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Law, Self-Interest, and the Smithian Conscience

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This essay examines how law understands and engages with self-interest. After examining the turn to voluntarism and away from a jurisdiction of conscience in recent law and legal theory, it moves attention to intellectual history, and examines the work of Adam Smith in ethics, economics and jurisprudence, where a theory of conscience based on sympathy is used to explain self-interest and to provide the ground of an original ethical system. Evidence is then adduced that lawyers in Chancery in the decades immediately following Smith's theorising came to think in similar terms, perhaps directly influenced by Smith's arguments.

I. How Does the Common Law Regard Self-Interest?

Self-interest as a term of art is only seldom found in the records of English and Scots common law. In one of the earliest instances, the Court of Session in 1708 found a 'conflict betwixt the point of honour and conscience on the one side, and self-interest on the other', in a case determining whether words in a letter betokened a mandatory assumption of trust or rather mere

words of precation, a benevolent desire that might freely be withdrawn.[1] The phrase 'self-interest' was used more negatively by Lord Chancellor Macclesfield in 1721, as a synonym for 'knavery' and 'dishonesty'.[2] Here was a certain irony, for Macclesfield was impeached for bribe-taking and corrupt sale of offices by Parliament some four years later. This was a judge who knew of what he spoke.

The negative connotations of self-interest recur later in the century. Counsel in a case of 1774 likened self-interest to 'malice'.[3] In 1810 the 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.[4] 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 dispute his own'.[5] In 1830 the Court of Common Pleas characterised fraud as a 'sordid regard to self-inter-

* I thank Maksymilian Del Mar and Michael Lobban for their acute and helpful comments, and also participants at the UK IVR 2013 Annual Conference and my colleagues at the UNSW Law School for lively responses to initial testing of this essay in the lecture theatre.

[1] *Francis Maxwell of Tindwal v Irving of Gribton* (1708) 4 Brown's Supplement 688 (Court of Session).

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

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

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

[5] *Doctor Bonham's Case* (1610) 8 Coke's Reports 113, 118; 77 ER 646, 652 (CP). 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 Analysis 325; for the classical Roman background on judges' liability see DN MacCormick, 'Iudex Qui Litem Suam Fecit' [1977] Acta Juridica 149, and PBH Birks, 'A New Argument for a Narrow View of Litem Suam Facere' (1984) 52 Tijdschrift voor Rechtsgeschiedenis 373.

est'. In that case liability attached for untruths spoken with a view to gain, whether it was intended to deceive or not.[6] 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.[7] 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.[8]

Outside the fiduciary principle, modern English law came to abandon the semantic association of self-interest with fraud or oppressive taking of advantage found in cases before 1830. 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.[9] But despite the paucity of direct reference in judgments, we may fairly claim that the operation and constraint of self-interest within the law of obligations is one of the abiding themes of the modern common law.

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

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

[8] Eg *McPherson v Watt* (1877-88) 3 LR App Cas 254, 266 (HL) per Lord Cairns: 'An attorney… must be prepared to shew that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest; that he has not misrepresented anything, or concealed anything; that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded'.

[9] See eg *Oswald v Ayr Harbour Trustees* (1883) 10 Rettie 472, 492 per Lord Craighill (Court of Session, 2d Division); *Mogul Steamship Co Ltd v McGregor, Gow, & Co* (1888) 21 QBD 544, 614 per Bowen LJ (QB); *Herron v Rathmines and Rathgar Improvement Commissioners* [1892] AC 498, 523 per Lord Macnaghten (HL(I)); *Allen v Flood* [1898] AC 1, 64 per Wills J.

II. How Does the Common Law Constrain Self-Interest?

The common law courts have used three main theories to explain the controls the law places on self-interest in bilateral relations.[10] The first approach deploys a *voluntarist* or *will* theory of obligations, describing the bonds of law as ultimately based on the consent of the parties, whether that consent is express, implied, or imputed to the parties as a rational inference of their will. Rights and duties constraining self-interest are seen to be chosen self-interestedly by the parties themselves, or at least prudentially accepted as the logical consequence of a system of mutual restraints. Breach of obligation is a defection from those mutually agreed restraints and will typically result in a remedy such as damages which is also seen to be party-designed, a part of the deal as an alternative to performance, and not a remedy ordained from without by the state. The state rather provides an enforcement mechanism for rights generated by party conduct. Much of tort as well as contract can be assimilated to this model as parties voluntarily engaging in conduct are taken to assume responsibility for any risks created by that conduct.

The second approach may be named a *command* or *paternalist* theory of obligations. Here, rights and duties are prescribed by law not to articulate party wills, but in order to apply communal or policy norms to guide conduct. Law can thereby curb the trespasses, opportunism and weaknesses that can trip cooperation and foment exploitation. The constraints imposed by law

[10] For alternative historical taxonomies see P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) esp ch 22, 716-79; W Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015), esp 153-230; D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999); M J Lobban, 'Contract' and 'Tort', in W R Cornish et al (eds), *The Oxford History of the Laws of England, Vol XII: 1820-1914* (Oxford University Press 2010) 297-610, 879-1150; M J Lobban, 'Contractual Fraud in Law and Equity, c1750-1850' (1997) 17 Oxford Journal of Legal Studies 441.

are the compulsory conditions within which self-interest is permitted to operate. Breach or abuse of obligation summons a police action to restore civility and raise conduct standards.

The third method of control may be described as the theory of *conscience* or *good faith*, expressed most extensively in Chancery's equitable jurisdiction, but by no means confined to that body of doctrines and remedies. Conscience does not provide a foundational theory of legal rights, but rather supplies a concurrent or overlaying jurisdiction, providing an engraftment of obligations on top of those rights and duties that derive from party consent or state prescription. Duties of conscience control the manner in which acknowledged legal rights may be exercised. The court makes a presumption of honesty, a kind of moral counterfactual where the parties, upon being confronted with the full evidence of their conduct and its impact on others, are taken to choose good faith in the exercise of their rights and duties. Based on this presumption, the court will lead the parties to correctly execute all rights and duties (through primary enforcement such as specific performance or an order of account of assets), or else will undo or block rights and duties improperly conceived or exercised (through *inter alia* injunction, rescission, estoppel, conveyance by constructive trust, relief against penalties and forfeitures, and *restitutio ad integram*).

Today it is the voluntarist or will theory that is ascendant in the courts. The command theory is now seen as the preserve of legislatures;[11] and the equitable conscience jurisdiction has steadily dwindled, with the most recent step being the uprooting of the primary performance obligation in trust law by judicial fiat.[12] The voluntarist theory was restated in its full force by Lord

[11] A Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 Law Quarterly Review 23.

[12] *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367 (Supreme Court of the UK).

Neuberger and Lord Sumption in *Cavendish Square Holding BV v Talal El Makdessi*,[13] a Supreme Court case of 2015 concerning the extent of control of penalties clauses in contracts stipulating remedies in excess of the greatest possible harm caused by breach of a primary obligation. Their Lordships noted that the rule was not based on the traditional equitable concern with procedural propriety and good faith negotiation, but acted directly on the primary content of negotiated contracts. They continued:

> The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law… In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach[14]

The court in that case reluctantly maintained the ancient jurisdiction to control penalties clauses in contract law, but refused to extend the jurisdiction to substantive obligations, as the High Court of Australia had done three years earlier in regulating banker-customer relations.[15] The Australian judges had held that since contingent primary obligations resembled remedies in their effect or function, they too fell to be controlled by the court outside the will of the parties. The English judges in *Cavendish Square* inverted this reasoning, with Lords Neuberger and Sumption making this analysis:

> Modern contracts contain a very great variety of contingent obligations. Many of them are contingent on the way that the parties choose to perform the contract. The potential

[13] *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67.

[14] *Cavendish Square* (n 13) [31], [35].

[15] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205. Cf *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696 (UKSC); S Whittaker, 'Unfair Contract Terms, Unfair Prices and Bank Charges' (2011) 74 Modern Law Review 10.

> assimilation of all of these to clauses imposing penal remedies for breach of contract would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement.[16]

Here the judges acknowledge the existence of a 'supervisory jurisdiction', constraining the parties *ex lege*, independently of their will, but this version of command theory was expressed as a subordinate source of rights and duties, to be applied only where there was a special justification. Otherwise voluntarism is the norm.

This tilt to voluntarism is not merely a phenomenon confined to commercial contracts. If we look elsewhere in the modern law of obligations we find increasing resort to putative consent or will to explain the origin and content of obligation. The courts use complex tests for *volenti* in order to determine who should shoulder risk;[17] they engage in elaborate interpretation of contractual intentions looking beyond the formal terms in order to set the level of performance and determine due discharge and remedy;[18] they use implied terms to explain contractual duties such as good faith disclosure in formation or fair dealing and good faith in performance;[19] they look for undertakings or assumption of responsibility or legitimate expectations, rather than relational

[16] *Cavendish Square* (n 13) [42].

[17] Eg *The Golden Victory* [2007] UKHL 12, [2007] 2 AC 353; *The Achilleas* [2008] UKHL 48, [2009] 1 AC 61; *Coope v Ward* [2015] EWCA Civ 30.

[18] Eg *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] WLR 1333.

[19] Compare *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111, [2013] 1 All ER (Comm) 1321 (QB) per Leggatt J, with *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200.

conduct or status, in order to trigger ascription of responsibility in tort and in fiduciary law.[20] The role of the will in forming obligations can also be inverted, with the *absence* of a causative will being sufficient to trigger a commutative obligation, for example to restore an unjust enrichment or an unjustly negotiated contract because there has been no fully autonomous will authorising value to be transferred in the first place.[21] And voluntary will can be used actively to cut back extant obligations, as where consent to lowered protection in fiduciary or tort law is derived from the circumstances or context of the parties, rendering normally expected rights and duties defeasible.[22] The juridical urge to place all or most obligational rights and duties on a voluntarist basis seems almost an *idée fixe*, as if the judges sense that any legal constraint of the conduct of self-interested actors can be justified only by tying that constraint back to the self-interested intentions of those actors.

