

The Neglected Agent: Justice, Power, and Distribution in Adam Smith

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The purpose of this essay is to argue that in Adam Smith, the right to subsistence is a natural right and that the reasons why it failed to reach the statute books are predominantly political. The concentration of political power in the hands of property owners and the various forms of economic dependency created by economic developments have generated, in Smith's view, a discrepancy between positive law and natural justice. It is upon this discrepancy that the difference of opinion lies with regard to the more general question of whether distributional matters are part of Smith's notion of justice.

At the heart of Smith's analysis of all aspects of society stands the socially conditioned individual agent. The efficiency of natural liberty as well as its morality rests on the prudent behavior and tempered attitudes of agents. The invisible hand of *The Theory of Moral Sentiments* suggests that the presence of private property, or more broadly stated, that of wealth inequality, does not necessarily deprive anyone of life's

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necessities.¹ Thus the creation of private property and unequal distribution of wealth need not offend against morality, as actual subsistence will be more or less equally distributed.² Similarly, the invisible hand of the *Wealth of Nations* proposes the unintended social benefits of the pursuit of one's own affairs. Thus efficiency is served. This means that there is no obvious reason to interfere for either reasons of expedience or equity.

This view is further enhanced through standard interpretations of Smith's ethics, which suggest that matters of distribution are never within the domain of justice.³ Indeed, why should matters of distribution come within that domain if life's necessities are always guaranteed? The universal pursuit of one's own interest in a prudent manner seems sufficient both to promote wealth (the invisible hand of the *Wealth of Nations*) and to benefit everyone (that is, trickle down through the invisible hand of *The Theory of Moral Sentiments*) within a system of natural liberty.

The social benefits (the unintended consequences) of the invisible hand of the *Wealth of Nations* depend primarily on the free functioning of markets.⁴ Those of the invisible hand of *The Theory of Moral Sentiments* rely

1. While there might be many interpretations of the broader significance of the invisible hand (see, for instance, Grampp 2000, which lists at least nine), the fact that it *facilitates* (that is, provides some kind of mechanism for) the equal distribution of life's necessities is difficult to dispute. "The rich," writes Smith, "consume little more than the poor, and in spite of their natural selfishness, . . . are *led* by an invisible hand to make nearly the same distribution of the necessities of life, which would have been made, had the earth been divided into equal portions" (*TMS*, 184–85; emphasis ours). We find it difficult to interpret "led by an invisible hand" as anything but a mechanism. Naturally, we do not claim that this mechanism is that of competition. That which facilitates the equal distribution of life's necessities is ultimately prudence, including among the selfish (see more in Witztum 1997).

2. The implied trickle-down effect that is suggested by our interpretation of the invisible hand of *The Theory of Moral Sentiments* is supported by the elaborate explanation that Smith himself offers of it. In the *Lectures on Jurisprudence*, he provides a detailed account of how an unequal distribution of ownership does not alter the basic distribution of subsistence (*LJ*, 194). The language he uses in these passages is almost identical to that he used in the invisible-hand passage. Here, in the *Lectures on Jurisprudence*, he attempts to enumerate how the fact that the stomach of the rich is not greater than that of the poor generates a flow of subsistence from the rich to the poor through the former's demand for luxurious consumption. The point is elaborated in Witztum 1997 and Witztum 2005a and later in this article in connection with slavery.

3. Raphael (2001, 114) points out that "it is certainly mistaken [to suppose] that Smith regards the needs of the poor as a claim of justice." See also, for instance, Werhane (1991), Salter (1994, 2000), and Vivenza (2001, 198).

4. Smith's discussion of the invisible hand occurs in the context of a discussion on the freedom of employing one's capital in a manner that will produce the greatest return (*WN*, 456). Mere prudent exchanges do not, in themselves, produce the social benefit. The testimony for this can be found in *The Theory of Moral Sentiments*, where Smith describes such exchanges as leading to a society that may subsist, but is by no means happy (*TMS*, 83). Therefore it is really the *freedom* to employ one's capital where one chooses that is the essence of the transmission mechanism from self-interest to social benefits.

solely on the prudent behavior of agents. Put differently, the efficiency of natural liberty depends on the competitive nature of markets,⁵ but the trickle-down effect proposed by the invisible hand of *The Theory of Moral Sentiments* depends on *all agents* behaving prudently and not, for instance, simply destroying that which they own. Evidently, the working of markets is a matter of policy and regulation. As such, whether or not a society wishes to improve wealth generation is a matter of choice. But if, for some reasons, the behavior of some agents prevents the trickle-down mechanism from ensuring life subsistence to all members of society, it is no longer a matter of choice or policy. Depriving individuals from access to subsistence may in the end affect their ability to survive. Behavior that results in such deprivation thus becomes immediately a matter of justice and legislation, inasmuch as the right to life constitutes a “perfect right.”⁶ The question that arises is why the potential failure of *The Theory of Moral Sentiment’s* invisible hand has not provoked Smith, in the list he provides in the *Lectures on Jurisprudence*, to include its proposed benefits (that is, subsistence) as a “perfect right”?

In our view, there are two possible explanations for this. First, the right to subsistence is embedded in two other rights that Smith clearly lists as perfect rights: the right to life and property rights as manifested in the right to the fruits of one’s labor. While the right to life, according to Smith, is clearly a natural right in the sense that it is universal, the rights to property are far less obviously so.⁷ Nevertheless, as far as the right to the fruits of one’s labor is concerned, Smith quite clearly states that “the property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable” (*WN*, 138).⁸ Moreover, without proper explanation Smith states quite clearly that “a

5. In Smith this means the ability to freely employ capital wherever it is most productive. The modern correspondence between efficiency and market competition is a bit more complex, as the benefits of competition require complete markets. While Smith does not seem aware of it, it is clear that if some markets are not competitive, the allocation of capital is bound to be less productive.

6. “For it is all one,” writes Smith, “whether one destroys the persons themselves or that which ought to afford them maintenance” (*LJ*, 194). “Perfect rights,” in Smith, “are those which we have a title to demand and if refused to compel an other to perform” (*LJ*, 9).

7. “The only case where the origin of natural rights is not altogether plain, is in that of property” (*LJ*, 13).

8. We are conscious of the fact that this statement, which is spelled out in Smith’s discussion of apprenticeship, is mainly about the right of workers to employ their labor as they deem fit. However, as was demonstrated in Witztum 1997 and Witztum 2005a, and as will be briefly summarized later, the right to one’s property is not entirely independent of the expectations that one may form with regard to unhindered use of it.

man *must* always live by his work, and his wages *must* at least be sufficient to maintain him” (*WN*, 85; emphasis ours). While this does not necessarily mean that people have a priori claims to a particular share in the national income, it does seem to suggest that it is commonly accepted that people should be able to live from their labor. As Smith did not consider exclusion from the labor market, by implication, if a person is able to raise his subsistence through labor (and thus survive) *but is impeded* from doing so either because of the level of wage or because of restricted access to the labor market, both his right to life and his property rights are violated.

Second, the absence of subsistence from the list of rights may reflect a distinction that Smith draws between “natural justice” and “positive law.” In the last pages of *The Theory of Moral Sentiments*, he claims that “systems of positive law . . . though they deserve the greatest authority, as the records of the sentiments of mankind in different ages and nations, yet can never be regarded as accurate systems of the rules of natural justice” (*TMS*, 341). This suggests that while the rights of the poor, or the propertyless, constitute, in Smith’s mind, part of natural justice, the absence of explicit legislation is merely a reflection of institutional circumstances that prevented them from becoming law.⁹ Consequently, the rights of the poor may be implicit rather than explicit. Their absence from Smith’s listing of rights in the *Lectures on Jurisprudence* may merely reflect their absence from the statute books rather than the opinions of an impartial spectator.¹⁰ Equally, there are rights that are clearly on the books but that, according to Smith, are contrary to natural justice. For instance, the primogeniture right of succession is, according to Smith “contrary to nature, to reason, and to justice” (*LJ*, 49).

