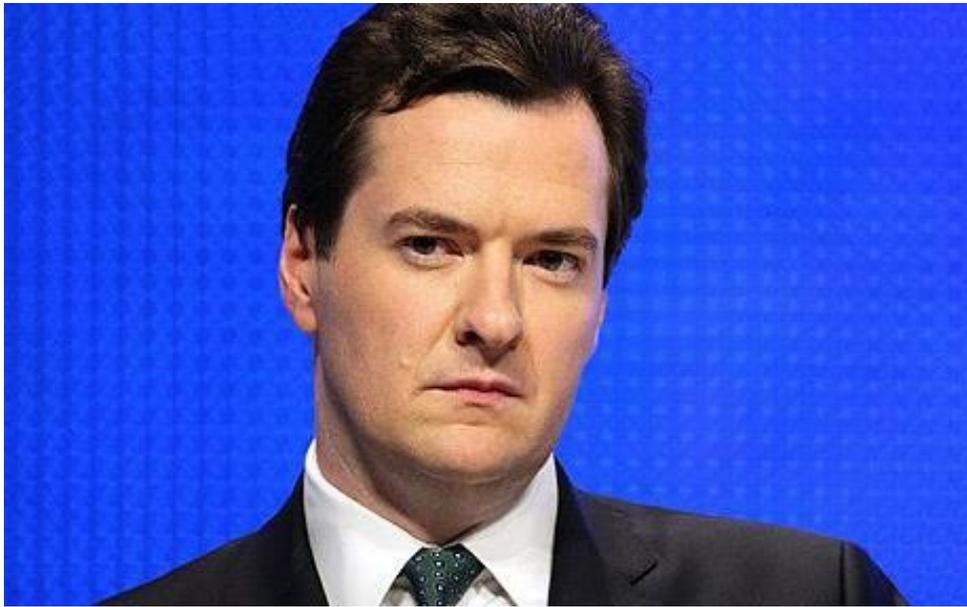
Adam Smith, after James Tassie.

Thomas Malthus in the wake of the Napoleonic Wars added to Smith's acceptance of self-seeking and inequality a novel under-consumptionist argument, namely that the best way to maintain demand in an under-employed economy was not to redistribute accumulations of

'Allocating Risks and Suffering: Some Hidden Traps' (1990, reprinted in JM Finnis, *Philosophy of Law: Collected Essays Volume IV*, Oxford, 2011) 337-40.

wealth, which might undermine the work discipline of the poor and collapse the prices of necessities, but rather to encourage markets in luxuries; for ‘a country with great powers of production should possess a body of consumers who are not themselves engaged in production’. With a luxurious elite soaking up production, the poor in this world could then be sustained by subsistence wages supplemented by carefully targeted charity, and so prevented from overbreeding.²⁰

Defenders of self-interest in today’s capitalist order have been embarrassed to use all of Smith and Malthus’s arguments about inequality, at least until now.



²⁰ TR Malthus, *Principles of Political Economy* (1820; 2nd ed, 1836) 322, 398; BA Corry, ‘Malthus and Keynes – A Reconsideration’ (1959) 69 *Economic Journal* 717.

A more useful defence is found in Adam Smith's preceding theory of the invisible hand. Note that in his 1759 argument it was important for Smith that the rich, through their asocial rapacity, bestow benefits '*without intending it, without knowing it*'. *Unselfconscious* self-seeking turns out to be a positive social force, if not a virtue. By 1776 Smith has further developed this idea in *The Wealth of Nations*, where we find perhaps the most perfect celebration of self-interest in the history of letters:

But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and shew them that it is for their own advantage to do for him what he requires of them....

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own but of their advantages.²¹

But Smith then leads us into a stark paradox qualifying this paean to self-interest. The 'invisible hand' as presented in the *Wealth of Nations* does not appear as some providential free market mechanism that aligns selfish wills into a greater whole, a beneficial equilibrium. Smith rather uses the example of a businessman who seeks protectionist State support for domestic trades against cheap foreign imports, in order selfishly to maintain his profits. The invisible hand can as well appear as the use of *public state power* to make private gains:

By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he 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. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.²²

²¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) i.2.2. Smith's argument that selfish motives can usefully be harnessed to reach individual and social goals, without having to rely constantly on the more fragile motivations of love or altruism, have struck a chord with economists to the present day: eg DH Robertson, 'What Does the Economist Economize?' (1954), in *Economic Commentaries* (1956). See further A Offer, *Self-Interest, Sympathy and the Invisible Hand: From Adam Smith to Market Liberalism* (Oxford Discussion Papers in Economic and Social History Number 101, August 2012).

²² Adam Smith, *Wealth of Nations* (1776) iv.2.9.

Yet another layer of paradox is added in the final phrase of this celebrated passage:

I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.²³

The invisible hand, it seems, can only work if it is precisely that – unseen, and perhaps more importantly, *unknown*. Even then it is fallible; private benefit only ‘frequently’ causes public gain, it is ‘not always’ harmful. And we are warned that when traders self-consciously assert their interests in public space then self-interest quickly becomes power, with the active few dominating and exploiting the whole. Smith’s mistrust of organised monopoly – by which he included most private corporations, the ‘visible hand’ of capitalism – runs throughout the *Wealth of Nations*, tempering any unalloyed belief in the beneficent power of myopic self-interest. Fear of knowing self-interest exerted consciously through state and market is the flip side of Smith’s original invisible hand idea.

The paradoxicality of Smith’s thought deepens when we come to his highly social model of how the self conceives its interests, and how law and institutions helps articulate an other-regarding sense of self. The apparent conflict between Smith’s asocial market theory and his social theories of morality and jurisprudence has been labelled ‘Das Adam Smith Problem’, a debate which kicked off in Germany as early as 1777, immediately upon the publication of *Wealth of Nations*.²⁴ Reviewing these complex elements of Adam Smith’s work in 1981, Neil MacCormick decided that Smith stood apart from the main utilitarian traditions in philosophy, economics, and law.²⁵ In his final work in moral philosophy MacCormick attempted to pull Smith’s empathetic model of moral judgment into Kant’s categorical imperative, a synthesis that has intrigued but not convinced the experts.²⁶ Maks Del Mar has recently expounded on

²³ Adam Smith, *Wealth of Nations* (1776) iv.2.9. An orthodox economist’s angst over the ambiguities of Smith’s exposition is set out in WD Grampp, ‘What Did Smith Mean by the Invisible Hand?’ (2000) 108 *Journal of Political Economy* 441.