The modern voluntarist trend in the law of obligations links back to other theoretical positions long extant in the law. For example English courts will control the methods by which rights are brought into being, protecting the free wills and capacities of interacting parties. But they have

[20] Eg for tort: *Woodland v Swimming Teachers Association and Others* [2013] UKSC 66, [2014] AC 537; *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2 for fiduciaries: *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731; [2012] Ch 613); JJ Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 Law Quarterly Review 302; cf J Getzler, 'Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 39-62.

[21] Cf P B H Birks and G McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 Oxford Journal of Legal Studies 46; P Birks and N Y Chin, 'On the Nature of Undue Influence' in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995) 57-97.

[22] J Getzler, 'Excluding Fiduciary Duties: The Problem of Investment Banks' (2008) 124 Law Quarterly Review 15; 'Ascribing and Limiting Fiduciary Obligations' (n 20).

tended to exclude not only the idea of substantive fairness in the content of rights,[23] but also any doctrine of abuse of rights, that is, denied any curial control over the manner in which acknowledged rights and associated powers may be wielded by the right holder, notably in the arena of property[24] but also in contract. Jhering made such non-interventionism into a political or moral argument in 1872 in *The Struggle for Law*, claiming that the self-interested absolutism of rights was intrinsic to the legal personality of a free agent; the state was strictly to enforce all rights, but never attempt to curb or balance the free exercise of rights. Jhering's manifesto for legal liberalism must have struck a chord in the English-speaking world: his book was a runaway bestseller and went into a number of English and American editions, as well as translating into twenty-five other languages.[25] Some theorists go still further and see this non-interventionism as structural, a position instinctive to rights recognition and enforcement, rather than merely a political choice. On this account legal rights only make conceptual sense as zones of untrammelled will or choice. Hence it is part of the definition of a right that the interests of others need not be taken into account in exercising that right within its due boundaries. Hart, for example, argued that the right holder is a 'little sovereign' in control of the duty performance,[26] and a sovereign is not accountable to outsiders as to what it decides within its territory, else it would not be a sovereign. External legal constraint on self-centred exercise of rights may then be re-

[23] Cf SA Smith, 'In Defence of Substantive Fairness' (1996) 112 Law Quarterly Review 138.

[24] M Taggart, *Private Property and Abuse of Rights in Victorian England* (Oxford University Press 2002).

[25] R von Jhering, *Der Kampf um's Recht* (Vienna 1872), translated by JJ Lalor as *The Struggle for Law* (Callaghan and Co 1879).

[26] HLA Hart, 'Legal Rights' in *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 162, 183-84.

mapped within a command model as conditions applied to the validity of the right by the recognising or coordinating authority as a condition of their exercise;[27] or alternatively as the resultant of conflicting rights and immunities of others that curb the privileges and powers of the first right holder, a kind of summing or integration of orthogonal wills.[28] Other theorists have described the oscillation between ascription of rights and defeasibility at the instance of counter-rights as the essence of practical legalism, a style of contingent moral reasoning deeply familiar to lawyers in their everyday practice. Hart, for example, propounded a defeasibility model in his earliest general analyses of law and obligation, and Honoré applied a similar model to property law, followed by Epstein in his theory of tort law as a succession of overlapping pleadings. Parties can scale their obligations up or scale them down at will, and the task of the legal system is to facilitate this free scaleability.[29]

Voluntarism can thus be elaborated to deliver a highly sophisticated law of obligations, that operates to constrain self-interest and balance rights, without much resort to rival norms. But the voluntarist model does not fully capture the phenomenology of rights. It must perforce resort

[27] J M Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 276-78; J W Harris, 'Human Rights and Mythical Beasts' (2004) 120 Law Quarterly Review 428.

[28] R Stevens, 'The Conflict of Rights' in A Robertson and TH Wu (eds), T*he Goals of Private Law* (Hart Publishing 2009) 139.

[29] HLA Hart, 'The Ascription of Responsibility and Rights' (1948) 49 Proceedings of the Aristotelian Society (ns) 171, reprinted in A Flew (ed), *Logic and Language* (Basil Blackwell 1951) 145; AM (Tony) Honoré, 'Rights of Exclusion and Immunities against Divesting' (1960) 34 Tulane Law Review 453; R Epstein, 'Defenses and Subsequent Pleas in a System of Strict Liability' (1974) 3 Journal of Legal Studies 165; 'Pleading and Presumptions' (1973) 40 University of Chicago Law Review 556. The ascriptive approach derives from JL Austin, 'A Plea for Excuses' (1956–7) 57 Proceedings of the Aristotelian Society (ns) 1, reprinted in JO Urmson and GJ Warnock (eds), *Philosophical Papers* (1961) 175; Hart later disowned ascriptivism, but philosophical supporters may still be found: eg JR Lucas, 'The Ascription of Actions' (c1975), at <http://users.ox.ac.uk/~jrlucas/ascript.html#r-1>.

to objectification of consent and imputation of intentionality from circumstances where the parties do not subjectively will their obligations. Moreover, the theory cannot easily protect the interests of weaker parties, especially in complex and continuing relationships where the voluntarist slogans of *caveat emptor* and *volenti non fit injuria* hold increasing sway, for example in markets for financial products and labour supply. When a model departs radically from lived experience, and brings with it bevy of painful moral and political problems, then it may be time to rethink whether the model is in good health – a question also increasingly asked of modern micro-economics, the partner theory to legal voluntarism.[30]

What is to be done? In a liberal or postmodern world, suspicious of the paternal authority and command of the state and its elites, does the third jurisdiction of conscience offer a possible corrective to the weaknesses of voluntarism? Much has been written by modern jurists about how conscience can operate in today's fused systems of law and equity, sometimes defending, usually attacking the existence of the third jurisdiction, with its apparent moralism and discretion seeming to challenge rule of law ideals.[31] Meanwhile the detailed operation of the Chancery jurisdiction of conscience before nineteenth-century fusion has been subjected to close scrutiny by legal historians, deepening our understanding of how conscience has operated within the

[30] The marriage of legal voluntarism with wealth-maximizing microeconomics through the medium of equilibrating shadow markets is expressed notably in RA Posner, *Economic Analysis of Law* (9th ed, Wolters Kluwer 2014).

[31] See for example the notorious attack levelled against equitable conscience by PBH Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia Law Review 1; for a more nuanced but still hostile view, see Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl: Taxonomy and Taxidermy in Equity' (2009) 68 Cambridge Law Journal 537. Stern defences of the old discourse of conscience have been issued by the High Court of Australia, eg *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107; and see JD Heydon, MJ Leeming, and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed LexisNexis Australia 2014).

common law tradition.[32] It may be useful to supplement these accounts of the third jurisdiction by taking an extra-legal vantage, and examining the thought of the economist and ethicist Adam Smith, who had much to say on the relations of self-interest, conscience, and the law. Smith's ideas on conscience and its jurisdiction are especially interesting on two major scores. The first concerns Smith's contrasting expositions of altruism in ethics and egotism in political economy. Smith postulated that the interactions of individuals in the market-place are driven solely by self-interest or 'self-love', and beneficially so; but he also held to his theory that social relations were sustained by a reflective moral sympathy based on conscience. How did Smith resolve this seeming disjuncture, and what role did he believe law might play in mediating this tension? The second reason to study Smith is that in his highly influential theory of ethics, a model of conscience using the secular language of Enlightenment reason and sensibility is placed at the very centre of his normative system, just at the stage when many conscience-driven doctrines of the modern Chancery jurisdiction are taking form, including the doctrine of presumptive equitable fraud and its twin the remedial presumption of honesty. Reading Smith's thought alongside the law of his day thus offers a new perspective on the development of the third jurisdiction.

Before reviewing Smith's ideas about self-interest and conscience, we will first touch on the utilitarian theorists who preceded and followed him in order to frame his thought within an intellectual tradition. We will then turn to the law of Smith's day to see how the contemporary

[32] Some of the leading contributions: M Macnair, *The Law of Proof in Early Modern Equity* (Duncker & Humblot 1999); M Macnair, 'Equity and Conscience' (2007) 27 Oxford Journal of Legal Studies 659; M Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery' (2004) 22 Law and History Review 389, 565; DR Klinck, Conscience, *Equity and the Court of Chancery in Early Modern England* (Ashgate 2010); R Havelock, 'The Evolution of Equitable "Conscience"' (2014) Journal of Equity 128; and J Rudolph, *Common Law and Enlightenment in England, 1689-1750* (The Boydell Press, 2013).

courts explained the constraints placed on self-interested actors in the exercise of their rights and powers.

III. Self-Interest and Its Infirmities: The Utilitarians

It is a commonplace of microeconomics and rational choice theory that the pursuit of self-interest by actors engaging with each other to improve their individual welfare can fail due to collective action problems and the logical limits of strategic bargaining.[33] Moreover individuals may be poor at pursuing their self-interest due to flaws in their ability to understand and interpret their external environment, and also poor conceptions of their own internal motivations and goals, with time inconsistency and weakness of will as particular curses tripping the individual's setting of goals and priorities.[34] These problems have been discussed for centuries in the utilitarian tradition, and many theorists have proposed that state law is the prime solution. The problem lies in explaining the justification and goals of state coercion that forces actors to pursue their welfare more effectively. A recent instantiation influential in the organisation of United States social policy calls itself 'libertarian paternalism', seeking to 'nudge' actors towards

[33] T Schelling, *The Strategy of Conflict* (Harvard University Press 1960); M Olson Jr, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965); RM Axelrod, *The Evolution of Cooperation* (Basic Books 1984); M Piccione and A Rubinstein, 'Equilibrium in the Jungle' (2007) 117 Economic Journal 883.