Indeed, the received view, according to which Smith was not much concerned with questions of distributive equity, is normally based on the absence of explicit textual evidence. However, some scholars have noted their unease about this conclusion, given Smith’s concern for injustice and oppression, a concern that goes well beyond that which is listed as injustice in the commutative sense of justice (Winch 1978, 98–99).¹¹

9. This is consistent with Rothschild’s (1992a) intriguing findings that Smith’s arguments had been used by supporters of the Poor Laws in the 1790 debate but were then expropriated by the opponents of those laws in 1801.

10. It may also reflect the fact that the *Lectures* are lecture notes that are more likely to serve the needs of rhetoric than those of a complete argument. In Witztum 1997 and Witztum 2005a, this point is elaborated further.

11. See also Young and Gordon 1996. Rothschild (1992a, 1992b, 2001) claims that the received view owes much to the post-1790 distortions of Smith that became common in debates over food and apprenticeship policies.

Of course, one may also argue that all of these concerns are unnecessary, because Smith did not contemplate the possibility of a failure in the “mechanism” distributing life’s necessities. In a world where all agents seek to better their condition, prudence will always drive them to employ that which is above their required subsistence in a way that will, intentionally or otherwise, benefit others. This will either be a result of employing unproductive labor or the result of accumulation (the ultimate employment of productive labor). While this may be generally true, there are two significant qualifications. First, even if Smith believed that the distribution of life’s necessities will always work since all agents are prudent, this does not make their right to subsistence less of a moral issue. It may help explain why the right to subsist has not become a matter of positive law, but it cannot explain its exclusion from natural justice.

Second, while in *The Theory of Moral Sentiments* Smith’s argument for the invisible hand is stated with great confidence, there is evidence elsewhere for the possible failure of the trickle-down mechanism that it implies.¹² The most obvious case is that of a stationary economy. If initially the wage fund provided for more than is needed for subsistence, the number of workers would rise so much that “the competition of the labourers and the interest of the masters would soon reduce them to this lowest rate which is consistent with common humanity” (*WN*, 89). In fact, this is a very peculiar notion of an economic equilibrium. Why should wages not go down sufficiently to bring about a decline (through deaths) in the number of workers and thus raise wages again? Why does Smith introduce a noneconomic lower boundary to the wage level? What is the meaning of “common humanity” in this context?

Whatever is meant by “common humanity” (or by “wages *must* at least be sufficient”), it is clear that the natural process by which the providers of the wage fund divide its use between accumulation and unproductive labor may produce outcomes where some agents will earn below subsistence. In such a case, Smith seems to rely on a social construct, or perhaps on a notion of compulsory beneficence, to ensure that the natural process is not allowed to claim any real victims. Could it be that “common humanity” refers to a certain moral responsibility that reflects a principle of natural justice that could either be demanded from each individual

12. Indeed, in Smith’s discussion of wages, he alerts the reader to the case of Bengal: “In a fertile country . . . where subsistence . . . should not be very difficult, . . . notwithstanding, three or four hundred thousand people die of hunger in one year” (*WN*, 91). Smith believes the reason for this is the decaying wage fund that could be the result of the misuse of surpluses.

agent (not to pay a wage below subsistence) or from society as a whole (some sort of social safety net)?

In what follows we will examine some of the difficulties with which natural justice, in Smith, translates into positive law. We will begin by briefly reviewing the case for the moral justification of a right to subsistence. We shall then examine Smith's perception of the development of political institutions and how this development may explain the failure of the rights of the poor to become codified in positive law. We will highlight the interplay between property, power, and economic relationships to show that Smith was right to suppose that in many combinations of political structures and economic relationships, there exists a natural mechanism to guarantee the prediction of the invisible hand of *The Theory of Moral Sentiments*. However, there are those circumstances where it is clear that the working of such a mechanism will rely on clear violation of other principles of justice (liberty). We will thus examine Smith's views on the right to exist as further evidence of our claim that though the right to subsistence has not been legislated, for Smith it does constitute a natural right.

To further demonstrate how things that are clearly within the domain of natural justice could remain, for a considerable length of time, outside positive law, we will examine the cases of the right of primogeniture and the problem of slavery. We will find that the idea of an equal right of access to that which had been jointly produced is at the heart of Smith's moral objections to the right of primogeniture. Equally, we will draw some parallels between the fate of slaves in some stages of social development and the fate of the poor. We will conclude our defense of the view that distributive considerations are part of Smith's conception of justice by examining the notion of compulsory beneficence, which transforms what is normally (or customarily) treated as an imperfect right into a perfect right, a matter of justice.

1. The Embedded Rights of the Propertyless

Whether or not people have a right to subsistence, in Smith's theory, is a question that has not really been debated in these terms. Normally, the debate about the rights of the propertyless focused on the more general question of whether or not there are distributive considerations in Smith's theory of justice. The main argument in favor of excluding distributional matters from Smith's theory of justice is the claim that according to the

Lectures on Jurisprudence, justice is about what we have, and not about what is due to us (derived from quotes in *LJ*, 7). Within the domain of justice there are only *perfect rights*, rights that constitute claims against everyone (and are thus universal and enforceable) and not against specific individuals.

In Witztum 1997 and Witztum 2005a, the possibility is explored that the rights of the propertyless can be derived from perhaps the most unexpected part of jurisprudence, property rights themselves. There are two elements to the argument. First, we must distinguish between what Smith *lists* as rights and the process, in Smith's theory, according to which such rights are formed. From the *The Theory of Moral Sentiments* we know that justice arises out of the sympathy of an "impartial spectator" with the resentment of an injured party, and his consequent approval of reprisal (*TMS*, 78–79). The views of the impartial spectator, which are a reflection of what the public feels, will inevitably depend on the universality as well as familiarity of the sentiments aroused by an action. In this respect there seems to be a connection between the impartial spectator and contemporary social norms. Consequently it becomes evident that what falls in the domain of justice generally, and property specifically, may vary at different stages of social development.¹³ This, we believe, is also consistent with the tension we alluded to before, between what Smith calls "positive law" and "natural justice."

The second, and more important, element in the argument is the exploration of the origin of property rights. Many scholars attribute to Smith a theory of property that is based on the natural law school. Accordingly, the claim that property rights begin and end with possession (*ius in re*) leads to the conclusion that no one has any claim to a share in the produce of their community (*ius ad rem*). Consequently, acquisition of private property is independent of its effects on propertyless people.

However, scholars now understand that Smith has an original theory of property rights that parts company from the tradition of natural law and from the Lockean tradition in significant ways.¹⁴ Smith's own analysis of the impartial spectator suggests that only in the very early stages of the development of private property could justification be based on actual possession. As society progresses, the justification for private

13. This is consistent with Smith's own explanation of why theft has not always been considered a violation of "natural rights" (*LJ*, 16).

14. Young (1995) and Haakonssen (1981) make similar arguments regarding spectator approval and agents' expectations in Smith's theory of property.

ownership becomes more complex and appears to be based on something entirely different. The rights to a thing seem to be based on the “reasonable expectations” that owners of assets have with regard to the use of the fruits of the asset. These expectations can be formed once someone has taken something into his or her possession or *before* that, when such expectations are based on the use of one’s natural assets.

Consider, for instance, the following discussion about a party injured by the theft of an apple:

From the system I have already explain’d, you will remember that I told you we may conceive an injury was done when an impartial spectator would be of opinion he was injured, would join with him in his concern and go along with him when he defended the subject in his possession against violent attack, or used force to recover what had been thus wrongly wrested out of his hands. . . . The spectator would justify the first possessor in defending and even in avenging himself when injured. . . . 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 what manner he pleases. . . . The reasonable expectation therefore which the first possessor furnishes is the ground on which the right of property is acquired by occupation. (*LJ*, 17; emphasis ours)

Thus we see that one’s right to the property (possession) in this case is based on the *expectations* that one forms with regard to the use of that property (in this case, to supply one’s subsistence).

Smith concludes the passage with a hypothetical conversation:

You may ask indeed, as this apple is as fit for your use as it is for mine, what title have I to detain it from you. You may go to the forest (says one to me) and pull another. You may go as well as I, replied I and besides it is more reasonable that you should, as I have gone already and bestowed *my time and pains* in procuring the fruit. (*LJ*, 17; emphasis ours)

The expectations we have go beyond outright physical possession if, in the mind of the spectator, there is still a close connection between the object and the agent (see also *LJ*, 19).