²⁴ R Teichgraber III, ‘Rethinking Das Adam Smith Problem’ (1981) 20 *Journal of British Studies* 106; K Tribe and H Mizuta (eds), *A Critical Bibliography of Adam Smith* (London, 2002).

²⁵ N MacCormick, ‘Law and Economics: Adam Smith’s Analysis’ (1981, reprinted in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Oxford, 1982, 103).

²⁶ See eg J Waldron, ‘Legal Judgment and Moral Reservation’ in A Menendez and J Fossum (eds), *Law and Democracy in Neil MacCormick’s Legal and Political Theory* (2011) 107; T Spaak (2009) 120 *Ethics* 192.

MacCormick's use of Hume, Smith and Kant,²⁷ and I look forward to learning more about this terrain from him. For now I would like to test MacCormick's earlier thesis on Smith's moral theory by moving in another direction, setting out some classical and modern utilitarian positions and contrasting these with the reflective welfare ethics of Smith. I will then draw the discussion back to the historical role of law in controlling self-interest.

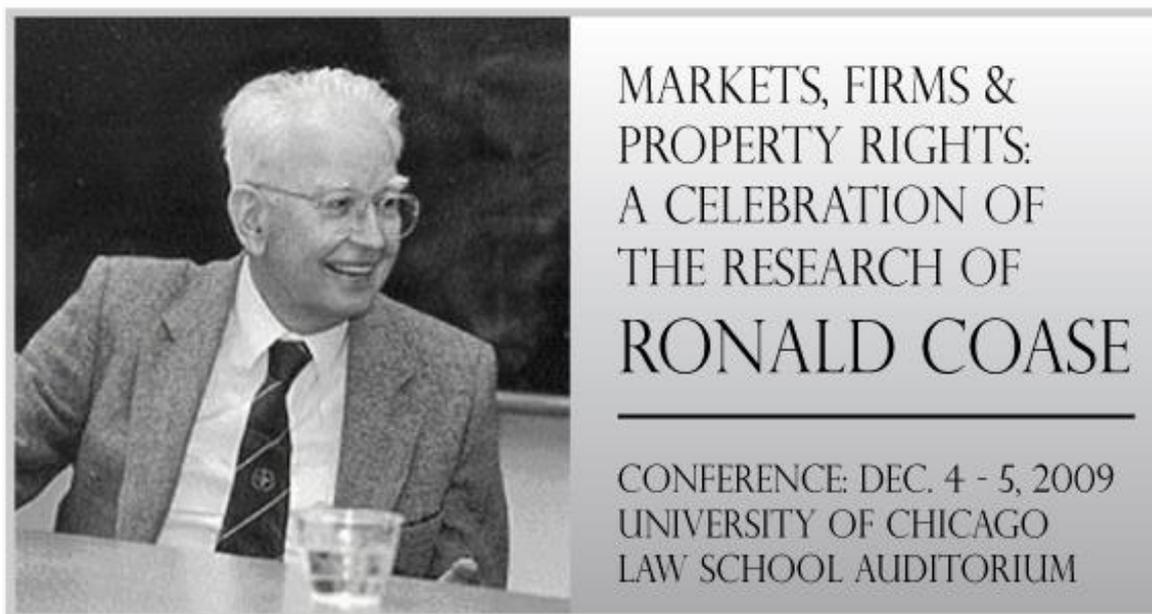
4.

In the classical utilitarian tradition, as propounded in different centuries by Hobbes, Bentham, Mill, and Hart,²⁸ the purpose of law, as of all social institutions, is to help individuals improve their welfare. Our *nomos*, the overriding norm that drives us, is to maximize our own self-selected satisfactions, be they noble or base, instinctive or socially cultivated. Reason can then yield formal rules to guide the combination of individual wills in order to permit the maximal aggregate pursuit of self-interests. A welfare-driven justice requires us to show some regard for the preferences and satisfactions of others when pursuing our own. Accordingly the law should prevent the non-consensual infliction of harms or disutilities by persons seeking their own ends. We cannot prefer and promote our own interests by means of intentional infliction of harm (from theft and assault to enslavement and killing); nor can we impose various unintended harms through culpable conduct. But outside a minimal core content of constraints established by utilitarian logic and social contract or convention, the law should be sparing in its coercions, acting above all to uphold the voluntary interactions of free individuals. Voluntarism can then shape the nature of coercions applied by the law. We can call on the legal system to bind ourselves to our mutual undertakings and respect each other's entitlements, and so perfect our interactive rationality; legal coercion then becomes the agent of our will. But we are also at liberty to exploit each other in free transactions, helped by the voluntarily summoned coercions of the law, provided we do not use violence, threats or deceptions that undermine our mutual freedom to choose our interactions.

²⁷ M Del Mar, 'The Smithian Categorical Imperative: How MacCormick Smithified Kant' (2012) 98 *Archiv für Rechts- und Sozialphilosophie* 233, and M Del Mar, 'The Evaluative Life: Between Fact and Value in MacCormick's Theories of Law and Legal Reasoning' (July 31, 2011, <http://ssrn.com/abstract=1899213>).

²⁸ See eg HLA Hart, 'Natural Rights: Bentham and John Stuart Mill', in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford, 1982) 79-104.

Yet even such a bare restatement of the utilitarian harm principle applied to law, excluding all ethical ends beyond upholding self-interest, dissolves in the hands of today's legal economists. The new utilitarian analysis of law began in Chicago some fifty years ago and is now the dominant discourse in US law schools. The new theory was inaugurated by Coase with his celebrated article on 'The Problem of Social Cost',²⁹ still the most cited single paper in all of economics AND in all of law.



The Coase Theorem was formalized by Stigler and Demsetz and from there developed into a general jurisprudential model by Posner. The core innovation was to characterize all human causal relations as entirely mutual, reciprocal and amoral. This is a sharp break with the classical utilitarian tradition, for it empties the harm principle of meaning. For Coase and his followers, harms are not the product of transitive causality, but rather reciprocal costs mutually imposed by interacting individuals, whether directly through privity of bargaining, or as externalities imposed without negotiation.³⁰ Competition is harsh and relentless, for even cooperative and continuous relationships reduce to zero sum games where the parties struggle to capture the greater share of any available consumer or producer surplus derived from cooperation, and to deflect the costs. In the Coasean account, which purports to be descriptive and normative simultaneously, all the law can do is set up market platforms allowing agents

²⁹ (1960) 3 Journal of Law and Economics 1.