[34] HA Simon, *Models of Bounded Rationality* (Cambridge, Massachusetts, MIT Press, 1982); RH Frank, *Passions Within Reason: The Strategic Role of the Emotions* (New York, Norton, 1988); A Tversky and D Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124; G Ainslie, *Picoeconomics: The Strategic Interaction of Successive Motivational States Within the Person* (Cambridge, Cambridge University Press, 1992).

choosing higher welfare paths by improving the salience of superior choice sets, without denying them the experience and responsibility of active choice.[35]

Thomas Hobbes is the *fons et origo* of this tradition. In a striking passage in the *Leviathan* of 1651 he explained the tendency of self-interested men tactically to fail in their transactions due to choosing betrayal and conflict rather than cooperation when left to their own devices, and how authority could provide a cure:

> 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.[36]

For Hobbes, authority, whether expressed by law or executive power, was therefore essential to stop rival self-interests nullifying each other. The key problem was to explain how any pact would be upheld by relentlessly self-seeking persons who might be expected rationally to breach

[35] RH Thaler and CR Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, Yale University Press, 2008). The 'nudge' theory of state-crafted individual choice was promoted energetically by Sunstein both as head of the Office of Information and Regulatory Affairs, and by writing some ten sole-authored books exploring the subject since the initial 2008 volume with Thaler.

[36] T Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (Andrew Crooke 1651) ch xiv, 64-71 (spelling modernised).

the pact if such defection could win advantage. Persons might be driven to breach without opportunism, but rather defensively, in order to forestall the predicted opportunistic defection of the counterparty. In other words we will often betray in order to get in first; not because we are monsters, but because it would be irrational to expose ourselves to the monstrosity of others. Mutual fear feeds mutual threat, creating a downward cycle. With the constitutional covenants we make to erect the law-making sovereign, we create a force that protects persons, property and pacts by law, repressing all defections, and so self-enforcing the legal order itself. Thus in the coercive state, argues Hobbes with self-conscious paradox, we have the highest creation of self-interest. The natural law schools that followed Hobbes recoiled from his egoistic theory of action, instead seeing the state as the objective enforcer of intrinsic rights that men interacting in the state of nature would otherwise observe or aspire to, but too imperfectly, let down by their partiality as distinct individuals with varying rational judgments. The state, on a Lockean or Kantian account, perfects a mutual network of rights by securing the practical commitment of all subjects to their equal enforcement, and such theories will often emphasise property in goods and personal autonomy or self-ownership as the foundational rights, protected by an adjectival law of wrongs, and prior to contract powers and liabilities.[37]

Jeremy Bentham, writing at the turn of the eighteenth century, likewise recoiled from the bare psychology and logical authoritarianism of Hobbes; yet he also rejected the natural law reasoning of Hobbes' critics.[38] Bentham created his own analysis of the interplay of law with

[37] For the revulsion against Hobbes see SI Mintz, *The Hunting of Leviathan: Seventeenth-Century Reactions to the Materialism and Moral Philosophy of Thomas Hobbes* (Cambridge University Press 1970); for the distinction of Hobbesian, Lockean and Kantian social contract models pertaining to private rights, see A Ryan, *Property and Political Theory* (Blackwell 1984); and J Waldron, *The Right to Private Property* (Oxford University Press 1988).

[38] See JE Crimmins, 'Bentham and Hobbes: An Issue of Influence' (2002) 63 Journal of the History of Ideas 677.

self-interest: like Hobbes he strongly emphasised the role of law in perfecting utilitarian calculation; but unlike Hobbes he gave priority to rule certainty over authority, rejecting the discretionary powers of prerogative rulers and common-law judges, favouring instead the fullest possible codification of the laws to constrain state power and promote predictable *ex ante* solutions. By insisting on respect for strict legal rights as a counter to opportunism and defection, Bentham argued that the law allowed parties to extend the range and complexity of successful interactions, and helped give individuals the self-discipline to overcome short-term advantage and pursue more ambitious goals.[39] A commitment by state and subjects to respect rights, no matter what the anticipated consequences, thus guaranteed the best ultimate consequences in promoting welfare – a utilitarian strategy that shaded into the rationalist and deontological theories of rights associated with Kantian thought. Here was a new paradox: the optimal strategy to uphold self-interested calculation through application of law was not to apply self-interested calculation to the application of law. In the next generation we find an echo of this approach in John Stuart Mill's psychological insight that individual felicity can often be attained only obliquely, through dedication to ideals and duties not chosen for their direct capacity to yield happiness, but pursued for some other metric of value.[40] Thus the classical utilitarians accepted that a calculated pursuit of happiness by competing individuals may be self-defeating at both the personal and social levels, unless moderated by respect for other persons, acculturation into social ideals, and obedience to protective rules and institutions promoted by the public order. We may best be utilitarians by trying not to be.

[39] J Bentham, *The Theory of Legislation & Principles of the Civil Code* (R Hildreth ed, W Stevens 1864) esp 97-157.

[40] JS Mill, *On Liberty* (Parker 1859); cf *Utilitarianism* (Parker 1863). On Mill's synthesis of libertarian and utilitarian thought see J Harris, 'Mill, John Stuart (1806–1873)', *Oxford Dictionary of National Biography* Oxford University Press 2004) §18711.

IV. Self-Interest and Self-Consciousness: Adam Smith

Active chiefly some two decades before Bentham, Adam Smith may be sited within the utilitarian tradition of devising institutions to maximise individual welfare. Certainly like Hobbes and Bentham, he had much to say about how self-interest fitted into welfare calculations. But Smith came from a different intellectual lineage, being a child of the Scottish Enlightenment. He was first educated at Glasgow by the Frances Hutcheson in the late 1730s, then from 1743 mentored by Henry Home, Lord Kames in Edinburgh following an unsatisfactory sojourn as a graduate student at Balliol College in Oxford; and then from 1751 to 1763 served as a professor at Glasgow, growing close to David Hume as he cultivated his work in ethics and law. He had contact in 1766 with the great figures of the French Enlightenment in Geneva and Paris, following a year and a half spent in Toulouse as a tutor, giving him time to deepen his reading in political economy.[41] He wrote two great books, on ethics and economics, and planned a third even greater, on the history and theory of jurisprudence, which he regretfully could not complete.

Smith wrote in 1759 in his first book *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

[41] IS Ross, *The Life of Adam Smith* (2nd ed, Oxford University Press 2010) 40-155, 195-218.

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[42]

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.
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> …

[42] A Smith, *The Theory of Moral Sentiments* (1st ed, A Millar 1759; 6th ed, 1790 in the *Glasgow Edition of the Works and Correspondence of Adam Smith, Vol. 1*, DD Raphael and AL Macfie (eds), Clarendon Press 1976 & 2014) iv.1, 184-85 (all subsequent page references to this work are from the *Glasgow Edition*, based on Smith's sixth and final edition of 1790). John Finnis identifies the importance of this passage as an example of moral reasoning about side consequences in 'Allocating Risks and Suffering: Some Hidden Traps' (1990), reprinted in JM Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press, 2011) 337, 337-40. The seemingly inegalitarian thrust of Smith's model whereby the demands of the rich for opulence benefit the poor was developed by Thomas Malthus in his *Principles of Political Economy* (John Murray 1820; 2nd ed, 1836) 322, 398, but Malthus' model in turn was adapted by John Maynard Keynes to justify redistribution to the poor in order to defeat recessions caused by collapses in demand: see JM Keynes 'Thomas Robert Malthus' in *Essays in Biography* (Macmillan, 1933, 2nd ed 1972) 71; BA Corry, 'Malthus and Keynes – A Reconsideration' (1959) 69 Economic Journal 717; RP Rutherford, 'Malthus and Keynes' (1987) 39 Oxford Economic Papers (ns) 175.

> 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.[43]

Smith's metaphor of an invisible hand has been deployed ever since to explain how self-interested transactions aggregate to form an efficient market economy ultimately benefiting all, even if greed and unequal rewards drive the mechanisms of production and trade. But Smith is quick to qualify his paean to self-interest, and shows how this spring of action can swiftly produce ambiguous or malign results. 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 never speaks of *the* invisible hand as a noumenon, a social law or causal mechanism. Instead, in order to illustrate his metaphor Smith 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. An invisible hand here appears in the guise of a use of public state power to make private gains:

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[43] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan 1776; 3rd ed, 1784 in the *Glasgow Edition of the Works and Correspondence of Adam Smith, Vol. 2*, WB Todd (ed), Clarendon Press 1975-76 & 2014) i.2, 26-27 (all subsequent page references to this work are from the *Glasgow Edition*, based on Smith's 3rd edition of 1784 as the most accurate version of his final intentions, superior to the 4th and 5th editions). 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), reprinted in *Economic Commentaries* (Staples Press 1956) 147. See further A Offer, 'Self-Interest, Sympathy and the Invisible Hand: From Adam Smith to Market Liberalism' (2012) 2 Economic Thought 1.

> 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.[44]

Yet another caution against the potential of conscious self-interest to distort the general welfare 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.[45]

The work of an invisible hand, it seems, can only benefit us 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 the public sphere then self-interest quickly becomes noxious 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 be-

[44] *Wealth of Nations* (n 43) iv.2, at 456.