Clearly, the sanctioning of one’s right is also closely associated in the mind of the spectator with the fact that other assets were involved, namely, one’s “time and pains.” Thus individuals’ initial expectations are formed

based on the use of their own natural assets, and this is the basis on which Smith agrees with Locke (1694, chap. 5, sec. 27.8) that “the property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable” (WN, 138). Putting this together with one’s reasonable expectation of using the fruits of one’s labor, there seems to be a strong argument in favor of a right to live by one’s labor. The most sacred origin of property rights, accordingly, is the ability to employ one’s labor freely *so that* one can live by one’s work.

Additional evidence in support of this interpretation can easily be found in Smith’s discussion of the laws prohibiting free hunting or fishing on privately owned land (LJ, 22–24). These feudal laws, he claims, are an encroachment on the rights of the lower ranks of society. But to which rights is Smith referring? Surely not rights to hunt and fish, as the mere desire to do these things does not constitute a right. In our view, banning the public from hunting and fishing on private land can constitute a violation (or encroachment) on the rights of the poor by denying them the fruits of their natural assets. Put differently, the rights of the poor are violated as they are unable to employ their labor as they deem fit so that they can live by it.

It is significant that in this context in the *Lectures*, Smith alludes to “rules of equity” (LJ, 23), suggesting that “equity” is synonymous with “natural justice.” As Raphael (2001, 118) has pointed out, Smith was one of the few to apply retributive justice to reward as well as to punishment. And it is in the former sense (justice as reward) that we find the concept of equity deployed in the *Wealth of Nations*, although Raphael criticizes Smith for neglecting that concept in his account of merit in *The Theory of Moral Sentiments* (118). Thus Smith says, “The produce of labour constitutes the natural recompence or wages of labour” (WN, 82). And “it is but equity . . . that they who feed, cloath and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, cloathed and lodged” (WN, 96).

Based on these references, we follow the line according to which the origin of property rights is the expectations that people have of the proposed use of an asset. These expectations, we claim, stem from the initial expectations all individuals have to use their natural assets so that they can subsist. Interfering with any aspect of these universal rights is a violation of a perfect right and of natural equity. This is so either through the violation of property rights or, ultimately, through the violation of the right to live.

2. Evolution of Power and the Neglected Agents

Having stated the case for the right of the propertyless (based on their right to their natural assets) that would be derived from Smith's theory of how principles of justice are formed, we now move to investigate the failure of these rights to become "positive law."

The main reason, in our view, for this failure is the close association, in Smith's view,¹⁵ between government and property. "Laws and government," he writes, "may be considered in this and indeed in every other case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods" (*LJ*, 208). To show that this is not only the rhetorical fire of an excited teacher, Smith repeats the point in his lectures dated 1766: "Till there be property there can be no government the very end of which is to secure wealth, and to defend the rich from the poor" (*LJ*, 404).¹⁶

This in itself should be sufficient to support the claim that positive law and natural justice are by no means synonymous. Moreover, as the objective of government seems to be the protection of property from the propertyless, the rights of the latter are obviously secondary. In spite of Smith's own admission that the original and most sacred property right rests with the right of people to employ their labor as they deem fit so that they can live by it, these rights do not seem to have been a major concern for legislative policy.

Some might argue that if we disassociate the right to employ one's labor as one sees fit from the right to be able to live by it, there is no necessary contradiction between the protection of property rights in general and the right to our natural assets in particular. However, this is not the case.

Why is it, one must ask, that the introduction of property calls for government? According to Smith, the reason is that once property is allowed, there is a threat of violence from the propertyless (see *LJ*, 208–9). But why, one must carry on asking, would the introduction of property be the cause of violence? The answer, at least for Smith, is very clear: because

15. Locke too makes a similar case, but it is important to keep in mind that in spite of similarities, there are distinct differences between Locke's and Smith's theories of property.

16. The 1978 editors of Smith's *Lectures on Jurisprudence* (R. L. Meek, D. D. Raphael, and P. G. Stein) note that Locke too makes a similar pronouncement. However, this is somewhat misleading. In the case of Locke, there is property in the natural state, and people have a natural right to defend it. The real cause of government is the need for an arbitrator. This is very different from Smith, who clearly associates the emergence of government with the introduction of private property. In his case, as we have tried to show in section 1, property rights—broadly construed—are not obvious natural rights.

“the chase can no longer be depended on for the support of anyone. All the animals fit for the support of man are in great measure appropriated” (*LJ*, 208). Put differently, the introduction of private property (beyond one’s natural assets) violates the right that people may have to employ their labor in any way they deem fit so that they can subsist. If until now a person could subsist through hunting, the action of another man has made this no longer possible and the former is no longer entitled to employ his labor in hunting alone. In fact, as will soon be demonstrated, he may not be able to raise subsistence whichever way he chooses to employ his labor.

Naturally, to understand both the role of government and the power base for legislation, we must investigate more closely the political relationship between the property owners and the propertyless. According to Smith, there are, basically, three types of relationships that prevail in different forms and at different stages of economic development. First, there is the situation where all agents are independent of each other and are in no need of assistance to raise their subsistence other than, perhaps, for security purposes. Second, there is a situation where the propertyless are dependent on those with property for their subsistence. And third, there is the situation where agents are interdependent. While each of these cases requires a thorough investigation, it would be difficult to provide a full account without deviating from the main objectives of this paper. We would therefore provide a brief summary of what Smith said about each of these stages and discuss how his account offers an explanation of the political failure of the right of the propertyless to reach the statute books.¹⁷

2.1. From Independence to Dependency with Political Power

Smith begins his chronology of social institutions at the age of hunters, when there was no significant accumulation of private property. As a result, all agents were independent and more or less equal. Therefore “in the age of hunters there can be very little government of any sort, but what there is will be of the democratical kind” (*LJ*, 201). Such societies, Smith claims, consist of a number of independent families who are connected merely by the fact that they live together in the same community or share the same language. All matters of disputation (and thus of justice) between families are resolved by the decision of the entire community.

17. Write to the authors for a full account with complete textual support.

Independently of the anthropological inaccuracy of this narrative, it is clear that for Smith, the origin of that which is *actually* considered to be just is the opinions of a collective of independent agents.

In such societies, Smith argues that the need for authority and law is very small indeed: “Property, the grand fund of all dispute, is not then known” (*LJ*, 208). In short, in a world of *independent* individuals, the only law required is the one that defines the boundaries for applying one’s natural assets.

The difficulties begin when we move to the next stage—the age of shepherds—when the accumulation of private property begins in earnest. The appropriation of flocks and herds made subsistence by hunting uncertain and precarious. Consequently, we now have communities with two types of agents: those who have appropriated flocks and herds and those who have not. It is not clear from Smith’s own analysis why all agents would not do the same thing and appropriate flocks all at the same time. After all, the accumulation of stock seems always to be associated with the wish to “better one’s condition.” Possible explanations of this could be either that the broader significance of bettering one’s condition—namely, gaining social approval through “sympathy”—directed some people to other means than accumulation (e.g., creating large and protective families)¹⁸ or that the number of wild animals was such that there was not enough for both accumulation and consumption by everyone in one period. Whatever the reason, the outcome is clear: some have access to subsistence, some do not. At the same time, according to the invisible hand of *The Theory of Moral Sentiments*, the distribution of natural assets has not changed. The poor who had been used to acquire subsistence from nature would now acquire it (or parts of it) from the rich. But how would such a transfer happen?

According to Smith, at the early phase of society, this could happen only due to the benevolence of the rich, as the poor have nothing to offer in return.¹⁹ Only when the notion of luxury consumption develops will the poor be able to sell services to the rich in return for their share in the social cake. All agents could thus become *interdependent*. However, even then, the position of the poor is not guaranteed, as the presence of slaves could create a situation when the rich people get their services from the slaves and do not need the poor’s services. Here again, the poor’s access to social wealth will be entirely dependent on the goodwill of the rich.