³⁰ Some libertarians rejected Coase precisely because of the discarding of transitive causality: see J Getzler, 'Richard Epstein, Strict Liability, and the History of Torts' (2010) 3 Journal of Tort Law §3

rationally to price these mutual costs and benefits and allocate them efficiently through free trades. The law does not favour or disfavour one party's preference for gains or avoidance of losses as against the preferences of others. Rather, law limits its ambition to constituting a clearing market in risks and entitlements, so that rivalrous preferences may be sifted by the market, weighted, ranked and coordinated by legally-guided negotiation, without micro-management from fallible external authority. Law can help constitute well-functioning markets by reducing bargaining frictions or curbing negative tactical behaviours; but law is not a direct allocative mechanism in itself; given free trades, the market will automatically achieve an optimal allocation. In Coase's words:

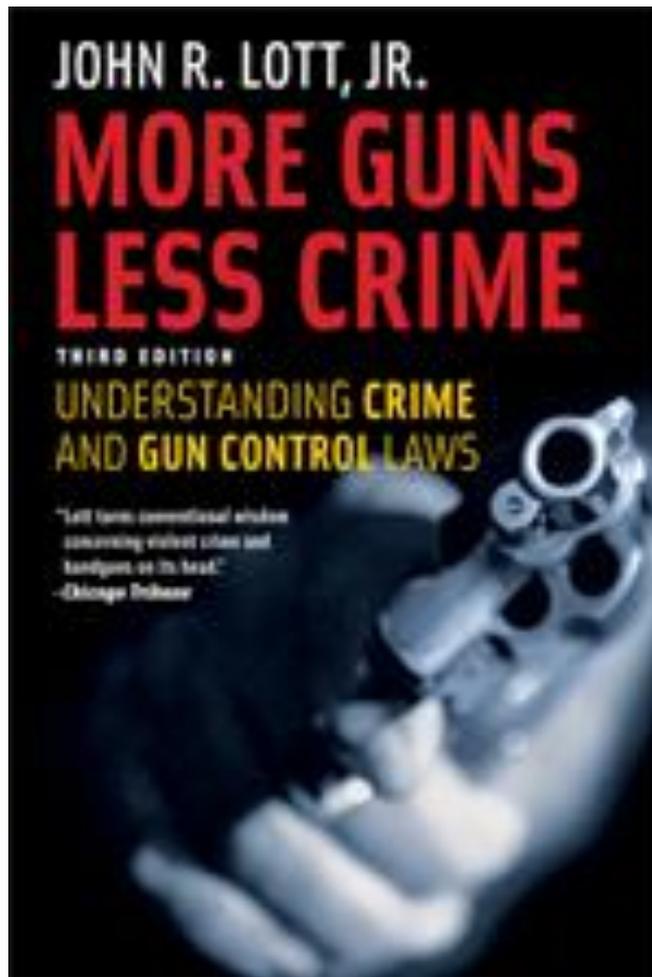
It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.³¹

Blatant harm infliction such as murder and theft can rightly be repressed outright by the law, not because these are ugly and destructive forms of self-interest that reduce aggregate utility, but rather because, in Posner's wonderful formulation, criminal conduct 'bypasses' the market system.³²

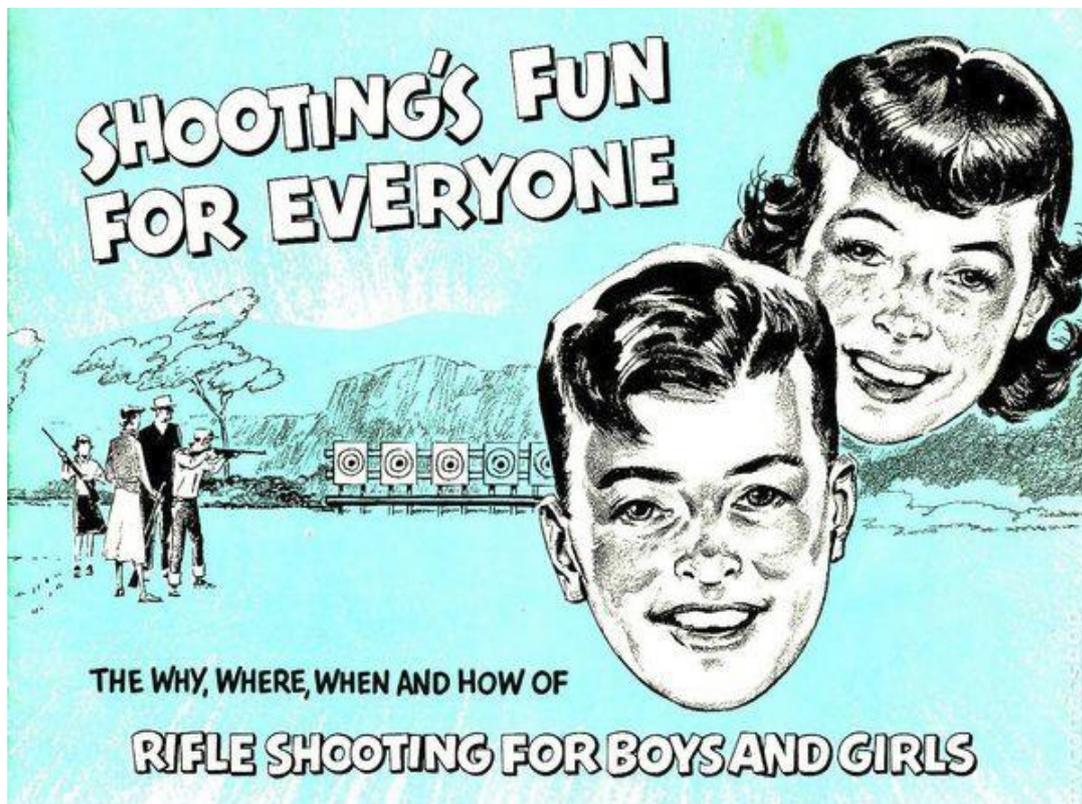
As an aside, we may observe that much of this thinking was promoted in the great American law schools from the late 1960s by the generous funding of the John M. Olin Foundation. Mr Olin, a gun manufacturer of fabulous wealth, was concerned to prevent regulation of American industry by funding pro-free-market theory in the universities. This was a very visible hand: Olin ended up spending some \$370 million on the academy in just 35 years (present value perhaps *two billion* dollars) in order to forward his anti-regulation message, and his expenditures helped raise an intellectual army converted to the cause of free market measurement of all value. So it is possible now in America to argue that a person's wish and interest not to be shot is only a preference as against another person's desire to sell guns; let the market sort it out. Olin's pro-gun campaign could also take a more direct route, funding academic advocacy against gun control:

³¹ RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, 8.