[45] Ibid. The ironies in Smith's position are identified in E Rothschild, 'Adam Smith and the Invisible Hand' (1994) 84 American Economic Review 319. A neo-classical 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.

neficent power of self-interest. Fear of knowing self-interest exerted consciously through control of state and market is the flip side of Smith's original invisible hand idea. Perhaps his suspicion of state action as an agent of rank self-interest limited Smith's usefulness for the classical utilitarians. Bentham and his circle appreciated Adam Smith's theories of economy and government and approved his pro-market stances; yet Bentham did not use Smith's theories in the details of his own systems, and indeed Bentham opposed Smith quite fiercely for not being utilitarian enough either to abandon state control of interest rates so as to allow money to find its natural price, or to support state intervention such as price controls in order to overcome market imperfections in the food supply.[46]

So we find that Smith the economist was tolerant of self-interest in the private sphere of market transactions, less so in the public sphere of state and corporate power. These elements of his thought were a chief inspiration for Ronald Coase and the Chicago school of law and economics when they constructed a new form of free market utilitarianism in the 1960s and 1970s. In Coase's model, lawmakers should not presume to be able to enhance social welfare by displacing a market allocation of risks and benefits. Any such allocation was likely to be futile, either because public decisions would be misconceived due to lack of information or bias about the relative utilities of actors competing for resources in transitive relationships; or because parties would trade around initial entitlements to a new and superior equilibrium in any case. Coase therefore argued that the role of the state should be confined to creating the best conditions for private market trades through elimination of barriers to transacting, so that the invisible hand of the market could then determine the optimal allocation of resources. Law

[46] J Bentham, *Defence of Usury* (1787) and *Defence of a Maximum* (1801), in W Stark, *Jeremy Bentham's Economic Writings: Critical Edition Based on His Printed Works and Unprinted Manuscripts* (Royal Economic Society & Allen & Unwin 1952-1954) i, 121-208, iii, 247-450.

should be used chiefly to *demolish* laws or any other barriers to free market entry. Only rarely were markets so difficult to construct that public allocations had to be created by law; even supposedly non-rivalrous public goods such as lighthouses, argued Coase, turned out to be profit-making club goods on closer inspection.[47]

Powerful and influential though the Chicago model has proved in the past half-century, it is hardly the case that Coase is Adam Smith's true heir, or that Chicago represents the correct interpretation of the Sage of Glasgow's[48] historical legacy. For one, there were many examples given by Smith where the market, purely as an instrumental device, might fail to provide the goods society needed, hence the need for publicly organised justice, police, revenue collection, utilities and so on. Moreover Adam Smith's thought about the role of self-interest in human affairs was far more complex than the Chicago reading, with its parsimonious view of wealth maximisation as the sole concern of welfare economics.[49] Smith by contrast was deeply concerned with the psychology of self-interest and the nature of hedonic states, explored in *The Theory of Moral Sentiments*, the work he saw as his most important contribution, so much so that he remoulded the original arguments through his life, issuing six editions from first publication in 1759 until his death in 1790. There he argued that the desire to emulate the wealthy and successful and so win the admiration of others was a spur to effort and achievement in a competitive market society; wealth was a status good and was not sought simply for the ease and enjoyment that riches bring.[50] Smith also observed that the specialisations and division of

[47] RH Coase, *The Firm, the Market and the Law* (University of Chicago Press 1988).

[48] The phrase is Charles Bonnet's, the French natural philosopher and lawyer, who befriended Smith in Geneva.

[49] RM Dworkin, 'Is Wealth a Value?' (1980) 9 Journal of Legal Studies 191.

[50] *Theory of Moral Sentiments* (n 42) i.3.2, 50-61, eg at 50: 'For to what purpose is all the toil and bustle of this world? what is the end of avarice and ambition, of the pursuit of wealth, of power, and pre-eminence?…and what

labour necessitated by capitalist production and trade could narrow the imagination and intellect and undermine an ethos of higher self-interest involving refined tastes, considered judgments, and deferred gratifications, each qualities that were essential for a free and active citizenry.[51] The danger to market society lay not so much in inequality *per se*, but rather in a coarsening of

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are the advantages which we propose by that great purpose of human life which we call bettering our condition? To be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation, are all the advantages which we can propose to derive from it. It is the vanity, not the ease, or the pleasure, which interests us. But vanity is always founded upon the belief of our being the object of attention and approbation'.

[51] *Wealth of Nations* (n 43) v.1.3.2, at 781-82: 'In the progress of the division of labour, the employment of the far greater part of those who live by labour, that is, of the great body of the people, comes to be confined to a few very simple operations; frequently to one or two. But the understandings of the greater part of men are necessarily formed by their ordinary employments. The man whose whole life is spent in performing a few simple operations, of which the effects too are, perhaps, always the same, or very nearly the same, has no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur. He naturally loses, therefore, the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him, not only incapable of relishing or bearing a part in any rational conversation, but of conceiving any generous, noble, or tender sentiment, and consequently of forming any just judgment concerning many even of the ordinary duties of private life. Of the great and extensive interests of his country he is altogether incapable of judging; and unless very particular pains have been taken to render him otherwise, he is equally incapable of defending his country in war. The uniformity of his stationary life naturally corrupts the courage of his mind, and makes him regard with abhorrence the irregular, uncertain, and adventurous life of a soldier. It corrupts even the activity of his body, and renders him incapable of exerting his strength with vigour and perseverance, in any other employment than that to which he has been bred. His dexterity at his own particular trade seems, in this manner, to be acquired at the expence of his intellectual, social, and martial virtues. But in every improved and civilized society this is the state into which the labouring poor, that is, the great body of the people, must necessarily fall, unless government takes some pains to prevent it'.

conduct amplified in turn by emulation.[52] As a prophet of capitalism (a label he never used), Smith was also its most powerful early critic.

Ever since the publication of *Wealth of Nations*, scholars have debated this ambivalence in Smith's thought: how Smith's political economy of competitive individualism can be made to cohere with the critique of self-interest and the sympathy-driven ethical theories contained in *The Theory of Moral Sentiments*. We cannot say that the 1776 publication supersedes that of 1759, for Smith continued to revise the earlier book up until 1790, the year of his death, whilst the later book was left largely unchanged. One solution to 'Das Adam Smith Problem', as it was dubbed in Germany immediately after 1776, is to see that Smith was an ironist who chose contradiction and dialectic as the truer representation of the predicament of humanity. In other words he well grasped the inconsistency between a fully-functioning market society and the demands of personal morality and character; his task was to investigate the problem, not wish it away.[53] Markets and market individualism were valuable not only for their potential to liberate mankind from material want through enhanced production, but also for their tendency to disabuse humanity of unwarranted respect for authority and hierarchy, thus allowing self-liberation. But with these gains in positive and negative liberty came losses to character, with the avaricious and haughty rich setting a bad example to the repressed and stunted poor. So an enlightened society would have to find new ethical teachings, shorn of the religious and authoritarian pressures of the past, to articulate how moral sentiments could be enhanced in a competitive self-

[52] *Theory of Moral Sentiments* (n 42) i.3.3, at 61-66, eg at 61: 'This disposition to admire, and almost to worship, the rich and the powerful, and to despise, or, at least, to neglect, persons of poor and mean condition, though necessary both to establish and to maintain the distinction of ranks and the order of society, is, at the same time, the great and most universal cause of the corruption of our moral sentiments'.

[53] See CL Griswold Jr, *Adam Smith and the Virtues of Enlightenment* (Cambridge University Press 1999) esp 292-301.

regarding society. Here was one of the great themes of Enlightenment thought – the conflict of modernity and character, the problem of sustaining morale and happiness in a disenchanted individualistic world. It is no surprise that resonances have been found between Smith's *oeuvre* and the great German philosophers of his time and after, as they struggled with similar themes.[54]

In *The Theory of Moral Sentiments* Adam Smith sets out a new model of sympathy and conscience as the foundation of ethics. He draws on Stoic, Christian and natural law theories of conscience, but his theory is original and distinct. Smith states that people are born with a strong natural sense of sympathy for others. We measure the feelings of others by imagining how we might feel in their position. 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, recognition and confirmation that chiefly drives our actions. 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

[54] Hegel in particular seems to have read Smith closely before producing his theory of will and reason as a search for recognition by other reasonable creatures, and like Smith he warned of the capacity of competitive individualism to undermine character and intellectual capacity: see L Herzog, *Inventing the Market: Smith, Hegel and Political Theory* (Oxford University Press 2013); JP Henderson and JB Davis, 'Adam Smith's Influence on Hegel's Philosophical Writings' (1991) 13 Journal of the History of Economic Thought 184. Marx too was fond of quoting Smith on the alienation of labour and free personality under capitalism: see RL Meek, *Smith, Marx, and After* (Chapman and Hall 1977) 14. Kant avowed his philosophical debts to Hume not Smith; yet some have found strong affinities between Kantian and Smithian thought, emphasising the objectivism in Smith's moral postulate of the impartial spectator, eg N MacCormick, *Practical Reason in Law and Morality* (Oxford University Press 2008) esp 47-68; for critique see 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* (Springer 2011) 107; M Del Mar, 'The Smithian Categorical Imperative: How MacCormick Smithified Kant' (2012) 98 Archiv für Rechts- und Sozialphilosophie 233.

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. Smith developed this psychology in a key phrase from *Theory of Moral Sentiments,* inserted only in the final 1790 edition:

> Nature, accordingly, has endowed him not only with the desire of being approved of, but with the desire of *being* what ought to be approved of.[55]

The way we handle our anxiety to be deserving of genuine approbation 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 endowed him not only with the desire of being approved of our own behaviour, and endeavour to imagine what effect it would, in this light, produce upon us.[56]

Smith's impartial spectator can be described as a third-party observer sitting in judgment over one's conduct by explaining how it might seem to others. 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 secularised rendition of the age-old idea of conscience, the desire to appear well in our own 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

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55 *Theory of Moral Sentiments* (n 42) iii.2, at 117.

56 *Theory of Moral Sentiments* (n 42) iii.1, at 110, 112.

nature' with 'Conscience', which 'properly signifies our consciousness of having acted agreeably or contrary to [the moral faculty's] directions'.[57]

It is notoriously difficult to pin down just what Smith meant by the intellectual devices of 'sympathy', 'conscience', and the 'impartial spectator'. He is eclectic, blending psychological speculation about the innate quality of empathetic imagination with the philosophical detachment of Stoic tradition, holding the two together with ideas from a deistic natural law. One initial problem is to specify the interior mental operation of sympathy. Smith suggests that sympathy might be derived from empathy, or living the experience of another by taking on their internal perspective; but empathetic feeling quickly blurs into sympathy, or understanding another's experience from the remove of an observer who can imagine similar experiences to self:

> As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation.[58]

> That this is the source of our fellow-feeling for the misery of others, that it is by changing places in fancy with the sufferer, that we come either to conceive or to be affected by what he feels, may be demonstrated by many obvious observations, if it should not be thought sufficiently evident of itself. When we see a stroke aimed and just ready to fall upon the leg or arm of another person, we naturally shrink and draw back our own leg or our own arm; and when it does fall, we feel it in some measure, and are hurt by it as

[57] *Theory of Moral Sentiments* (n 42) vii.3.3, at 326.

[58] *Theory of Moral Sentiments* (n 42) i.1.1, at 9.