18. This issue is elaborated in Witztum 2005b.

19. There is no luxury consumption, no art, and no manufactured goods (*LJ*, 202).

The main question, for which there is no explicit answer in Smith, is whether the goodwill of the rich in such circumstances is really optional. Or, will the collective will of the community dictate that such transfers are obligatory? According to Smith, in the early stages of the shepherding period, communities were still small, and while the introduction of private possession increased the scope of disputations, the form of social management remained direct democracy. However, while the source of authority was the whole community, the fact that the poor were dependent on the rich gave the latter a considerable amount of influence over them. The three powers of government (legislative, judicial, and executive) will thus be effectively in the hand of the few rich people, and even among them, the power may be further concentrated in the hands of one or two most powerful individuals.

However, Smith insists that in spite of the great economic dependency of the poor, the authority of government still comes from the entire community (*LJ*, 209). The whole political administration must be approved by some form of general assembly. Hence, while property owners may use their power to ensure that the laws correspond to their wishes, they still depend on the consent of the poor. In this respect, the first stage of government may not be altogether a stage of dependency. While there is economic dependency, the rich stand in political need of the poor. Therefore, it is in the interest of the rich to ensure that their dependents get their subsistence and support the enforcement of the law that protects property. Had the right of the poor to subsistence been legislated, the rich would have no power over the poor. This could explain both why the rights of the poor would not become law and why subsistence would be guaranteed even though there is no legal requirement.

2.2. Dependency without Political Power

What gave the propertyless political power, in Smith's anthropological discussion, is the particular arrangement of direct democracy in the transition between the social state of hunters-gatherers without government to a state of shepherds with government. But Smith, the historian, observes that a similar development, without political power, also developed in the ownership of land.

In the discussion of the transition between *allodial* and *feudal* land ownership in the post-Roman world, Smith claims that a similar state of economic dependency developed (*LJ*, 49–50). Land was grabbed, and a

social division developed between those who had large amounts of land and those who did not. As the owners of great property could not use it all for themselves or their guests, they ended up giving parts of it to the propertyless so that they could take their share of subsistence directly from the land. In return, the small farmers would pay the owner a sum that was “rather as an acknowledgement of their dependence than as a value of the land” (*LJ*, 50–51). Consequently, the owners of these large estates had many dependents (either directly or indirectly) upon whose services they could rely in times of war.

Unlike the cases of the hunter-gatherers and the shepherds, here there is no democratic regime, and the allodial lord is also the lawmaker.²⁰ The dependent has no political power other than to refuse service to the lord. However, such a refusal would also deprive the dependant of the ability to secure his own subsistence. Thus the lord has neither a need nor an incentive to decree (or act) in the defense of the propertyless. He does not need to ensure that the arrangements that secure his ownership are properly enforced (as was the case when authority came from the assembly of people), nor need he worry much about securing the services of the propertyless. For them, the refusal to provide the lord with services, as well as any kind of disobedience, will leave them without subsistence.

Thus according to Smith, in society’s first stages of property acquisition, the political power rests with the community, and while there is clear economic dependence, this is balanced by the political power of the propertyless. The more historical account of the emergence of property in land paints a different picture, where there is very much the same economic dependence but the propertyless have no real political power.

The meaning of this is that according to Smith’s own perception of the evolution of government and society, whether or not the poor had political power, the rights of the propertyless would not have become law. In the presence of political power, the working of the invisible hand of *The Theory of Moral Sentiments* will be ensured through the self-interest of those who own property. In the absence of such power, there is actually no real mechanism to ensure the distribution of surplus from

20. In the allodial case, authority comes from sympathy with the rich. In *Lectures on Jurisprudence*, Smith suggests that monarchical types of regimes can be explained by the dominance of sympathy, while democracy of the type we analyzed earlier represents the dominance of utility (401). In Smith’s historical analysis, he also claims that the move toward the feudal (through the allodial) stage had removed all sorts of popular governments, the kind that we described in the previous section (*LJ*, 418).

the lord to anyone who is in need of subsistence. At the same time, as there is no law (i.e., no assembly to legislate and no government to enforce), to guard one's property one would need the help of as many people as possible. Giving some individuals a share of the land so that they could derive their own subsistence directly from it or to allow them to eat leftovers from one's table would achieve the same objective: it would provide the physical means (soldiers) to protect one's power.

2.3. The Right to Rebel

In the two cases we have thus far discussed, we have noted that while the propertyless were completely dependent on the rich for their survival, their subsistence was more or less ensured through the self-interest of the rich.²¹ This also seems consistent with the view implicit in the invisible hand of *The Theory of Moral Sentiments*—namely, that the trickle-down system will never fail, and thus there is no need to worry about the propertyless.

However, as we said before, the fact that there may be a natural mechanism that will protect a certain right does not make it a lesser right. What the story so far seems to suggest is rather that when there is such a mechanism, the rights of the poor are unlikely to be registered. In the case of direct democracy, dependency makes subsistence the means for generating legal protection of property (*de jure*). In the case of no political power, subsistence is the means of physically securing property (*de facto*).

So what political justification is there, in Smith, for the right to subsistence? We can learn it from his treatment of the cases where there is a breakdown in the trickle-down mechanism implied by the invisible hand of *The Theory of Moral Sentiments*. It is interesting to note that these failures occurred, according to Smith, at the time when there was, potentially, *economic interdependence*.

In terms of social progress we move now to the stage where arts and luxury consumption are present. At this stage, the poor are no longer dependent on the rich, because the poor derive their subsistence through the provision of services. In this situation, the rich and the poor are in an equal economic relationship, and the subsistence passed on to the worker is not a result of the goodwill of the rich person but rather a recompense

21. In the case of direct democracy, the goal of the rich was to secure their own interests in the assembly. In the case of lawlessness, the goal of the rich was to secure an army. In both cases, the interest of the rich, consistent with Smith's view of government, is to maintain the power they have acquired through property.

for the worker's services. However, in a world where there are slaves, the rich can acquire the same services from the slaves and thus leave the poor in the community as dependent as they were in an earlier stage. But, one wonders, what will happen to their political power? The answer is that they will lose it through a system of bribes and loans, which is described below. But it is not quite clear why such a development could not take place even without the presence of slaves. However that may be, the point is that Smith recognizes a situation where the natural mechanism behind the invisible hand of *The Theory of Moral Sentiments* no longer functions.

For instance, in the presence of slaves and life's luxuries (i.e., in a world of interdependence), the rich owner of an estate does not need the services of his fellow members of society if he can get the services from slaves (*LJ*, 194). But if he employs slaves on his land and uses them to provide him with all he needs (or wants), there will be nothing left for the other members of society. In fact, by employing slaves he will be effectively either enslaving or virtually killing (!) the propertyless individuals: "Slavery remarkably diminishes the number of freemen" (*LJ*, 194).

The question that arises is whether this failure of the natural mechanism of distribution should be tolerated or whether it justifies a change. To discuss these possibilities, Smith refers to the fate of the poor in Greece and Rome. He argues that in both there was a popular demand for redistribution. The reason for this demand was that all the work and services the poor could have offered the rich were carried out by slaves. "The only means of support they had was either from the general largesse which were made to them, or by the money they got for their votes at elections" (*LJ*, 197).

This means that even a form of democracy was not sufficient to temper the demand for redistribution. Put differently, the political power of the propertyless was seriously diminished in this case of dependency. There are basically two reasons for this. First, a reason that is not mentioned explicitly in Smith but follows from his description is that there is a decline in the proportion of the poor who are free. This is due to the inability of the free poor to maintain themselves or sufficiently large families to support the number of people in their class. Second, to ensure the political support of the poor, the rich, according to Smith, had given the poor some of their surplus but in the form of loans. These loans were given at high rates of interest so that "this soon ran up to a very great amount such as they had no hopes of being able to pay. The creditors were in this manner

sure of their votes without any new largesse, as they had already a debt upon them which they could not pay, and no other could out bid them, as to gain their votes he must pay off their debt, and as this had by interest come to a great amount there was no one who would be able to pay it off. By this means the poorer citizens were deprived of their only means of subsistence” (*LJ*, 197). In this way, the political support of the poor could either be derived from their need to borrow more to finance the debt itself or from further reduction in the number of free poor, since debt was a means of enslaving individuals (*LJ*, 198).

There are two possible consequences to this situation where the poor lose their economic ability to earn their subsistence (due to the presence of slaves) as well as their political power. One would be a form of rebellion, where the poor try to obtain their share in the national income by force. The other, an attempt to bring about a constitutional change that would prevent situations like this.