³² RA Posner, 'An Economic Theory of Criminal Law' (1985) 85 *Columbia Law Review* 1193, 1195; cf PH Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201.



and popular advertising promoting gun lifestyles:



But let's return to the lofty world of the theorists. It is fair to note that Coase ended up condemning Posner's use of his theory as a general approach to all questions of law and justice. But ideas often escape their author's intentions. Meanwhile the dominance of Coasean economic theorizing about law in much of intellectual and public space has helped summon into existence its shadow, today's rights theorists, who draw on Aristotle, Kant, and increasingly Hegel, rather than the utilitarian tradition. Amongst these theorists we may plausibly count Dworkin – whose live voice is now lost to us but whose work has powerfully influenced generations of lawyers since the 1970s – and Weinrib, whose voice has enormous sway among private law theorists today. For the rights theorists the central purpose of the law is to protect legal rights, which rights justify themselves as guarantors of the autonomy, dignity and self-cultivation of the legal subject. Legal rights are not to be viewed simply as instruments to reach other welfare goals – just as love is not merely functional to interpersonal commitment or the propagation of the species. If legal entitlements are to be protected for their own sake, using purely juristic forms of reasoning, this also means that rights theorists tend to put corrective or commutative justice at centre stage. The core practice of law is to protect extant rights from interference, where remedy is bilateral and transitive between victim and harmer. Law should not attempt to have distributional policies or efficiency goals or indeed any curiosity about social or multilateral consequences of remedial decisions, for all such distributive questions are seen as properties of political-economic decision, not legal adjudication. The rights theorists' lack of interest in the distributional consequences of the law comes into play for reasons very different to the economists, who merely doubt the efficacy of distributional decision-making outside the market, and who accept existing endowments not through conviction about separation of powers, but for instrumental reasons.

But there are deeper ways in which rights theories can be aligned with utilitarian or economic functionalism, despite the apparent incompatibility of these points of view. The sneaky economist might say – let's talk Kant in order to enhance respect for persons, property and contract, to curb rational defection in market trading, and so reduce the need to police deals using public resources. We can best be utilitarians by thinking otherwise, a kind of cunning of unreason. By a similar metric, religious belief may be prized, not in order to create a personal relationship with the deity, but to keep public order and create communal pooling and insurance mechanisms; only we can't proclaim or admit the functionalist basis of religion without undermining its efficacy in engaging our spiritual and aesthetic natures. In that sense the Coasean identification of the law as a visible hand guiding the invisible but fallible hand of

market rationality is quite possibly a poor strategy for the utilitarian legal theorist; as Adam Smith warned, why not manipulate markets by seizing control of the rules? Unless lawmakers themselves (Congressmen? elected judges?) are immune to the utilitarian calculus, Coaseanism might as well point to corruption of the law itself by self-interested individuals seeking the faster route to power and fortune, but at the expense of aggregate welfare and the durability of the market system. Rights theories therefore provide the meta-utilitarian strategy that market cultures badly need, since no market culture could survive if peopled by consistently self-interested and single-minded utilitarians. Perhaps late capitalism has developed rights talk as a secular substitute for the lost religious and civic beliefs that once served as a necessary regulator of and counterweight to market values.

Long ago I visited the University of Chicago Law School for a semester, with my office next to that of Ronald Coase. I heard a brilliant young civil rights lecturer and state senator from Illinois give a spell-binding oration on Martin Luther King Day in the university chapel – you can guess who that was. Judge Richard Posner’s research assistants worked in the room adjacent to mine – most hours of the day, so far as I could see; and Posner would occasionally drop by to check on his old colleagues. Perhaps the view I took then of hard-bitten Chicago gave me too harsh and conspiratorial a view of the ideologies of modern economics. In fact economists within Chicago and without have been busy evolving their own critique of simple welfare-maximizing models of self-interest, without discarding their distinctive utilitarian and instrumentalist worldview, and we should pay these new developments some attention.

In a stunning attack on the foundations of market-driven welfare theory, Piccione and Rubinstein recently modelled the logic of a system of exchange without any constraints, and permissive of every type of fraud and act of violence. What would a law-free world, with no protection of persons, property or contract, look like? *Contra* Hobbes, they found that such an unbridled market would yield the same optimizing results as a legally-ordered market. This ‘equilibrium in the jungle’, as they describe it, might result in wide disparities in welfare, but aggregate utilities would be no different to a conventional market of law-bound voluntaristic exchanges. End states in the jungle might even be Pareto-optimal or neutral regarding the position of losers in the system, as coalitions would prevent wholly uncompensated transfers. The lesson for utilitarians from this thought experiment is not to prize so highly legal-market rationality ordered by property and contract and driven by self-interest, but to care more about

initial entitlements and distributional consequences. Rubinstein in a coda argued that economics should try to find its way back to the egalitarian welfare politics of Bentham.³³