> well as the sufferer. The mob, when they are gazing at a dancer on the slack rope, naturally writhe and twist and balance their own bodies, as they see him do, and as they feel that they themselves must do if in his situation. [59]

When we shift the sympathetic imagination away from experiences so basic as physical risk or harm, and instead aim to assess moral feeling, the operation of sympathy necessarily shifts, since we can all imagine a like reaction to pain or fear but do not necessarily share in common our experience and judgment of conduct and motive. Smith does seem to think that there was a basic commonality of moral view to set the ball rolling:

> The all-wise Author of Nature has…taught man to respect the sentiments and judgments of his brethren; to be more or less pleased when they approve of his conduct, and to be more or less hurt when they disapprove of it. He has made man, if I may say so, the immediate judge of mankind; and has, in this respect, as in many others, created him after his own image, and appointed him his vicegerent upon earth, to superintend the behaviour of his brethren. They are taught by nature, to acknowledge that power and jurisdiction which has thus been conferred upon him, to be more or less humbled and mortified when they have incurred his censure, and to be more or less elated when they have obtained his applause.[60]

It is at this point that the impartial spectator is invoked as an objectifying device to improve the shared moral sympathies of subjective wills:

> But though man has, in this manner, been rendered the immediate judge of mankind, he has been rendered so only in the first instance; and an appeal lies from his sentence to a

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[59] *Theory of Moral Sentiments* (n 42) i.1.1, at 10.

[60] *Theory of Moral Sentiments* (n 42) iii.1.31, at 128, 130.

> much higher tribunal, to the tribunal of their own consciences, to that of the supposed impartial and well-informed spectator, to that of the man within the breast, the great judge and arbiter of their conduct. The jurisdictions of those two tribunals are founded upon principles which, though in some respects resembling and akin, are, however, in reality different and distinct. The jurisdiction of the man without, is founded altogether in the desire of actual praise, and in the aversion to actual blame. The jurisdiction of the man within, is founded altogether in the desire of praise-worthiness, and in the aversion to blame-worthiness; in the desire of possessing those qualities, and performing those actions, which we love and admire in other people; and in the dread of possessing those qualities, and performing those actions, which we hate and despise in other people.[61]

Smithian conscience thus works in two directions, with the device of the impartial spectator being used to evoke imagination of the effects of one's conduct produced on the second person, but also to create some distance from self so as to assess one's first-person motives and behaviours as if from the outside, imagining how others fairly regard one's behaviour. Smith borrowed heavily here from the Stoics, but he also distances himself from their tradition as too coldly objective, using over-much the idea of external observation to repress the feelings and inter-subjective emotions (that is, the sentiments) that Smith deemed necessary for moral being. Thus the second person in the three-party court of moral conscience is affected not only by the objective conduct offered to him or her by the first person, but also by the motives underpinning the first-person action; the impartial spectator helps the first-person actor look more deeply at both sides of relationships to discover how first-second person relationships are truly operating. Smithian conscience can thus be portrayed as a kind of higher egoism seeking truth about and validation of self:

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[61] *Theory of Moral Sentiments* (n 42) iii.1.32, at 130-31.

> It is reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct.… It is from him only that we learn the real littleness of ourselves, and of whatever relates to ourselves, and the natural misrepresentations of self-love can be corrected only by the eye of this impartial spectator. It is he who shows us the propriety of generosity and the deformity of injustice; the propriety of resigning the greatest interests of our own, for the yet greater interests of others, and the deformity of doing the smallest injury to another, in order to obtain the greatest benefit to ourselves. It is not the love of our neighbour, it is not the love of mankind, which upon many occasions prompts us to the practice of those divine virtues. It is a stronger love, a more powerful affection, which generally takes place upon such occasions; the love of what is honourable and noble, of the grandeur, and dignity, and superiority of our own characters. [62]

To sum up Smithian conscience: a subjective desire to seem well in the eyes of the self was measured against objectively-won knowledge of the appraisal of others, attained by use of the sympathetic imagination refracted through the eyes of the impartial spectator. Thus Smith melded older theological concepts of *conscientia*, knowledge of one's moral conduct, and *synderesis*, the innate moral desire to act well planted by God and nature, and he translated these Stoic and Christian concepts into a modern theory of ethics based on sentiment and the yearning for approbation.

[62] *Theory of Moral Sentiments* (n 42) iii.1.4, at 137.

V. A Sympathetic Law? Smith's Jurisprudence

Smith thought about law as the foundation of civil government and the guarantor of personal security from injury; law thereby provided a foundation for economic and ethical life in civil society. Smith promised to give the subject full treatment, and his planned history and principles of justice and police seems to have occupied him for decades; yet he could not complete, and he had the long-worked-over drafts burnt at his death. All we have is the evidence of his earlier legal thought contained in detailed student notes of his Glasgow lectures of the 1760s,[63] which some scholars discount as provisional work, and too filtered through the vagaries of second-hand transmission to be relied upon. So we are left with the fact that the third great work, the treatment of jurisprudence as the solvent of the problem of self-interest, was promised but never delivered. It may be that finding the correct juristic or institutional balance between self-interested market freedoms and an ethic of sympathy ultimately defeated Smith. Was this an echo of 'Das Adam Smith Problem' within the master himself?

In the notes we have of Smith's 1760s lectures, he uses the idea of the sympathetic yet impartial spectator to evolve a commutative theory of legal justice. One can suffer breach of perfect or natural rights on the one hand, 'those which we have a title to demand and if refused to compel another to perform', or imperfect or adventitious rights, moral claims that one can hope for but cannot demand.[64] An example of breach of the first category are those actions that injure the security of the self in any setting, the latter those that are an injury due to a social context such as such as praise to the worthy or charity to the needy. Smith uses the distinction of perfect and imperfect rights to illustrate the various causes of action, the triggers for legal intervention in

63 Adam Smith, *Lectures on Jurisprudence* (RE Meek, DD Raphael & PG Stein (eds), Clarendon Press 1978).

64 Ibid 9.

human affairs. Thus a seriously made promise where no formal contract had been concluded was imperfect; one could expect but not demand performance; but a formal covenant was perfected and exigible.[65] A right to exclusive use of a picked apple or a captured hare was perfected; but if one's friend interposed to snatch a fruit one was about to pick, or likewise took a hare one had long been chasing, then there might be breach of an imperfect right through the lack of courtesy and consideration, but no legal claim. How was one to distinguish the perfect and imperfect rights in these famous examples? In the lectures Smith learnedly explains the different opinions in Roman and medieval law on just such points of doctrine, but concludes that the deeper reason is that an impartial modern spectator would 'justify the first possessor' in defending his occupation, but would not see a grave enough offence to sanction even a bad-mannered taker of goods not occupied.[66]

> The cause of this sympathy or concurrence betwixt the spectator and the possessor is, that he enters into his thoughts and concurs in his opinion that he may form a reasonable expectation of using the fruit or whatever it is in the manner he pleases. This expectation justifies in the mind of the spectator, the possessor…If I was desirous of pulling an apple and had stretched out my hand towards it, but another who was more nimble comes and pulls it before me, an impartial spectator would conceive this was [a] very great breach of good manners and civility but would not suppose it an incroachment on property.[67]

Smith conceded that the case of an apple picked, then dropped and snatched by another, would be an even worse case of ill manners and 'bordering very near on a breach of the right of

[65] Ibid 98.

[66] Ibid 16-19.

[67] Ibid 17.

property'.[68] He is not very clear on what basis other than assertion of reasonableness one might use the impartial spectator technique to resolve such liminal cases.

The legal system, argued Smith, existed to launch retribution against those who cause unwarranted harm to the security and expectations of others, creating 'resentment' that can overpower social order. For example, 'The whole of criminal law is founded on the fellow feeling we have with the resentment of the injured person'.[69] The legal system chooses the relevant *iniuria* to be regulated by referring the offence to the measure of the impartial spectator, who can judge the level of rightful resentment caused and hence find the proportionate level of legal sanction necessary to restore comity. Hence not all subjective harms will be actionable, for example many expectations to be benefitted by others, a distributional concern, must be left to be enforced by religion, morality and politics rather than law. Only those ruptures of expectation that our postulated ideal observer would find egregious will be sanctioned. Since all persons may be taken to agree that the perfect rights should be both respected and enforced, a breach involved a disturbance of commutative justice, of settled expectations, and the ensuing resentment had to be redressed by a restoration of the prior position.[70] In effect, this is setting up a morality based on the objective or shared common sense 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.[71] It is not entirely clear here whether Smith was concerned to distinguish the viewpoint of his ideal sympathetic observer from the common opinions of average mankind; perhaps we

[68] Ibid 19.

[69] Ibid 277.

[70] Ibid 475-76.

[71] J Evensky, 'Retrospectives: Ethics and the Invisible Hand' (1993) 7 Journal of Economic Perspectives 197.

can postulate the impartial observer as the ideal commoner – not that different from the common law's romantic concept of the juror, though Smith's own discussion of the jury is brief and uninformative. It is striking that in Smith's extant theory of law the impartial spectator is used quite seldom, maybe thrice in all the extensive notes of his law lectures;[72] and then not in the sophisticated and discursive manner evoked in *Theory of Moral Sentiments* as a guide through reflexive sympathy into heightened *conscientia* and *synderesis*. The Smithian spectator in the law appears more as an objective, disembodied third-person standard of reasonableness, not far different from the civilian standard of the *bonus paterfamilias*, the reasonable burgher behaving as like burghers would think fit.

How can one account for the thinness of the Smithian theory of conscience in law? One theory is that we simply do not know his developed thoughts, since the notes that make up the *Lectures on Jurisprudence* cannot be taken to be a sufficient guide. Another more speculative interpretation would be that Smith disliked the idea of applying some internal model of conscience by a legal process forcing such conscience on parties as mandatory. Perhaps this seemed too much like state enforcement of natural law norms rooted in religion; indeed all his work, including the lectures, presents an anthropological and relativistic appraisal of religious beliefs including the belief systems of Christians, indicating that any moral-legal standards drawn from such a source would be irrational and unstable. Thus for example he notes that in many times and places Christians, including the American colonists of his own day, and the past Christian emperors of Constantinople, had wholeheartedly supported the institutions of slavery.[73] Religion could only come into legal enforcement if such beliefs could be seen to enter into the appraisals of the impartial spectator as a measure of the common wisdom of the local community;

[72] *Lectures on Jurisprudence* (n 63) 421, 459, 475; Smith's lectures also involve a 'bystander' at 19.