While Smith was clearly dismissive of the “social contract” approach to society, he does acknowledge the right to rebel: “Whatever be the principle of allegiance, a right of resistance must undoubtedly be lawful” (*LJ*, 434). However for Smith, the right to rebel is associated with the unreasonableness of those in authority. This includes individual leaders as well as legislatures. Following David Hume, Smith seems to suggest that at a time when the system fails to provide people with life’s necessities, legislated laws of justice should be suspended. In other words, the natural right to subsist overrides all acquired rights (like property): “It is a rule generally observed that no one can be obliged to sell his goods when he is not willing. . . . in time of necessity the people will break through all laws” (*LJ*, 197).²² Smith compares the situation of the poor to the case of famine where people force their way into granaries and force the owners to sell their goods at the price the rebels deem reasonable. By so doing, the poor violate the established laws of property, but they do so in defense of their natural right to subsist. In a very similar discussion in the *Enquiry Concerning the Principles of Morals*, Hume ([1777] 1975, 186) explicitly claims that when society fails to ensure preservation, property laws become secondary. The use of the same story in Smith without questioning the moral conclusions of Hume on this matter seems to suggest that Smith was in agreement.

22. In Plato’s *Republic*, a similar discussion is used to explain (1) the rise of tyrants who exploit the unhappiness created by the oligarchy (the rich) and (2) the demands of the poor for their impeachment (see bk. 8, pt. 9, art. 8).

Exactly as in the case of the hunters, violating the right of the poor to access subsistence constitutes a violation of justice. If the existing laws do not deal with it, this is because of the appropriation of power that follows the introduction of private property. In such a case, natural justice will be very different from positive justice.

2.4. Interdependence and Neglected Agents

When there are no slaves and society has progressed to a stage where there are art and luxury goods, the propertyless members of society are elevated from a status of dependence to a position of equality. If all agents are equal, then they can equally benefit or equally harm each other. But while the rich depend on the poor for their luxury consumption and not for their subsistence, the poor depend on the rich for their subsistence. This is by no means a state of simple interdependence, and while it may be true that both agents act out of self-interest, the consequences to the one are much more serious than the consequences to the other.²³ The question that arises is whether it is conceivable that the rich, in such a situation, might harm the poor.

On the face of it, an owner of herds has the right (by law) simply to destroy some of the animals. If he does so, the total number of animals (free or otherwise) may no longer be sufficient to provide subsistence for everyone. From the “impartial spectator’s” point of view, this is something that everyone will feel strongly about, “for it is all one whether one destroys the persons themselves or that which ought to afford them maintenance” (*LJ*, 194). In such a case, the people’s view of this man as “a great fish who devours up all the lesser ones” (*LJ*, 194) will be the correct one.

Smith, the observer, agreed with the public denunciation of such behavior. By implication he would agree that the failure to distribute subsistence is a violation of justice in its commutative sense (i.e., requiring positive reprisal). He doubts, however, whether such behavior is likely. Nonetheless, this means that for Smith, the acquisition right that was based on the right to the fruits of one’s assets had only gained conditional approval. Namely, a person’s right to the fruits of his, or her, acquired assets is conditioned on not depriving someone else of the intended fruits of their labor, namely, their subsistence.

23. See discussions of these issues in Witztum 2003 and Witztum 2004.

In a more indirect way we may consider a situation where the rich use most of their surplus (above their own subsistence) for luxury consumption (unproductive labor). As productive labor is not sufficiently supported, productivity may fall, and the economy may slip into a regressive state where wages fall below subsistence level.

But would society legislate to ensure the right of the propertyless? We saw that in both democracy and feudalism, whether dependent or independent, the poor had little political power to force such legislation. As they were at all times dependent on the rich (either directly or due to the presence of slaves), the political power of the poor was mainly a means to derive their subsistence. It was never sufficiently significant to set the agenda of social debate other than through some forms of social upheaval.

In the world of interdependence, according to Smith, things are not much better. In an interesting discussion of the republics of the Middle Ages, Smith makes a point that has great relevance for today:

They gave the name of democracies to those governments where the people had the same access to the magistracies and offices of the state as the nobles. But of these we have none at this time in Europe. . . . The people of all these countries *voluntarily resigned the power* into the hand of the nobles, and they alone have since had the administration of affairs. . . . In the modern republics every person is free, and the poorer sort are all employed in some necessary occupation. They would therefore find it a very great inconvenience to be obliged to assemble together and debate concerning public affairs or tryalls of causes. Their loss would be much greater than could possibly be made up to them by any means, as they could have but little prospect of advancing to offices. (LJ, 226)

In short, when all agents are free but the poor have to work very hard to make ends meet and provide services and luxury to the rich, the poor will have neither the means (time) nor the ability (probably, education)²⁴ to enter politics and influence the agenda. Therefore, in spite of an apparent democracy, the poor voluntarily relinquish their political power. It is extremely unlikely that such a political structure will recognize the rights of the poor.

24. A similar point is made in the *Wealth of Nations*. Smith discusses there the importance of education for the common people, whose labor and exertion is so severe “that it leaves them little leisure and less inclination to apply to, or even think of any thing else” (WN, 785).

3. Positive Law, Power, and Natural Justice

So far we have argued the case for the right of subsistence to be part of Smith's idea of natural justice, despite the fact that it did not become positive law. We have first tried to show that the right to subsistence is, in fact, embedded in the more advanced concept of property right (through the rights we have to the fruits of our natural assets) and in the concept of natural equity. We then argued that its failure to reach the books is entirely due to the power structures that emerged from the introduction of private property. In this section we will give two examples of laws that did make it to the books but that are blatantly inconsistent with natural justice. We do this to counter the argument that the domain of natural justice is completely accounted for in Smith's list of perfect rights.

3.1. Primogeniture

Property rights, according to Smith, constitute a perfect right but are the least obvious of all those things one can call natural rights (*LJ*, 13). Having questioned how natural are the rights to own, Smith progresses to discuss the various ways in which property becomes one's own. We have discussed some of this in section 1, where we highlighted the importance of the way property is acquired to the legitimacy of the right to own. We would like to discuss now another method of acquiring ownership: the rules of succession.

Smith distinguishes between two methods of succession. One, by law, where the state (or society) decides how an estate should be divided. The other, where the division of the estate is decided by the will of the owner. However, Smith then goes on to claim that the former preceded the latter (*LJ*, 38). This, of course, has important implications, since it suggests that the rules of succession originated from social norms rather than from an innate right of the initial owner.

As far as movables and divisibles are concerned, Smith argues that throughout history and different stages of social development, the principle underlying the division of an estate was that of localized "communal" ownership. Society, in his view, recognized that the whole estate of the master of the house was kept through the collective labor and effort of the entire family. Therefore, the stock of which the estate is comprised entails the implicit claims of the father, the wife, and the children. This division, argues Smith, remained unchanged upon death. Over the years, however, the share of the father, which was mainly used to facili-

tate a dignified passing, has been transferred to the purpose of maintaining the children (*LJ*, 45). There had been different treatments of the wife in different cultures and stages of development, but the key element is really the equal division among all the members of the family.

In fact, Smith believes that these equitable principles of dividing an estate were broadly accepted for all types of assets: "The method of succession therefore to all subjects, indivisible as well as divisible amongst the Roman, and to divisible subjects amongst the modern nations of Europe . . . is governed by the same laws. . . . the subjects of the deceased of all sorts were equally divided by the children" (*LJ*, 49). That is, until the introduction of primogeniture:

But now a different method is introduced, I mean the right of primogeniture. . . . this method of succession, *so contrary to nature, to reason, and to justice*, was occasioned by the nature of the feudal government. (*LJ*, 49; emphasis ours)

The logic behind this development is the lack of security. The allodial lords were lawmakers in their own domain, and they could rely only on their vassals to ensure the safety of their estates. On many occasions they also depended on their neighbors. In this state of affairs, it was clear that the bigger one's estate, the more powerful it is and consequently, the more secure it becomes. To divide it then between all the children of the lord would weaken it to a degree that would expose the land and its inhabitants to great insecurity. "If therefore an estate which when united could easily defend itself against all its neighbours should be divided in this manner as movables were, that is, equally betwixt all the brothers, it would be in no state of equality with those to whom it was before far superior" (*LJ*, 55).