Another radical critique internal to today's economic science takes a rather different tack, challenging the very concepts of 'self' and 'interest' as unquestioned black boxes and prising them open using the toolkits of rational choice theory blended with positive psychology. Simon's bounded rationality,³⁴ Tversky and Kahneman's decisional heuristics,³⁵ and Franks' strategic emotions³⁶ are three versions of the genre. Perhaps the most intriguing development in behavioural economics is Ainslie's theory of 'picoeconomics' or micro-micro-economics, by which he denotes the utility-maximizing relations a person has with his or her own self.³⁷ In this model of practical reason, the self divides between different time frames and motivational states, yielding distinct personae identified by the self as having differential interests. Ainslie shows how rationality in selecting and ranking of preferences by the unified self can be modelled as a constant series of bargains over the allocation of time and energies struck between these different personae, constantly blurring means and ends across successive time periods of goal striving. These intrapersonal bargains can be betrayed by self-defection and incompetent allocations, defeating important projects through the tactical victory of lesser, more easily gratified motivations, and reducing our moral capital or capacity to discipline ourselves to meet the next set of goals. There are juristic implications in the picoeconomic model of motivation and action. Law and other external sources of normativity and duty become crucial aids to self-discipline, as we invoke the interests of others and cultivate social duties in order to precommit ourselves to execute our own cross-temporal internal bargains. I do not discipline myself and bring my future interests to mind in order to ensure that I execute a value-maximizing contract with you, and so sustain our mutual reliances and expectations; rather, I contract with you and invite your reliance and build your expectations in order to discipline my fallible present self and make it possible to achieve my more complex executory projects. Similar ideas can be located in Kant and Hegel, who speak rather of the making of long-term personal identity through relating to others. But perhaps the best investigation of

³³ M Piccione and A Rubinstein, 'Equilibrium in the Jungle' (2007) 117 *Economic Journal* 883.

³⁴ HA Simon, *Models of Bounded Rationality, Vols. 1 and 2* (Cambridge, MA, 1982).

³⁵ A Tversky and D Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124.

³⁶ RH Frank, *Passions Within Reason: The Strategic Role of the Emotions* (New York, 1988).

³⁷ G Ainslie, *Picoeconomics: The Strategic Interaction of Successive Motivational States Within the Person* (Cambridge, 1992).

how dialogue within the self yields an ethic of conduct towards others comes from an earlier thinker, and an economist to boot.

5.

In the *Theory of Moral Sentiments* Adam Smith states that people are hard-wired with a strong natural sense of sympathy for others.³⁸ We measure the feelings of others by imagining how we might feel in their shoes. And the strongest of all moral sentiments is the reciprocal desire to feel that others approve of us; for Smith it is the restless desire for regard and confirmation that chiefly drives our actions – a stance that puts him closer to Hegel than Hobbes. The approbation of others is desired mainly as an objective validation of our own self-worth; indeed our chief desire in life is to feel good about ourselves, but we need to win our own self-approbation by a valid and convincing path. The approval of others helps us bestow strongly authenticated approbation upon ourselves. But to further authenticate that external approval, we need to convince ourselves that we have rightly earned the approval of others and not fooled them into praising what is dishonest or empty. Even with loud applause the anxiously critical subjective voice inside the individual is not stilled (as every performer, indeed every plenary speaker, knows too well). Here is Smith's key insight into the psychological predicament of man:

Nature has endowed him not only with the desire of being approved of, but with the desire of *being* what ought to be approved of.³⁹

The way we handle this tension is to route the reactions of others through the postulated mind of the 'impartial spectator' with whom we maintain a constant moral dialogue:

We endeavour to examine our own conduct as we imagine any other fair and impartial spectator would examine it.... We suppose ourselves the spectators of our own behaviour, and endeavour to imagine what effect it would, in this light, produce upon us.⁴⁰

Smith's impartial spectator can be analogized to a third party observer constantly sitting in judgment. I imagine my internal critic's response as a third person to the conducts I offer to a second person, and then review and adjust my first-person conduct accordingly. This is a secularized rendition of the age-old idea of conscience, the desire to appear well in our own

³⁸ A Offer, *Self-Interest, Sympathy and the Invisible Hand: From Adam Smith to Market Liberalism* (Oxford Discussion Papers in Economic and Social History Number 101, August 2012).

³⁹ Adam Smith, *The Theory of Moral Sentiments* (1759) iii.1.14.

⁴⁰ Adam Smith, *The Theory of Moral Sentiments* (1759) iii.1.2.

eyes by conduct that we can objectively imagine as morally valid. And indeed Smith makes this assimilation, comparing the ‘moral sense’ or ‘sentiment’ which ‘Providence undoubtedly intended to be the governing principle of human nature’ with ‘Conscience’, which ‘properly signifies our consciousness of having acted agreeably or contrary to [the moral faculty’s] directions’.⁴¹ Raphael in his recent study of Smithian conscience suggests that the impartial spectator is chiefly concerned sympathetically to assess first-person motive, though Smith’s language is also consistent with empathetic imagination of the effects produced on the second person.⁴² There is a union between the models as the second person is affected not only by the objective conduct offered to him or her, also but by the motives underpinning the first-person action; the impartial spectator helps the actor look more deeply at both sides of relationships.

In the notes we have of Smith’s early lectures on jurisprudence, he uses the idea of the sympathetic yet impartial spectator to evolve a commutative theory of legal justice. An offence can breach either natural or adventitious rights. The first are those that injure the security of the self in any setting, the latter those that are an injury due to a social context such as the breach of a seriously made promise where such contracts are expected to be performed. The legal system exists to launch retribution against those who cause unwarranted harm to the security and expectations of others. The legal system chooses the relevant *iniuria* to be regulated by referring the offence to the measure of the impartial spectator. Hence not all subjective harms will be actionable, only those that our postulated observer would find egregious will be sanctioned. In effect, this is setting up a morality based on the objective or shared commonsense we would expect from an ideal peer group engaging in moral reflection – the sympathetic juror, the wise judge, the reasonable man. Some have called this ‘invisible hand ethics’, depending on a social equilibrium of moral thought. But Smith was concerned to distinguish the viewpoint of his ideal sympathetic observer from the common opinions of average mankind.

Nussbaum, another Chicagoan but of a different stripe, has invoked Smith’s impartial spectator to argue for an emotionally empathetic model of universal moral relations, but this pushes too far; emotional bonds such as love or friendship involving shared feelings are intrinsically partial and subjective, first-second person only. We might instead see Smith’s moral-legal theory as a modern restatement of the Stoic naturalist concept of conscience. And

⁴¹ TMS ch. iii.

⁴² Raphael, *The Impartial Spectator*.

I would like suggest that Smith by reviving Stoic ethics was really bringing to the surface what eighteenth-century courts around him were already doing – namely, deploying a theory of reflective conscience in order to set moral standards for a commercial and secular age.

We can identify maybe four concepts of conscience working within English law up to the end of the long eighteenth century (Scottish law has its analogues but I will not discuss these here).