[73] *Lectures on Jurisprudence* (n 63) 191.

religious norms could not be applied by fiat as this would be a forcing of moral conscience for those who might not believe or accept religious authority.

Indeed the point about not enforcing morals by legal command was placed at the very centre of Smith's jurisprudence. Recalling that duties of benevolence were 'imperfect', because the impartial spectator could discern no reasonable expectation of performance by those hoping to benefit, he went on to explain:

> Imperfect rights, again, refer to distributive justice…rights…that belong not properly to jurisprudence, but rather to a system of morals as they do not fall under the jurisdiction of the laws. We are therefore in what follows to confine ourselves *entirely* to the perfect rights and what is called commutative justice.[74]

This leaves the question whether Smith really did intend to exclude imperfect moral rights 'entirely'. Was there no room for enforcement of duties of good faith or honesty that sounded in morality but yet might attract legal support? We may close our discussion of Smith's jurisprudence by asking what role he found for the equity jurisdiction of the Court of Chancery as a test case for his division of benevolent morality from legal expectation. The answer, so far as we can see from the *Lectures*, lay in remedy. Courts of law might be cramped in their heads of remedy due to their jurisdictional history, and here Chancery could issue fresh writs modelled on the old but extending the scope of actions. But then the Chancellor began to give remedies 'in those cases which the courts of common law did not comprehend'.[75] For example common law courts saw breach of contract as an injury warranting corrective damages, but the Chancellor went further:

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[74] *Lectures on Jurisprudence* (n 63) 9 (emphasis added).

[75] *Lectures on Jurisprudence* (n 63) 474.

> The first thing he did in this way was to order specifick performance of contracts. These were not sustained by the common law; all they did was to give the pursuer damages but did not think of forcing specifick performance. This however a man was bound in honour to perform, and the Court of Chancery, which was considered a Court of Conscience with the Chancellor at the head who was generally a clergy man skilled in the cannon law, began to give action on this head. Anoth(er) thing was all cases of trust and fraud.[76]

Smith then enumerated the areas where the Court of Chancery intervened in either sole or auxiliary jurisdiction: the enforcement of trusts; the specific performance of contracts for sale of land; the upholding of testamentary trusts and probate of wills; charitable trusts for the church or eleemosynary corporations. He admitted that whilst common law judges are tightly circumscribed by strict law with few powers of interpretation, and are beholden to the jury for fact finding, 'the Chancellor is certainly as arbitrary a judge as most'.[77] But if this could not be defended in principle, it could be tolerated in practice:

> But neither is he [the Chancellor] very dangerous to the liberty of the subject, as he can not try causes besides those which have no remedy at common law. Nor can he in any case act contrary to any method of proceeding laid down by courts of common law. And from this court as from all others appeals may be carried before the House of Lords.[78]

Smith showed no greater interest in applying his own elaborate ideas of conscience to law; indeed he seems to have merely tolerated the application of ideas of conscience, mainly in the realm of specific enforcement of contract and trusts, as a relic of the past, an appendix that was perhaps marginal and exceptional. In his attitude to Chancery jurisdiction, Smith was very far

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[76] *Lectures on Jurisprudence* (n 63) 281-82.

[77] *Lectures on Jurisprudence* (n 63) 282; also 286 on the historical anomaly of the Court of Chancery having no jury, since at the outset it was not supposed to have the dignity of a court of law.

[78] *Lectures on Jurisprudence* (n 63) 282-83.

from his mentor Henry Home, Lord Kames, who saw equity as a practical instantiation of natural law, stating that

> the duty of benevolence arising from certain peculiar connections among individuals, is susceptible in many cases of a precise rule. So far benevolence is also taken under the authority of the legislature, and enforced by rules passing commonly under the name of the law of equity.[79]

Kames published his own elaborate treatise on the *Principles of Equity* in 1760, just after Smith issued *The Theory of Moral Sentiments* and just as Smith was writing his *Lectures on Jurisprudence.* Smith can be seen to reference details from Kames' legal treatise on a number of occasions in the lectures; but it can be no accident that he resolutely refused to follow Kames' view that equity legislated natural morality. Smith was not a command theorist of the law; but at the same time he resisted the use of conscience as a moral constraint on self-interested conduct. The record of his lectures in jurisprudence suggest that he can more properly be placed within the *ius commune* tradition, whereby legal professionals use the doctrines of the old civilian jurists to work up solutions agreeable to the sentiments and customs of modern populations. This would make Smith a more conventional and conservative thinker in the law than he ever was in ethics or economics.

VI. The Conscience of Chancery and Smithian Conscience

Can Smith's theories of conscience and self-interest be traced into the legal discourse of his time? It is likely that cultivated lawyers of the mid to late eighteenth century were exposed to

[79] Henry Home, *Lord Kames, Essays on the Principles of Morality and Natural Religion* (2nd ed, Hitch & Hawes *et al*, 1758) 102, quoted by 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, 108.

Smithian ethics; after all, Smith was read and debated very widely, and he assiduously lectured on his ethical theories alongside his political economy and jurisprudence for over fifteen years in Edinburgh and Glasgow up to 1761, to many of the young men who went on to lead the court systems of Scotland and England.[80] Moreover a great number of university-educated lawyers from Scotland pursued advocacy either full time or *ad hoc* in the English courts.[81] Whether some direct transfer of Smithian ideas into the law can be established or not, it may be shown that lawyers in English Chancery deployed the idea of conscience in new ways that recalled Smith's moral language of sympathy and the impartial spectator. Chancery jurisdiction in fact went further than Smith was prepared to go, and sometimes enforced the so-called 'imperfect' duties of benevolence that Smith saw as outside the province jurisprudence. It is striking that leading Chancery judges and advocates of the 1770s and 1780s used Smithian ethical language as they extended the province of conscience as a legal device to constrain self-interest. The English lawyers were here more Smithian than Smith.

In one important aspect the lawyers of mid-century wholly agreed with Smith: conscience could not be enforced by courts in the form of simple moral command. Judges could not in the latter half of the eighteenth century be conceived as delegates of a confessional state or monarch, as early seventeenth century lawyers had sometimes argued. For example Lord Ellesmere in the *Earl of Oxford's Case* in 1615 described the conscience jurisdiction of Chancery in terms of political theology:

> The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be…. Law and Equity are

[80] Ross, *Life of Adam Smith* (n 41) 129-42.

[81] J Finlay 'Scots Lawyers and House of Lords Appeals in Eighteenth-Century Britain (2011) 32 Journal of Legal History 32, 249.

> 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.[82]

Lord Ellesemere earlier described the judges as 'noe subordinate Magistrates, but absolute Kings', fully as sovereign within their realm of law as the king in any of his prerogatives. If the judges were ordained by the king, yet they were independent of 'the discretion or Conscience of the King'.[83] This independence was a quality required by the king himself, who appointed each judge to decide 'by true reason of the Law', and 'his owne heart and Conscience'; they were to serve as '*Coram Deo & Angelis*', a divine and angelic court. The king's power as '*Pater patriae,* and soveraigne head' constituted the body politic, with the courts as impartial members and treated in return with impartiality by the king.[84]

After the Revolution and Restoration Lord Nottingham marked the shift away from spiritual command theory with his analysis of equitable jurisdiction in *Cook v Fountain* in 1676:

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[82] *Earl of Oxford's Case* (1615) 1 Chancery Reports 1, 6-7; 21 ER 485, 486 (LC) per Ellesemere LC. D Ibbetson, 'The Earl of Oxford's Case (1615)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 1-32, argues that Lord Ellesmere gave his celebrated speech many months after the actual judgment, as a polemical defence of the Chancery's jurisdiction to gloss the common law by *in personam* restraint of litigants. The real problem addressed by Ellesmere was how to claim this power for Chancery without rupturing statutory prohibitions against interference with common law judgments, a policy aimed at barring ecclesiastical and especially papal jurisdiction.

[83] 'A Coppie of a Wrytten Discourse by the Lord Chauncellor Elsemore Concerning the Royall Prerogatiue' (c.1604), in LA Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesemere* (Cambridge University Press 1977) 197, 198 & 200.

[84] 'The Speech of the Lord Chancellor of England, in the Eschequer Chamber, Touching the *Post-Nati*' (1608), Knafla, Law and Politics in Jacobean England, ibid 202, 214.

> With such a conscience as is only *naturalis et interna*, this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures; …for otherwise…no man need to be confessed.[85]

A more expansive argument against conscience as discretionary command was made in *Cowper v Cowper* in 1734 by the Master of the Rolls, Sir Joseph Jekyll:

> The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue and though proceedings in equity are said to be *secundum discretionem boni viri* [in accord with the judgment of a good man], yet when it is asked, *vir bonus est quis*? ['what man is to be called good?] the answer is, *qui consulta patrum qui leges juraq; servat* [the one who keeps the decrees of the fathers, and who maintains the laws and justice]'[86] and as it is said in *Rook's* case, 5 Rep. 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is exercised here, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does

[85] *Cook v Fountain* (1676), reported (1827) 3 Swanston 585, 600-601; 36 ER 984, 990. The case significantly went through some nine hearings in the House of Lords following the Chancery decision: *Journal of the House of Lords: Volume XIV, 1685-1691* (His Majesty's Stationery Office 1774) 55, 79, 356, 407, 409, 425, 449, 462, 464; but Nottingham's own notes of the case were not published until 1827. See further MR Macnair, 'Coke v Fountaine (1676)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 33-62.

[86] Jekyll MR is here quoting Horace's *Epistles* i.16.40. This passage in *Cowper* was in turn quoted incessantly for the next hundred years as epitomising the nature of English equity.