But while there may be good historical reasons for such a development, Smith produces a cynical view of these circumstances:

When land, like movables, is considered as the means only of subsistence and enjoyment, the natural law of succession divides it, like them, among all the children of the family; of all of whom the subsistence and enjoyment may be supposed equally dear to the father. . . . But when land was considered as the means, not of subsistence merely, but of power and protection, it was thought better that it should descend undivided to one. (*WN*, 382–83)

Clearly, it is not simply a natural development that made primogeniture important, but the use of property as a means to gain power. Put differently,

the scramble for power seems to bend the rules of natural justice. So powerful are these political forces that “laws frequently continue in force long after the circumstances, which first gave occasion to them, and which could alone render them reasonable, are no more” (*WN*, 383).

In spite of acknowledging the circumstances that initially gave rise to laws of primogeniture, Smith denies them any moral justification. Laws that are in place merely to ensure security when the need no longer exists “are founded upon the most absurd of all suppositions, the supposition that every successive generation of men have no equal right to the earth, and to all that it possesses” (*WN*, 384).

There are a few interesting lessons one can draw from this discussion. First, even within what constitutes natural justice there may be an internal hierarchy. For instance, the principle of equitable succession may be sacrificed for the sake of security (which, presumably, relates to the right to live). Second, as in the case of military justice, sacrificing the rights of the individual for the good of the whole is justified on the grounds of social utility, yet is a violation of natural justice nonetheless (*TMS*, 90).²⁵ Third, whatever the circumstances that required the denial of rules of succession that are consistent with natural justice, they have long been irrelevant; yet the violation of natural justice, through the assumed sanctity of property rights, remains unaffected. Thus those things that have become law do not necessarily correspond with what may be understood as natural justice.

Fourth, and perhaps most important, Smith seems to accept that the idea of an equal division of all property to all members of the family is a strong principle of natural justice. In the analysis of the laws of succession, he implicitly acknowledges that the whole idea according to which everyone who participated in creating a stock has an equal right to it, is a prevailing principle of justice. The division after death, in his view, should reflect the claim that all members of the family had while property was being acquired or improved:

The children and their parents all lived together, and the goods of the father were supported by the joint labour of the whole family. The master of the family, again, maintained them from this stock, which as it was maintained and procured by the labour of the whole family was

25. D. D. Raphael's commentary on this passage in *The Theory of Moral Sentiments* is also relevant. Smith actually makes the point that the greater overriding social utility of putting to death the sentinel who falls asleep at his post makes the practice just. Raphael (1972–73, 96) contends that it does not. We agree with Raphael and believe it is Smith's true position also.

also the common support of the whole. The master of the family had indeed the privilege of alienating in his life time his stock; which the others had no claim to; but at the same time he could not alienate it at his death. All the members of the family came in for an equal share in it at his death, as they all contributed their assistance to the support of it. (*LJ*, 39)

It should not be too difficult to extend the principle and ask why it is that in the whole economy, where the produce of land is the result of a combined effort, the division of it should not be ruled by the same principle occasioning the division of stock before and after the death of the father?

3.2. Slavery

For Smith, then, the law of primogeniture represents a travesty in the sense that it contradicts natural justice; yet it is an important element of the perfect right to private property. This is not inconsistent if we accept Smith's distinction between natural justice and positive law, and if we refuse to delineate the domain of justice using the list of laws that defend these perfect rights. The fact that the law proposes to protect rights that are so blatantly divorced from natural rights may suggest the possibility that there are natural rights that could have failed to become law. There is no better example for this than the institution of slavery.

In a somewhat detached and dry manner we must first note that slavery generated a clash between two types of perfect rights: liberty and property. There is also no doubt, as was indicated earlier, that Smith considered the rights to life and to liberty (the rights of a man derived from being a man) to be obvious natural rights, while property rights were less obviously so. Therefore, the superiority of the right to be free should have dominated the right to own, in exactly the same way that the right to live was dominant in the formation of the laws of primogeniture. But according to Smith this was not the case. Perhaps the most important reason was that slavery began by capturing and enslaving those people who were not part of one's own community, and thus they were not the object of any rights. Nevertheless, as was suggested earlier, there were periods in which becoming a slave was something that could happen to a member of one's own community either by his own volition or through his inability to repay debts. Smith notes that these two methods of becoming slaves had been banned in the Middle Ages of the Roman

Empire (*LJ*, 455) so according to Smith the main problem is really that the majority of slaves were simply “others.”

In spite of slaves’ being “others,” Smith’s own analysis of sympathy should apply, as these people were not physically distant from those who “owned” them. Indeed, Smith employs this analysis to argue that whenever there was great opulence, the ability of the free people to sympathize with the slaves was very low. This was because the distance in lifestyle was so great as to render the “imaginary exchanges of places” completely impossible. In poorer countries, on the other hand, as the distance, in terms of one’s personal circumstances, between the free and the slaves was much smaller, the free could more easily identify with the slaves (*LJ*, 184).

This means that among poor nations, the drive to abolish slavery should have been greater than in the more opulent ones. But this was not really so if we consider, for instance, the case of Russia. It seems that the more important elements in driving a wedge between natural justice and positive law were power and political institutions.

In a democracy, Smith argues, it will be difficult to abolish slavery. The slaves are part of people’s property, and by voting to abolish slavery, people will vote themselves out of assets. Naturally, if we have a democracy where people are poor, the sympathy that the free have with the slaves and the fact that the free do not have large estates may lead them to abolish slavery. In a beautifully sad passage, Smith captures the whole dilemma:

The more society is improved the greater is the misery of a slavish condition; they are treated much better in the rude periods of mankind than in the more improved. Opulence and refinement tend greatly to increase their misery. The more arbitrary the government is in like manner the slaves are in better condition, and the freer the people the more miserable are the slaves; in a democracy they are more miserable than in any other. The greater the freedom of the free, the more intolerable is the slavery of the slaves. Opulence and freedom, the two greatest blessings men can possess, tend greatly to the misery of this body of men, which in most countries where slavery is allowed makes by far the greatest part. A humane man would wish therefore if slavery has to be generally established, that these greatest blessings, being incompatible with the happiness of the greatest part of mankind, were never to take place. (*LJ*, 185)

If progress generally means opulence and more liberty (for the free), there seems to be no obvious natural mechanism that will bring about the correction of this disjunction between positive law and natural justice. However, as in other cases, Smith seems to believe that the struggle for power could, unintentionally, rectify this situation. The forces which, according to Smith, brought about the abolition of poverty were not motivated by the desire to correct these anomalies. He suggests that instead they were the clergy's desire to give more power to those people on whom the clergy exerted greater influence and the desire of kings to undermine the powers of the barons (*LJ*, 188–89). Nevertheless while, for instance, in the case of dependency and direct democracy (without slavery), the self-interest of the rich is bound to redistribute the surplus in such a way as to provide the propertyless with their subsistence, this was not the case with forces which, according to Smith, brought down slavery. The clergy and the kings may have shared a desire to undermine the landlords, but this in itself was not sufficient to ensure the desirable outcome.

There is a certain similarity between the position of the slaves and the poor in society. The rights of both groups are recognized as natural rights but, for political reasons associated with the distribution of power emanating from ownership, these rights failed to be enshrined in law. In the end, the rights of the slaves have been recognized, but the rights of the poor remain outside positive law. The fact that violation of the rights to subsistence are much less evident than slavery could help explain why this is so. Yet notwithstanding this difference, and even notwithstanding the possibility that most of the time the right to subsistence will be guaranteed, the failure to achieve legal status does not mean that the right itself is not a natural right.

4. Coerced Beneficence

The foregoing has shown that the right of the poor to their subsistence is a part of natural justice, thus bringing it into the realm of commutative justice, what Smith calls justice proper (*TMS*, 390). We have further argued that the failure of this to appear in Smith's list of perfect rights is related to the historical interplay of property and political power that in various ways has prevented the recognition of the right to subsistence in positive law. However, when it comes to listing rights, the right of the poor to relief was listed as an imperfect right in the jurisprudence tradition that Smith inherited most immediately from Francis Hutcheson (*LJ*, 9; *TMS*, 269–70).