The first concerned legal regard for religious belief, as the legal implications of the seventeenth-century Test Acts and the Toleration Act were explored. Lord Mansfield both as judge and Parliamentarian here broke new ground, erecting privileges for non-Anglican faiths in the 1760s, superseding the intolerant position of Lord Hardwicke.⁴³

The second concept of conscience, which I will name the command theory, has roots in political theology, and has recently been explored in detail by Klinck. God plants in us a natural moral instinct that we strive to obey. God has also commanded authority, whether secular sovereign or church, to pursue moral conduct in the State, and by delegation to the courts the judges wield a duty of conscience to hold all subjects to good conduct; thus conscience is a power in effect to legislate morality and so articulate God's commands through the structure of state adjudicative power.⁴⁴

The third theory of conscience is associated with Aristotelian equity. Where the specific facts of a case make the normal legal result unjust, a man's conscience, afforced by the intervention of the court, requires that the normal legal rights and duties be adapted, and the full force of the right restrained, lest rule-bound law itself become an instrument of injustice. Conscience is thus based on full knowledge of the circumstances of one's relationships, and a court of conscience has special techniques of evidence to uncover the circumstances that affect men's

⁴³ *The speech of the Right Honourable Lord Mansfield in the House of Lords, in the Cause between the City of London and the Dissenters [Chamberlain of London v Evans (1767)]* (Belfast, 1774); *Harrison v Evans* (1767) 3 Bro Parl Cas 465; 1 ER 1437 (HL). See further J Getzler, 'Faith, Trust and Charity' in A Burrows, D Johnston, and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013) 559.

⁴⁴ DR Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Farnham, 2008).

consciences or moral knowledge. My colleague Mike Macnair has made a special study of this English *epikeia* or equitable conscience.⁴⁵

The fourth type of conscience I will name the presumption of honesty model. It requires the actor to look reflectively and critically at his or her conduct and to govern behaviour so as to avoid the possibility of misconduct. Courts administer such duties of conscience by applying objective moral presumptions to evidence, attaching liability wherever there is a risk of overreaching, and thereby steering parties away from situations where there can be any temptation to wrongdoing. To give examples, it is against conscience to contract with the weak and incapacitated⁴⁶ or to exploit an entrusted office,⁴⁷ at least without strong safeguards of consent, advice and representation, because there is too great a risk of exploitation and harm corrupting the relationship, even if no corrupt intent or harm to the victim is actually proven in a particular case. Like the Smithian impartial spectator, the legal voice of conscience is concerned with the moral quality of *motive* in judging the conduct. The eighteenth-century courts signalled these concerns in two different voices: through a positive discourse of ‘good faith’ or *aequum et bonum* on the one hand; and through a negative discourse of ‘fraud’ on the other. A court of conscience will eliminate fraud by ascribing to the parties good motives and requiring them to act on moral counterfactuals so as to avoid bad conscience or ‘unconscionable exercise of rights’. Modern courts and commentators have sometimes merged this fourth presumptive theory of conscience with the third knowledge model, and have tried to ‘impute’ or ‘imply’ or ‘infer’ intentions that bind the conscience as objective mental acts, a kind of implied speech act. The true search here is for reflective self-judgment that retrospectively re-characterizes the moral quality of actions so as to restrain rights and thereby fix duties. Conscience here operates as an internal dialogue, guided and afforded from without by the adjudicative process.

Both the command theory and the knowledge theory of conscience are contained in the famous 1615 judgment of Lord Chancellor Ellesmere in the *Earl of Oxford’s Case*, which has recently been analysed closely by David Ibbetson in an important forensic study.

⁴⁵ M Macnair, ‘Equity and Conscience’ (2007) 27 Oxford Journal of Legal Studies 659; *Law of Proof in Early Modern Equity* (Berlin, 1999).

⁴⁶ *Earl of Chesterfield v Janssen* (1750) 1 Atkyns 301; 26 ER 191 (LC).

⁴⁷ *Keech v Sandford* (1726) Select Cases Temp King 61; 25 ER 223 (LC); *Bishop of Cloyne v Young* (1750) 2 Vesey Senior 9; 28 E.R. 60 (LC); *Langham v Sandford* (1816) 2 Merivale 6; 35 E.R. 843 (LC).



Lord Ellesmere, by Anon. c. 1600

Lord Ellesmere in that case wrote:

The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.

The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called Summum Jus.

And for the Judgment, &c. Law and Equity are distinct, both in their Courts, their Judges, and the Rules of Justice; and yet they both aim at one and the same End, which

is, to do Right; as Justice and Mercy differ in their Effects and Operations, yet both join in the Manifestation of God's Glory.

We can find a similar union of the command and knowledge theories in Lord Kames' 1760 work on the *Principles of Equity*, recently explained to us by Michael Lobban,⁴⁸ and particularly interesting since Kames was an exact contemporary of Smith's.

The presumption of honesty measure of conscience is adumbrated in the writings and judgments of Lord Chancellor Nottingham in the later seventeenth century, who often cites *ius commune* sources to ground his theories.⁴⁹ We can also find it in the work of the early eighteenth-century Chancellors, as in Lord Hardwicke's important 1750 judgment in *Earl of Chesterfield v Janssen*. Here Lord Hardwicke makes it quite clear that it is not only fact that can be presumed through forensic inquiry, but also the moral interpretation of proved fact. I have learnt much from Catherine Macmillan and Michael Lobban through their sustained work on this crucial part of the law of conscience.⁵⁰

Here are the crucial passages from Lord Hardwicke's judgment:⁵¹

Whether it is contrary to conscience, and relievable upon any head or principle of equity?

This court can certainly relieve against all kinds and species of fraud.

Fraud may either be dolus malus, a clear and express fraud, or fraud may arise from circumstances, and the necessity of the person at the time.

But this court will relieve against presumptive fraud, so that equity goes further than the rule of law, for there fraud must be proved, and not presumed only.

To take an advantage of another man's necessity, is equally bad, as taking advantage of his weakness, and in such situation, as incapable of making the right use of his reason, as in the other.

⁴⁸ M Lobban, 'The Ambition of Lord Kames's Equity', in A Lewis and M Lobban (eds), *Law and History* (2003) 6 Current Legal Issues 97.

⁴⁹ DEC Yale, ed, *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (Cambridge, 1965) 166-167, 196, 200; *Palmer v Jones*, in DEC Yale, ed, *Lord Nottingham's Chancery Cases* (Selden Society vol 79, London, 1961) 649, no. 824 (1678); cf rehearing by North LK at (1683) 1 Vern 144; 23 ER 376.