> it contradict or over-turn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.[87]

Both the above cases involved controversy over whether the benefit of estates could be shifted by secret evidence of motive in transactions, where the court had no direct evidence to expose relevant motive through evidence, but could only extrapolate from context. In *Cook v Fountain* it was acknowledged that a conveyance without consideration or obvious reason might raise a regular presumption that a trust had been intended without the beneficiary having to go to further proof. Because parties knew of this 'violent and necessary presumption'[88] of trust from conduct when they settled property, it was just to hold them to this structure of expectations of right conduct. *Cowper* went on to show that such pro-beneficiary presumptions were not to be invented by the courts merely to solve particular cases. Jekyll MR denied that good conscience required the court to impose a trust 'when such release or conveyance is only supposed or inferred from appearances, out of which that supposition does not necessarily or even naturally arise'.[89] Extrapolating from these instances, the general question for the court of equity was to interpret in which stereotypical situations conduct that was *prima facie* legal was nonetheless likely to be affected by hidden motives and intentions (including impaired intentions due to problems of position and capacity) warranting intervention by the court on the grounds of conscience. Judges came to describe the 'conscience of the court' in two limiting senses: the court needed good evidence of wrongdoing or fraud, or at least strong presumptive proof of

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87 *Cowper v Cowper* (1734) 2 Peere Williams 720, 753-54; 24 ER 930, 941-42 (ChD).

88 *Cook v Fountain* ([1676]/1733) 3 Swanston 585, 591; 36 ER 984, 987.

89 *Cowper v Cowper* (1734) 2 Peere Williams 720, 753; 24 ER 930, 941 (ChD).

such; and the court was bound to follow Chancery precedents in applying forensic and presumptive rules to interpret conduct.[90] These principles surface in *Heathcote v Paignon*, a 1787 case of sale of an annuity at an undervalue by a family claiming afterwards that they had acted in distressed circumstances. Lord Chancellor Thurlow challenged counsel for the plaintiff, Mr. John Scott (later Lord Eldon) to show evidence why the sale was against conscience, stating

> The business of a court of equity is certainly not so much to make people honest, as to obviate the inconveniences of dishonesty. Here is no evidence of distress, nothing but the inadequacy of the value; and if that could be made the rule, the least circumstance which varied the next case which occurred might make the difference.[91]

Scott in the end succeeded in showing the court that such distress existed and was known to the defendant who took an advantage. Setting aside the contract protected the conscience of the defendant by preventing him from carrying through what would have been a fraudulent act.

What was emerging in Lord Thurlow's time was a separate procedural conscience test quite distinct from moral assessment of the parties subject to decision. The court is speaking of the demands of conscience as a duty *on the decision-maker* to find evidence and follow precedents before discovering equitable fraud. This represented a considerable shift from the 'command' equity of Lord Chancellor Ellesmere. It may be that the change reflected the new age of toleration and scepticism where courts began to withdraw from enforcement of religion and ethics. Lord Mansfield said as much in a debate over religious pluralism and liberty in 1767, in language echoing both Smith and Hume:[92]

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[90] Eg *Smith v Evans* (1725) Ambler 834, 835; 27 ER 523 (Ch) per Lord King C.

[91] (1787) 2 Brown's Chancery Cases 167, 175; 29 ER 96, 100 (LC).

[92] Griswold, *Adam Smith* (n 53) 266-92.

> Conscience is not controllable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction; and are only calculated to make hypocrites, or – martyrs.[93]

If the modernising eighteenth-century Chancery's jurisdiction of conscience was not based on command, then what was its *modus operandi*? It may be summed up by the maxim 'equity sees as done that which ought to be done', which may be restated as a presumption of honesty. Equity presumes that every party in court, when all available evidence is discovered, all permitted inferences drawn, and all relevant conduct understood, will seek to perform due obligations and avoid pressing home undue rights, and thereby choose to avoid a conscious breach or abuse of rights. The court by uncovering the fullest evidence and confronting the defendant with the quality of his or her actions and so guides that party to choose honest conduct. Equity's presumption of honesty on the civil law side was sometimes conceived as an extension of the presumption of innocence in criminal law.[94] The criminal law requires positive proof of guilt before it will adversely interpret the moral quality of a person's ambiguous conduct as a breach of duty. By analogy courts of conscience in controlling civil obligations will look at ambiguous conduct and require proof showing a completed commitment to perpetrate a fraud before finding an actor

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[93] *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)] (D Blow 1774) 21; see also *Harrison v Evans* (1767) 3 Brown's Parliamentary Cases 465; 1 ER 1437 (HL). On legal enforcement of religious dogma in England and Scotland in Chancery 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 University Press 2013) 559-74.

[94] Interestingly this attitude was deprecated by common law judges after the fusion of law and equity in 1873-75; see eg *Ward v Hobbs* (1877) 3 QBD 150, 166 per Cotton LJ: 'I think it would be too great a refinement to imply, from the presumption of honesty, a representation by every one that there is nothing to his knowledge which makes his acts dishonest'.

guilty. Equity will always prefer to avoid such a finding, and instead reinterpret party conduct so as to induce or steer a defendant away from committing a breach in the first place. There are two sides to this equation: an anti-fraud jurisdiction and a primary duty jurisdiction. In the first, the court requires a defendant to foreswear a right he or she ought not to insist upon, for example because the right was attained in circumstances where its unrestricted exercise will turn it into an engine of fraud or wrongdoing. In the second jurisdiction the court will order a party bearing a primary duty e.g. of contract relating to specific property, or of fiduciary management or trustee control of assets, to tender specific performance of a finite contractual duty, or to render an account and make a due performance of a continuous stewardship or agency, rather than choose to breach and offer a secondary remedy.[95] This explains the maxim 'a court of equity does not punish'.[96] the court of conscience prefers to put the parties out of breach and into performance so they do not need to be punished; punishment as a secondary remedy is not in Chancery's armoury. If a party does insist on carrying through or ratifying a fraudulent breach, this will usually be severe enough to attract actions for tortious and criminal fraud or deceit with dishonest intent, bringing legal damages, forfeiture and imprisonment as sanctions. But this is a jurisdiction of law and police, when equity and conscience fails.

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[95] J Getzler, '"As If". Accountability and Counterfactual Trust' (2011) 91 Boston University Law Review 931.

[96] *Hodgens v Hodgens* (1837) 4 Clark & Finnelly 323, 353; 7 ER 124, 135 (HL, counsel in arguendo). This was a case where a mother who scandalously abandoned husband and children nonetheless could not have her marriage settlement trusts reopened to extract maintenance for her children simply because of her anterior bad behaviour; Lord Brougham C noted that contempt of court could bring imprisonment of the person to coerce obedience, but negative sanctions for bad behaviour did not lie in the normal jurisdiction of Chancery. See further *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (NSWCA), where Heydon JA covers all the significant 18th and 19th century authorities on equity's aversion to punishment.

The presumption of honesty measure of conscience is adumbrated early in the writings and judgments of Lord Chancellor Nottingham in the later seventeenth century.[97] His theory that neglectful exercise of managerial power over the affairs of another could lead to a primary accounting remedy in turn provided the basis for the eighteenth century's development of co-trustee and directors' duties of due care and supervision in management roles, notably in Lord Hardwicke's decision in the 1747 case of *Charitable Corporation v Sutton.*[98] On the negative or restraining side of the conscience jurisdiction we have Lord Hardwicke's important 1750 judgment in *Earl of Chesterfield v Janssen.*[99] There Lord Hardwicke explained how equity could find out fraud presumptively, from circumstances that spoke loudly of exploitation or sharp practice, where direct proof of ill motive might not be discoverable. His judgment amounted to a codification of equitable practice, stating a fourfold test of fraud in bargaining:

> The…question is, supposing the…contract to be valid in law, whether it was contrary to conscience, and to be relieved against in this court upon any head or principle of equity? … This court has an undoubted jurisdiction to relieve against every species of fraud. 1.The fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains;… A 3rd kind of fraud is, which

[97] DEC Yale (ed), *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (Cambridge University Press 1965) 166-67, 196, 200; *Palmer v Jones*, in DEC Yale (ed), *Lord Nottingham's Chancery Cases* (Selden Society vol 79, 1961) 649, no. 824 (1678); cf rehearing by North LK at (1683) 1 Vernon's Cases in Chancery 144; 23 ER 376.

[98] (1742) 9 Modern 349; 88 ER 500 per Lord Hardwicke C.

[99] *Earl of Chesterfield v Janssen* (1750-51) 2 Vesey Senior 125; 28 ER 82; 1 Atkyns 301; 26 ER 191 (Ch).

> may be presumed from the circumstances and condition of the parties contracting: and this goes farther than the rule of law; which is, that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other. A 4th kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement.[100]

He here identified a double ill – callous disregard by the stronger party, and inadequate consent of the weaker party, fomented or exploited by the stronger. Equity offered two remedial solutions to a bargaining fraud: it might deny the stronger party specific performance and thus leave the party to seek possibly derisory damages; or it might order the stronger party not to enforce the contract, or to rescind the contract and restore the position *ex ante*.

In this peculiarly English discourse of conscience and the presumption of honesty, where do Adam Smith's ideas fit in? Smith briefly picked up on the primary performance idea in his jurisprudence lectures, albeit briefly, noting how a 'Court of Conscience' will 'order specifick performance of contracts' where 'a man was bound in honour to perform'.[101] It is interesting then to ask what work the idea of 'honour' performs in his formulation. And here we reach a thoroughly Smithian moment in the history of law and conscience. In the 1778 case of *Gwynne v Heaton* [102] 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

[100] 2 Vesey Senior 125, 155-56; 28 ER 82, 100; 1 Atkyns 301, 351-52; 26 ER 191, 224-25 (LC).

[101] *Lectures on Jurisprudence* (n 63) 281-82.