However, in the *Short Introduction to Moral Philosophy*, Hutcheson ([1747] 1968), 124–25) also points out that perfect and imperfect rights lie on a continuum, the one shading imperceptibly into the other. Whether or not Smith accepted this, we will argue in this section that he did allow for the evolution of imperfect rights into perfect ones as the sentiments of the people (the impartial spectator) progressed over time. Moreover, we shall also argue that, following natural jurisprudential tradition, these imperfect rights could rise above perfect ones in times of “urgent necessity.” This suggests that, at least in the case of subsistence, what is normally treated as an imperfect right ultimately rests on natural justice, as we argued above in section 1.²⁶ In this last section, we will provide further support for our view that redistribution is an element of what Smith considers to be the domain of justice by the investigation of the notion of coerced beneficence.²⁷

In his formal account of justice in *The Theory of Moral Sentiments*, part 2, Smith makes an important qualification, which we contend blurs the distinction between imperfect and perfect rights, and between benevolence and justice. Here Smith argues that justice in the sense of commutative justice can and should be enforced by governments because of the resentment the impartial spectator feels when a person is injured and because the rules of commutative justice are capable of exact specification. By contrast, the rules of benevolence cause no one injury when benevolent actions are not performed, and the rules themselves are highly inexact. Thus, charity appears to be a purely private matter, as in the standard view outlined above.

26. In previous work with Barry Gordon, Young (Young and Gordon 1996, 1997) addressed Smith’s concern for the provision of the poor under the category of “distributive justice,” since Smith explicitly notes that imperfect rights “refer to distributive justice.” However, as Gloria Vivenza (2001, 198, 202) points out, the original Aristotelian concept of distributive justice had nothing to do with the fairness of distribution (of economic means) and everything to do with maintaining inequality, not reducing it. In this paper we confine ourselves to Smith’s assertion that commutative justice is the only proper meaning of the term and eschew any reference to distributive justice. Our concern is that Smith allowed for the possibility of imperfect rights becoming perfect rights and for natural justice to underpin an imperfect right in extreme circumstances.

27. By *beneficence* we mean charitable acts, while we reserve the term *benevolence* for the desire to do good. In this sense benevolence is one of the virtues that Smith identifies as primary, and it is under this virtue that he places the moral obligation of charity. However benevolence, by definition, cannot be coerced. No one can force another to desire to do good, although one can force another to *do* good. Hence beneficence, not benevolence, can be coerced. We owe this point to A. M. C. Waterman.

However, this reasoning applies to acts of beneficence among equals. In relations between unequals, such as the relation between the sovereign and the people, the situation is somewhat different:

A superior may, indeed, sometimes, with universal approbation, oblige those under his jurisdiction to behave, in this respect, with a certain degree of propriety to one another. The laws of all civilised nations oblige parents to maintain their children, and children to maintain their parents, and impose upon men many other duties of beneficence. The civil magistrate is entrusted with the power not only of preserving the public peace by restraining injustice, but of promoting the prosperity of the commonwealth, by establishing good discipline, and by discouraging every sort of vice and impropriety; he may prescribe rules, therefore, which not only prohibit mutual injuries among fellow-citizens, but command mutual good offices to a certain degree. When the sovereign commands what is merely indifferent, and what, antecedent to his order, might have been omitted without any blame, it becomes not only blamable but punishable to disobey him. When he commands, therefore, what antecedent to any such order, would not have been omitted without the greatest blame, it surely becomes much more punishable to be wanting in obedience. (*TMS*, 81)

In relations between the sovereign and the people, the sovereign may, with the community's approval, establish laws that require individual acts of beneficence based on the community's obligation to the beneficiaries.

The paragraph concludes: "Of all the duties of a law-giver, however, this, perhaps, is that which it requires the greatest delicacy and reserve to execute with propriety and judgement. To neglect it altogether exposes the commonwealth to many gross disorders and shocking enormities, and to push it too far is destructive of all liberty, security, and justice [commutative justice]" (81). The legislator must be wise enough to find the Aristotelian mean between "shocking enormities" and individual liberty, and therefore not to overstep the bounds of commutative justice more than is necessary. Unlike the previous cases we discussed, where the problem was to bring the positive law into conformity with natural rights, here we have a need to balance conflicting claims, *all of which are rooted in natural rights*. It is natural both that the father has authority over the child and that the child has a right to life. Hence, the need for the sovereign to exercise wisdom. However, if both invisible hands are working tolerably well, there may be only a few instances in which distributive

concerns conflict with and overrule commutative justice. Commutative justice remains the essential foundation that makes social life possible, but this should *not* be taken to imply a lack of concern for distribution in its own right as a possible object of law in some instances.

We gain further insight into what Smith is doing here if we look at his discussion of the father's obligations toward his children found in the *Lectures on Jurisprudence*:

We may observe also that in the early and more rude periods of society men were not conceived to be bound to alimnt their children (or maintain them). It was not then supposed that one was bound to do any thing for those who did not do their part to their own maintenance. As now men are only bound not to hurt one another and to act fairly and justly in their dealings, but are not compelled to any acts of benevolence, which are left intirely to his own good will, so in the ruder times this was extended to the nearest relations, and the obligation they were under to do for one another was supposed to be binding only by their inclination; and all kindnesses betwixt them were reckon'd as acts of benevolence and not as what they were bound in justice to perform. If a son is taken by pirates, or any other set of men, as the barbarous nations on the coast of the Mediterranean sea, who will either in all probability put him to death or reduce him to slavery, we do not look on the father as bound to ransom according to the rules of justice, but only as a great sign of inhumanity and hardheartedness. This was extended at first much farther, and a parent was considered as at liberty either to maintain and educate his children or to leave them at the mercy of the weather and wild beasts. (*LJ*, 172)

We see here that the boundary between justice and benevolence evolves over time. The nature of the obligations of a father to his children has undergone change. As Smith observes a little further on in the text, in Rome, "The authority of the father over the life of the son, which seems at first sight so excessive, appears to have been very soon brought to a moderate and proper pitch" (*LJ*, 173). Then, before concluding the topic, Smith points out:

One of the great differences betwixt the state of the fathers in Rome and in this country, and all other Christian ones, is that the father is bound to provide for and alimnt his children. The exposing of a child is in this country accounted the same with the murdering of one, which

is punished in the same way as any other murder. The children are in like manner bound to maintain their parents if they should happen to become destitute and unable to maintain themselves. (*LJ*, 175)

Now murder is a clear violation of a perfect right, and so what we have here is an instance of how an obligation has evolved through the stages of society from one of benevolence to one of justice. From the passage in *The Theory of Moral Sentiments*, we understand that this evolution occurs through the consent of the people (actually the impartial spectator), as their moral sensibilities change. We also see that the right to be maintained, whether as a child or as an elderly parent, also becomes a perfect right in the course of economic development. Further, Smith has placed his stamp of approval on the modern system of obligations, suggesting that moral progress has occurred.²⁸

Whatever the boundary between perfect and imperfect rights, it evolves and is subject to acts of the sovereign rooted in the sentiments of the common people, as they arise in the experience of daily life. If the sentiments of the people call for creating a perfect right where only an imperfect one existed before, it is praiseworthy for the sovereign to create it. Strictly speaking, imperfect rights remain outside the purview of jurisprudence, but this is a mere definitional matter. The sovereign can make an imperfect right a perfect right. Just as we argued in the case of primogeniture and slavery, rights that are not natural can become perfect through positive law. The difference is that in this case the sovereign proceeds with the consent of the people, suggesting that as sensibilities develop, the concept of natural justice itself undergoes development.

It is not a great leap from supposing that children have a right to subsistence within a family to arguing that the propertyless have a right to subsistence within a state. Consider, for example, Smith's analysis in the

28. Smith echoes a similar sentiment in "Introduction and Plan" in the *Wealth of Nations*, when speaking of nations of hunters:

Such nations . . . are so miserably poor, that, from mere want, they are frequently reduced, or, at least think themselves reduced, to the necessity sometimes of directly destroying, and sometimes abandoning their infants, their old people, and those afflicted with lingering diseases, to perish with hunger, or to be devoured by wild beasts. (*WN*, 10)

Hunting societies, when faced with famine, may adopt customs out of their greater public utility that violate natural justice. The inability of the community to provide subsistence for all may result in actions that are reasonable if they protect the good of the whole, but in Smith's view these are cases of public utility trumping natural justice. The provision of subsistence as a right in natural justice still holds.