⁵⁰ C MacMillan, 'Earl of Aylesford v Morris (1873)', in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Oxford, 2012) 329; M Lobban, 'Contractual Fraud in Law and Equity, c1750-c1850' (1997) 17 Oxford Journal of Legal Studies 442.

⁵¹ (1750) 1 Atkyns 301; 26 ER 191 (LC).



Lord Hardwicke, from the studio of Michael Dahl c. 1740

In the 1778 case of *Gwynne v Heaton* Lord Chancellor Thurlow noted that in *Janssen's Case*, 'Lord *Hardwicke* treats inequality as a mark of fraud'. In that case the defendant had sold to a necessitous heir a life annuity for the father for a large sum charged against the family estate, where there was ample evidence that the father was at death's door and the annuity would not

amount to much. After establishing by evidence that the father's 'dissolution' was notorious, Lord Thurlow used this test of conscience:

To set aside a conveyance, there must be an inequality *so strong, gross, and manifest*, that it must be *impossible to state it* to a man of common sense, *without producing an exclamation at the inequality of it*.



Lord Thurlow, by George Romney, 1784

It is in the eighteenth century that this presumption of honesty test takes full form. It is often postulated as a moral counterfactual – the court requires the agent to act ‘as if’ he or she were honest, no matter what the subjective motives or mind of the agent might be.⁵² My argument, then, is that this presumption of honesty, this fourth juristic version of conscience, is an English solution to the problem of law and self-interest. It is distinct from the prior forms of conscience because it trains parties to measure their conduct against the gaze of an impartial spectator, not simply to obey the commands of an inquisitorial and authoritative court.

6.

I would like to end by suggesting that there are classical foundations for the eighteenth-century method of injecting the impartial spectator and the quality of conscience into legal dealings.

One of the many memorable sentences in Roman law is this text of Ulpian’s, the most important jurist of the early third century, or perhaps any century, set within the opening paragraphs of both the *Institutes* and *Digest* of Justinian:

Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.

The following are the precepts of the Law: To live honourably, to harm no one, to give to each his own.⁵³

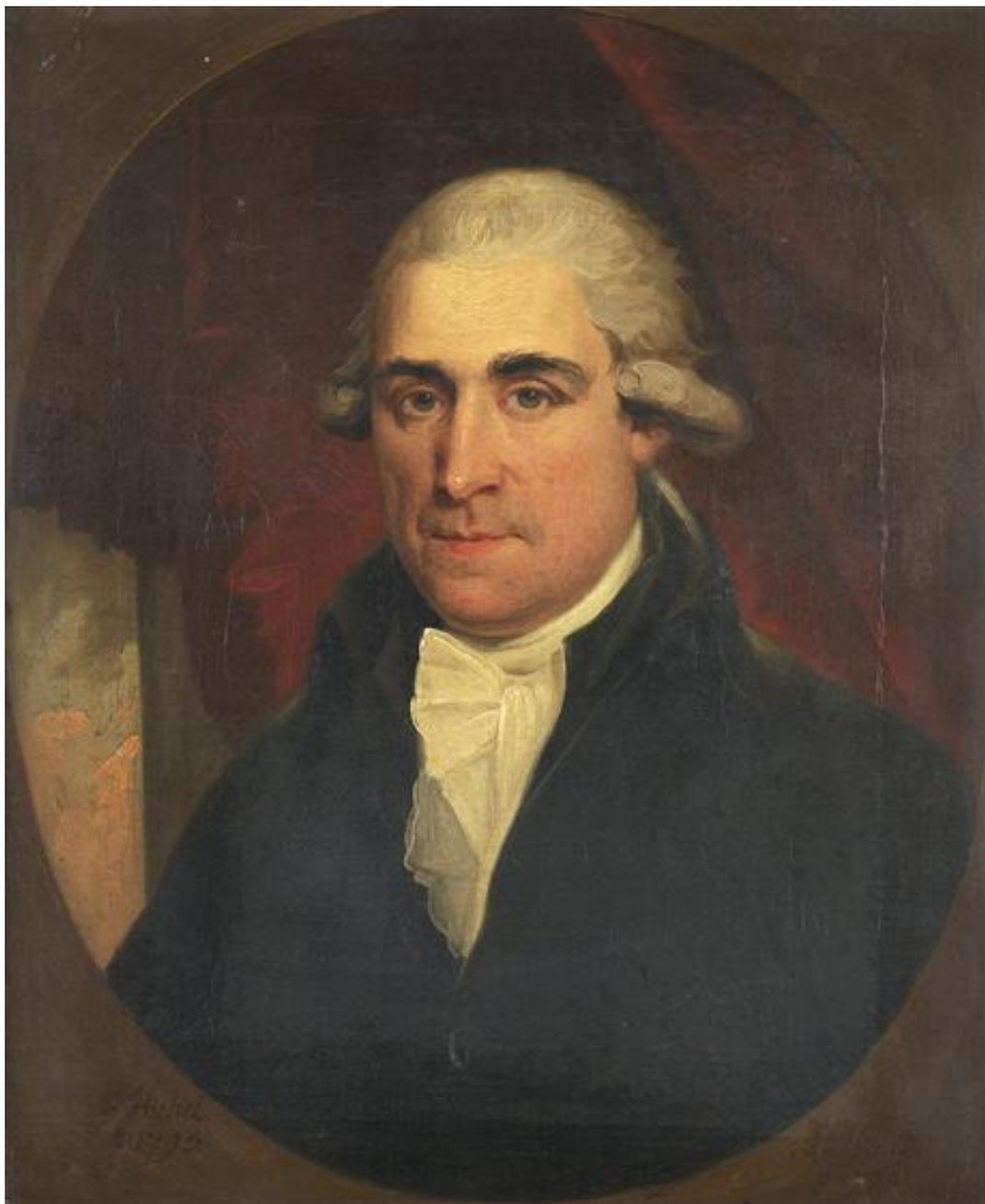
The two latter precepts are circular: by determining rights and duties, it is the law itself that defines what is a harm, and what is due to each of us. But to live honourably or honestly – *honeste vivere* – how can law begin to determine this mysterious virtue? Tony Honoré has recently argued that Ulpian’s meaning here was deeply influenced by Stoic philosophy, as taught by Cicero, Seneca and Marcus Aurelius.⁵⁴ In the Stoic view nature promotes an ethic of concern for others rooted in our biology. Tranquillity of mind or good conscience is achieved by honouring the interests of others and winning our own self-approbation through our good treatment of others. Lawyers familiar with classical culture would understand how ‘*honeste vivere*’ encoded that philosophy.