[102] (1778) 1 Brown's Chancery Cases 1; 28 ER 989 (LC).

death's door and the annuity would not amount to much. The plaintiff's case was presented by Alexander Wedderburn. He was a Scottish-educated barrister who had attended Adam Smith's lectures on rhetoric and politics in Edinburgh in 1748, and then became his fast friend.[103] Wedderburn had moved his practice to England in 1757 and became Attorney-General in 1771. After long service as Chief Justice of Common Pleas from 1780 to 1793 he served as Lord Chancellor from 1793 to 1801 as Lord Loughborough and then the Earl of Rosslyn. He was regarded as the most rhetorically gifted barrister in the London of his day, if not the most learned. He participated avidly in the politics of his day, moving from the Tory side to the Whigs over the John Wilkes case, and moving back again during the American Independence crisis. He notably applied Smithian ideas on political economy and Smithian rhetoric to legal problems; for example, when introducing legislation in the House of Lords to contain accumulations in the wake of *Thellusson's Will Case*, Wedderburn stated:

> A fortune in circulation, even if spent in luxuries, waste, and dissipation, did more good to the public, and afforded more emulation to industry, and better encouragement to arts and manufactures, than any useless accumulation of money could do.[104]

As counsel for the plaintiff in *Gwynne v Heaton*[105] Wedderburn began by tactically heading off the possibility that the court might refuse the aid of specific performance or rescission to either party, and let them fight it out at law on the matter of damages – in effect a victory for the defendant. He pressed instead for equitable rescission and *restitutio ad integram*, or restoration

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[103] A Murdoch, 'Alexander Wedderburn' in *Oxford Dictionary of National Biography* (Oxford University Press 2004) §28954; Ross, *Life of Adam Smith* (n 41) 52-53 et seq.; Finlay (n 81).

[104] *The Parliamentary Register; Or, History of the Proceedings and Debates of the Houses of Lords and Commons* (Debrett, 1800) xii, 77 (HL, 6 June 1797); see further P Polden, *Peter Thellusson's Will of 1797 and Its Consequences on Chancery Law* (Mellen Press 2002).

[105] (1778) 1 Brown's Chancery Cases 1; 28 ER 949.

of the position before the contract. The problem he faced was explaining why a self-interested purchase of an asset at a low price must taint the contract and make it vulnerable to court control. To this end he offered a novel theory of the court's jurisdiction in conscience:

> No case puzzles me so much as one where the Court will assist neither party.—It is certainly true, that courts have no censorial authority, but it does not follow from hence, that they can give no relief.—The rules of morals, *honeste vivere, alterum non lædere, suum cuique tribuere*, do not all apply to courts of justice.— *Honeste vivere* is not their object, *suum cuique tribuere* is their proper ground, but they will prevent one man from injuring another: on this foundation stands the action upon the case.—If the bargain is beyond the limitation the law has fixed, it will punish. But there are cases which are not illegal, but which still are unconscientious.—If a man finds another in distress, and supplies him on unconscientious terms, the Court, in relieving him, enforces the rule of morality.[106]

Wedderburn here referenced Ulpian's great statement of the ends of law that stands at the head of the *Institutes* and *Digest* of Justinian:

> *Juris praecepta sunt haec: honeste vivere, alterum non lædere, suum cuique tribuere*.
>
> The following are the precepts of the Law: To live honourably, to harm no one, to give to each his own.[107]

Wedderburn's rhetoric and civilian learning must have been striking to those in court that day; for one a young John Scott, struggling to establish himself at the bar and spending all hours he could find listening to the arguments of the best London counsel, wrote a *précis* of the speech in his notebook that helps explain what was at stake:

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[106] (1778) 1 Brown's Chancery Cases 1, 6-7; 28 ER 949, 952 *in arguendo*.

[107] *Institutes* 1.3; *Digest* 1.1.10 (*Ulpianus libro secundo regularum*).

> 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.[108]

The key phrase identified here is the assimilation of conscience to '*honeste vivere*'. 'To live honorably' encoded the Stoic ethic of concern for others in order to attain tranquillity of mind or good conscience. It was a foundation of the Ulpianic vision of law at the high point of Roman classical jurisprudence.[109] Wedderburn's speech as reported seems at first to argue that honorable conduct, with its connotations of honest respect for others, was not the business of justice or law: there is no 'censorial' jurisdiction, no power to command good morals; or (in Scott's recollection) 'Many moral Obligations beyond the reach of Laws'. But if conduct within legal bounds was yet so exploitative of a person as to become 'unconscientious', then 'the Court, in relieving him, enforces the rule of morality'. Wedderburn's rhetoric was brilliant because it divided moral standards into two: those standards reserved for moral regulation outside the law – Smith's imperfect obligations of benevolence – and those standards where breach would in-

[108] John Scott, *Notebook of Chancery Cases*, Saturday 27 June 1778, MS., Lord Eldon Collection, Georgetown Law Center, Washington DC.

[109] AM (Tony) Honoré, 'Ulpian, Natural Law and Stoic Influence' (2010) 79 Legal History Review 199.

volve patent dishonesty, living without honour, pursuing self-interest beyond conscience as accepted by any neutral observer or judge, and so disrupting society. These latter moral obligations fell to Chancery to correct. Wedderburn completed his advocacy by concluding that the terms of the deal were so bad on their face, and the powers given to the lender over the family estate so extensive and overbearing in the circumstances, that it was no answer that the lender claimed in his subjective mind to be 'honest' in both acquisition and exercise of rights. Looking at all available facts including the obvious distress of the family and the adverse terms extracted, it was simply implausible to presume other than that this was an 'exorbitant' contract:

> The circumstances put together shew the bargain to be enormous… I do not desire a casualty to be considered; but what at the time was most probable to happen should be considered.[110]

Wedderburn won his case. Lord Chancellor Thurlow gave relief against the contract, using *Janssen's Case* as supporting precedent: 'Lord *Hardwicke* treats inequality as a mark of fraud'.[111] The evidence was sufficient to establish that the father's 'dissolution' was notorious and so the security was likely to be called early, so that at the time of transacting the estate was likely be acquired at gross undervalue, greatly overcompensating the lender for any risk *ex ante*. Lord Thurlow then applied 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*….It then comes to this; that Heaton the purchaser, knowing the actual state of the lives for which he was bargaining, the inequality which that introduced, and the indigence of the man with whom he was contracting, makes a

[110] *Gwynne v Heaton* (1778) 1 Brown's Chancery Cases 1, 7; 28 ER 949, 952 *in arguendo*.

[111] (1778) 1 Brown's Chancery Cases 1, 8; 28 ER 949, 953 (LC).

> bargain with him, which appears as enormous…, without one circumstance to cast a shade over the case. The deeds must be set aside.[112]

Here the Court of Conscience uses 'a man of common sense' as the third-party observer, the impartial spectator, showing the defendant where the dictates of conscience lay. The honourable or honest course of conduct was not to press home his acknowledged, perfected legal rights, and indeed because the defendant had put the plaintiff to the trouble of filing a bill to resist a contract that was clearly pernicious in principle, it was proper that plaintiff's costs should follow the cause.[113]

Gwynne v Heaton was an important milestone in Chancery doctrine, cited continuously into the late nineteenth century with *Chesterfield v Janssen* as a foundation of the equitable fraud jurisdiction. In *Gwynne* Wedderburn and Thurlow elucidated how equitable fraud should be understood, taking the Smithian ideas of impartial conscience and the limits of imperfect moral obligations, marrying these to Chancery forensics, and using Stoic ideas embedded in Roman law to explain why court enforcement of conscience involved a presumption of honesty, and was not some 'censorious' imposition of top-down morality. Lord Thurlow went on to apply the presumed honesty test in the positive cases of accountability, for example ordering accounts against a servant or agent in a fiduciary position and also against a stranger who acquires trust

[112] (1778) 1 Brown's Chancery Cases 1, 9, 10-11; 28 ER 949, 953-54 (LC) (emphasis in the original).

[113] (1778) 1 Brown's Chancery Cases 1, 11; 28 ER 949, 954 (LC).

property or assists the agent in breach of retainer;[114] from the same Smithian language came the modern law of fiduciaries.[115]

It remains to note that the language of conscience is also found in common law claims of the age. In the seminal unjust enrichment case of *Moses v Macferlan* in 1760, Lord Mansfield CJ gave an argument for recovery of flawed payments as conscience-driven, using Roman language '*ex æquo et bono*', obligations from equity and good faith:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering.[116]

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[114] *East India Company v Henchman* (1791) 1 Vesey Junior 287, 289; 30 ER 347, 348 (Ch) (the name of defendant is a happy coincidence). See also *Bonney v Ridgard* (1784) 1 Cox's Chancery Cases 145, 147; 29 ER 1101, 1102 per Sir Lloyd Kenyon MR, where primary enforcement of trust duties was ordered against an executor who had used a legal power to transact with the deceased estate to retire his own debts; 'common honesty' required an account of profits by the executor lest he commit 'equitable fraud'.

[115] *East India Company v Henchman* is still cited as a foundational fiduciary case in J McGhee (ed), *Snell's Equity* (33rd ed, Sweet & Maxwell 2014) 7-054.

[116] (1760) 2 Burrow 1005, 1012; 97 ER 676, 680-81 (KB) per Lord Mansfield CJ.

The notion of conscience is here used in a striking fashion not only to explain *prima facie* restitution as a unified cause of action,[117] but also to construct an important defence: where monies are paid to a person gratuitously under an imperfect obligation, 'payable in point of honor and honesty', then there is no conscience to repay simply because the donor afterwards repents his non-enforceable payment. This seed laid the foundation for much that followed in the common law of unjust enrichment. Now William Murray, Lord Mansfield, had left Scotland behind as a schoolboy and was English-educated, yet he corresponded with Adam Smith and sent him foreign students anxious to learn philosophical jurisprudence.[118] It is difficult to imagine that this learned judge was ignorant of the theories of Smith and Kames on the nature of obligations and the calls of conscience. The language seems closer to Smith.

VII. Conclusion

If lawyers of the stature of Thurlow and Wedderburn, Scott and Mansfield, could each resort to arguments of Smithian conscience to explain the jurisprudence of obligation, and in fact used such ideas to invent much of our modern law, then that leaves us with a tantalising question for the present. Can the judges of today do a better job of constraining self-interest if they dispense with the third jurisdiction of conscience? Can a better explanation be given of how self-interest may be perfected?

[117] PBH Birks, 'English and Roman Learning in *Moses v. Macferlan*' (1984) 37 Current Legal Problems 1.

[118] Ross, *Life of Adam Smith* (n 41) 32, 158; and see Ross's account of the influence of *Theory of Moral Sentiment*s on Mansfield's judgment in Somerset's Case, ibid, 170-71.