Wealth of Nations, book 4, of the grain trade. As noted above, Hume ([1777] 1975, 186) had already argued that “the strict laws of justice are suspended, in such a pressing emergence [famine], and give place to the stronger motives of necessity and self-preservation.” In Hume’s theory this is offered as proof of the point that the sole reason for property is public utility. When it no longer serves that purpose, people revert to a natural sense of equity and establish an “equal partition of bread” (186).

Smith takes a somewhat different course to arrive at much the same position. In examining it, Istvan Hont and Michael Ignatieff (1983, 24) conclude that for Smith, contrary to Hume, the rights of property must be “absolute,” a clear expression of the standard view. This leaves the poor at the mercy of private charity in the short run, but with the hope of adequate subsistence as the fruit of economic growth. “This position,” write Hont and Ignatieff, “effectively excluded ‘distributive justice’ from the appropriate functions of government in a market society” (24). Smith, however, urges:

When the government, in order to remedy the inconveniencies of a dearth, orders all the dealers to sell their corn at what it supposes a reasonable price, it either hinders them from bringing it to market which may sometimes produce a famine even in the beginning of the season; or if they bring it thither, it enables the people, and thereby encourages them to consume it so fast, as must necessarily produce a famine before the end of the season. The unlimited, unrestrained freedom of the corn trade, as it is the only effectual preventative of the miseries of a famine, so it is the best palliative of the inconveniencies of a dearth; for the inconveniencies of a real scarcity cannot be remedied; they can only be palliated. No trade deserves more the full protection of the law, and no trade requires it so much; because no trade is so much exposed to popular odium. (*WN*, 527)

Smith expresses a similar sentiment in *The Theory of Moral Sentiments* when he says that “the poor man must neither defraud nor steal from the rich, though the acquisition might be much more beneficial to the one than the loss could be hurtful to the other” (*TMS*, 138).

However, we contend that Hont and Ignatieff are mistaken when they conclude that Smith does not consider distributive justice (distributive equity) to be a proper aim of government. We base our contention on Smith’s “Digression on the Corn Trade” (*WN*, 524–43). As Young and Gordon (1996) have argued, the thrust of Smith’s position is that previ-

ous economic analyses were mistaken on scientific grounds. He argues that poor harvests do not bring the rights of property into conflict with distributive justice, as previous writers supposed:

When the scarcity is real the best thing that can be done for the people is divide the inconveniencies of it as equally as possible through all the different months, and weeks, and days of the year. The interest of the corn merchant makes him study to do this as exactly as he can; and as no other person can have either the same interest, or the same knowledge, or the same abilities to do it as exactly as he, this most important operation of commerce ought to be trusted entirely to him; or in other words, the corn trade, so far at least as concerns the supply of the home-market, ought to be left perfectly free. (*WN*, 533–34)

One of the fears that led to price controls was that inland merchants could monopolize the market in times of scarcity. This, says Smith, is unfounded, since “it is scarce possible, even by the violence of law, to establish such an extensive monopoly with regard to corn” (*WN*, 525). The only exceptions he allows to the principle of *laissez-faire* in the corn trade are for small republics such as the Swiss cantons, where exportation might be artificially restrained to maintain local supplies, or for situations of “the most urgent necessity” (*WN*, 539).

These exceptions are, however, significant. They suggest that in some circumstances the market will not provide sufficient protection against famine, even when it is working properly.²⁹ In light of the position sketched out above, we can view this as a case of the sovereign creating a perfect right to avoid a “shocking enormity”—namely, starvation. Alternatively, we can see it as an instance of the sovereign suspending the adventitious rights of the grain traders in favor of the principles of natural equity embodied in the spectator’s sympathy with the starving. Either way Smith asserts the right of the poor not to starve in such a way as to make this an obligation of justice on the part of the community. In a Swiss canton, a person would be punished for exporting grain in a crisis and not allowing it to feed the local population. Granted, Smith

29. In researching the positions of Smith, Turgot, and Condorcet on the freedom of trade in grain, Rothschild (1992b, 2001) has pointed out that Smith’s analysis rests on the implicit assumptions that the internal trade is well developed with a complete set of geographically integrated markets and that the poor are living above the subsistence level. When these conditions were not met, as in France, she argues persuasively that Smith would have favored the kinds of interventions, such as public works to get cash into the hands of the poor, that Turgot tried to implement.

believed that in the long run in a properly constituted commercial society, such emergencies would be rare. However, there can always be exceptions to the rule, and as in the case of economic policy, Smith allows for the exceptions in his conception of justice. Should the market fail to deliver a “tolerable” standard of living, or a basic subsistence, Smith stands ready to instruct the sovereign to intervene. Indeed, Smith expresses a similar sentiment in his sweeping denunciation of the mercantile system when he concludes:

It is the industry which is carried on for the benefit of the rich and the powerful, that is principally encouraged by our mercantile system. That which is carried on for the benefit of the poor and the indigent, is, too often, either neglected, or oppressed. (*WN*, 644)³⁰

5. Conclusion

The idea of equally sovereign interdependent individuals has produced a belief that natural liberty ensures that basic principles of equity are guaranteed, and therefore are not part of what constitutes justice. Those who oppose the introduction of distributive considerations into Smith’s conception of justice usually rely on what Smith lists in the *Lectures on Jurisprudence* as perfect rights, as well as on his distinction between imperfect and perfect rights. On the face of it, perfect rights do not seem to include any distributive element in them, while the right of the poor to demand subsistence is not a matter of justice. However, based on Smith’s own recognition of the disjunction between natural rights and positive law, we have tried to demonstrate both that in Smith’s terms a right to subsist is a natural right and that Smith implies that its absence from the statutory books is merely a reflection of the political circumstances that influenced the emergence of law. As the sentiments of the people change, so will those circumstances. Just as evolving sentiments moved the right of a child to subsistence from an imperfect to a perfect right, Smith allows the possibility of the same with respect to the right of the propertyless to subsistence.

We had argued that according to Smith this had not yet happened because of the close association between government and property, which

30. Young and Gordon 1996 has a more complete discussion of distributive issues in Smith’s critique of the mercantile system.

provided the rich with both political and economic power. Consequently, the power to legislate was mainly in the hands of property owners. As a result, in spite of the fact that according to natural justice, property rights are not independent of how they have been acquired, that which is listed as a property right is based on the principle of actual possession (i.e., *ius in re*).

In part, the absence from positive law of the right to subsistence can be associated with the presumption that there are natural processes that guarantee the equal distribution of life's necessities, and there is hence no need to legislate. By examining the various political setups in the evolution of society, we showed that this is not universally true. In the absence of slavery in both direct democracy and in a hierarchical regime (like feudalism), there will be a clear interest of the property owners to provide subsistence to the propertyless. However, in the case of hierarchy, there is no real cost to excluding anyone. Hence, in this form of government one cannot assume that the invisible hand of *The Theory of Moral Sentiments* functions universally. In the presence of slavery, of course, there is a clear breakdown of the distribution mechanism. Even in a world of interdependence and representative democracy, the propertyless will be unable to influence the political agenda, and the functioning of the invisible hand of *The Theory of Moral Sentiments* relies on the universal rationality (and propensity to improve) of the property owners.

From all this, it seems clear to us that for Smith, the right to subsistence is a natural right, even though it has failed to be protected by law. This failure cannot be attributed to the existence of a natural mechanism that on its own distributes life's necessities, as we have shown that Smith himself was very much aware of the failures of such a mechanism. It was rather a result of a continuous concentration of both economic and political power in the hands of the property owners. The propertyless were left to the mercy and interest of those individuals. When Smith writes that wages must never fall below a level that is consistent with common humanity, he does not tell us whether this issue should be left to market forces or whether there should be either government intervention or legal restrictions. Overall, it seems that Smith thought that this objective would be met without intervention some of the time. But, with or without intervention, if wages fall below a level consistent with common humanity, then the blessings of opulence and freedom, denied as they are to the mass of people who become increasingly poorer, are "incompatible with the happiness of the greatest part of mankind," and a humane man would wish them "never to take place."

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