⁵² J Getzler, ‘As If’. Accountability and Counterfactual Trust’ (2011) 91 Boston University Law Review 93.

⁵³ Institutes 1.3; Digest 1.1.10 (*Ulpianus libro secundo regularum*).

⁵⁴ T Honoré, ‘Ulpian, Natural law and Stoic influence’ (2010) 79 Legal History Review 199.

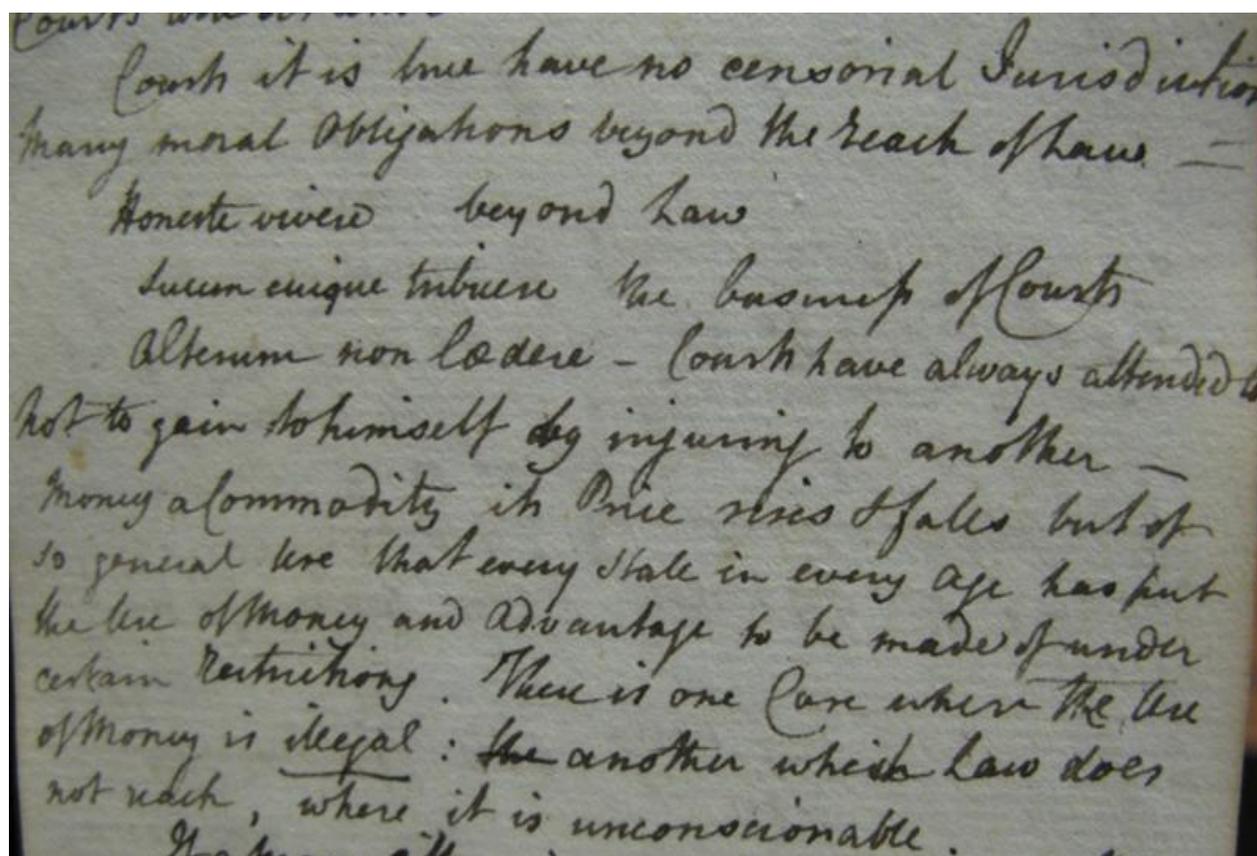
I mentioned just before the 1778 judgment of Lord Thurlow in *Gwynne v Heaton*. Now a newly admitted barrister named John Scott sat at the back of the court during that hearing (it was at Westminster Hall rather than Lincoln's Inn as this was in the middle of the Trinity law term).



John Scott, later Lord Eldon, by Anton Hickell, 1793-94

The young man characteristically took careful notes for his own instruction. Scott went on to become Lord Chancellor Eldon, one of the great lawyers of England, and his library was well preserved. We can read his schoolboy notes of Cicero's *De Officiis*, and his dozens of notebooks of the cases he attended, argued or heard across a long career at the centre of English justice. In his apprentice notes of that 1778 case Scott recorded the arguments of plaintiff's counsel. This was Alexander Wedderburn, a Scottish-educated barrister who may well have heard Adam Smith lecture on jurisprudence in Edinburgh and Glasgow in the 1750s (the dates fit exactly). Wedderburn had moved his practice to England and by now had become Attorney General, and was later to rise to the Lord Chancellorship, like Scott in due course.

Here is the original of Scott's notes of Wedderburn:⁵⁵



– and you can see some Ulpian if you look hard, three lines down.

⁵⁵ John Scott, *Notebook of Chancery Cases*, Saturday 27 June 1778, MS., Lord Eldon Collection, Georgetown Law School, Washington DC.

Here is my transcription:

Courts it is said have no censorial Jurisdiction. Many moral Obligations beyond the reach of Laws.

Honeste vivere beyond Law

Suum cuique tribuere the business of Courts

Alterum non lædere – Courts have always attended to – Not to gain to himself by injury to another –

Money a commodity its Price rises & falls but of so general use that every State in every Age has put the Use of Money and Advantage to be made of [it] under certain Restrictions. There is one case where the use of money is illegal: ~~the~~ another which Law does not reach, where it is unconscionable.

‘Honeste vivere’ is ‘beyond Law’, in the sense of it being a standard of virtue that cannot be captured by legal rules. But where ‘Law does not reach’, that is, where the common law and the statute books are silent, we have the Courts of Equity to supply the restraints of conscience. There is a practical resolution for the intricate theoretical problem of law and self-interest.

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