

ADAM SMITH ON LIBERTY AND REPUTATION:
IS REPUTATION PROPERTY? ARE DEFAMATION LAWS COERCIVE?

by

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DEDICATION

To my fellow soldiers, past and present, living and passed on, sworn to uphold and defend the Constitution of the United States of America.

It is this habitual contempt of danger and death which ennobles **the profession of a soldier**, and bestows upon it, in the natural apprehensions of mankind, a rank and dignity superior to that of any other profession. The skilful and successful exercise of this profession, in the service of their country, seems to have constituted the most distinguishing feature in the character of the favourite heroes of all ages.

Adam Smith, The Theory of Moral Sentiments

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ABSTRACT

**ADAM SMITH ON LIBERTY AND REPUTATION: IS REPUTATION PROPERTY?
ARE DEFAMATION LAWS COERCIVE?**

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George Mason University, 2013

Dissertation Director: Dr. Daniel B. Klein

Esteem, admiration, fame, and reputation are powerful motivators of human behavior in Adam Smith's moral philosophy. According to Smith, we are willing to go to great ends to earn the esteem of others and achieve a lasting reputation. Indeed, he asserts men are even willing to attempt acts which will result in certain death if they believe they might achieve a sufficiently great and lasting reputation in the process. Despite the central nature of reputation and its importance to understanding human motivation, Smith is never explicit about how reputation should be treated under the law. We know Smith thinks we will go to great lengths to achieve a good reputation, but we do not know with certainty how the government should treat the reputation of individuals. The focal questions of this dissertation then, are first, whether Smith believed reputation was like property, which men can be said to have a right to defend with violence; and second, if he believed it should be protected by law.

In the first essay, I consider Smith's jurisprudence, and the role of natural liberty. In The Theory of Moral Sentiments Smith alludes to an intent to write a full book on jurisprudence ("TMS"), which presumably would have dealt fully with the issue of reputation. I discuss the nature of commutative justice and distributive justice, which becomes central to my exploration of Smith. I then discuss the role of natural liberty and natural jurisprudence, and conclude that Smith was optimistic about establishing a society that embraced a system of natural liberty based on classical liberal ideals. Such a system would likely have included a libertarian perspective on reputation.

In the second essay I begin to explore the question of reputation using Smith's published works, The Theory of Moral Sentiments and An Inquiry into the Nature and Causes of the Wealth of Nations ("WN"). I use a simple 2x2 framework to consider the interactions between the two core questions of the dissertation, i.e., is reputation property-like and therefore the subject of commutative justice, and are laws protecting reputation desirable? I also introduce a model of rhetorical bargainer vs. challenger to explain why Smith might have opted to avoid an explicit libertarian position on reputation.

In the final essay, I continue my inquiry expanding beyond Smith's published works to a review of the *Lectures on Jurisprudence* ("LJ"), two collections of student notes taken down during Smith's lectures at Glasgow University. In this concluding paper, I explore some statements which seem on the surface to explicitly support the position that reputation is a perfect right, but also review many interesting statements Smith makes about related issues, such as dueling, that point to the opposite conclusion.

INTRODUCTION

The counter-view, and the current basis for holding libel and slander (especially of false statements) to be illegal is that every man has a “property right” in his own reputation, that Smith’s falsehoods damage that reputation, and that therefore Smith’s libels are invasions of Jones’s property right in his reputation and should be illegal. Yet, again, on closer analysis this is a fallacious view. For everyone, as we have stated, owns his own body; he has a property right in his own head and person. But since every man owns his own mind, he cannot therefore own the minds of anyone else. And yet Jones’s “reputation” is neither a physical entity nor is it something contained within or on his own person. ***Jones’s “reputation” is purely a function of the subjective attitudes and beliefs about him contained in the minds of other people. But since these are beliefs in the minds of others, Jones can in no way legitimately own or control them. Jones can have no property right in the beliefs and minds of other people.***

Murray Rothbard, The Ethics of Liberty
(Rothbard, 1998 (1982), p. 165)

But what is a person’s “reputation”? What is this thing which may not be “taken lightly”? Clearly, it is not a possession which may be said to belong to him in the way, for example, his clothes do. In fact, a person’s reputation does not “belong” to him at all. A person’s reputation is *what other people think of him*; it *consists* of the thoughts which *other* people have. ***A man does not own his reputation any more than he owns the thoughts of others—because that is all his reputation consists of. A man’s reputation cannot be stolen from him any more than can the thoughts of other people be stolen from him.*** Whether his reputation was “taken from him” by fair means or foul, by truth or falsehood, he did not own it in the first place and, hence, should have no recourse to the law for damages.

Walter Block, Defending the Undefendable
(Block, Defending the Undefendable, 2008 (1976), p. 49)

The higher estimation, or intensive, as some call it, is not a matter of perfect right; as no man can at the command of others form high opinions of any person, without he is persuaded of his merit.

Francis Hutcheson, Philosophiae Moralis Institutio Compendiaria with a Short Introduction to Moral Philosophy (Hutcheson, 2007 (1742), p. 542)

Such men need to learn ***that true reputation (which is nothing but the opinion of one's excellence on the part of other men, particularly of good and sensible men) can be neither got nor kept except by doing good and deserving well of human society***; and that it cannot be weakened by insults, except so far as they raise a suspicion that one deserved to be so badly treated; hence reputation can only be restored and renewed by measures which altogether remove that suspicion. No one but a madman could convince himself that violence leveled by private assault against the author of the insult would contribute to this one little bit.

Gershom Carmichael, Natural Rights on the Threshold of the Scottish Enlightenment
(Carmichael, 2002 (1724), p. 68)

That is intensive esteem, in accordance with which persons equally honourable in civil capacity are preferred one above another, in proportion as one has a larger share than another of those things whereby the minds of others are commonly moved to show honour. ***Now honour, which corresponds to the intensification of esteem, is properly the signification of our judgement concerning the superiority of another; and therefore, in truth, honour is not in the person honoured but in the person who shows honour, although by a certain kind of metonymy, esteem also itself, or that which deserves honour, is denoted by this word***, and, in a special sense, definite statuses which honour is wont to accompany, are called honours, because in due course these statuses are bestowed only upon those who surpass others in some point of superiority. That same esteem, as far as it produces in others the opinion of a special prudence and wisdom regarding the determination of practical affairs or of theoretical truths, is called authority. ***And as far as it suggests the widespread recognition of that superiority among large numbers of men, it is called reputation.***

Samuel Pufendorf, The Two Books of the Elements of Universal Jurisprudence (Pufendorf S. , 1931 (1672), p. 96)

Esteem, admiration, fame, and reputation are powerful motivators of human behavior in Adam Smith's moral philosophy. According to Smith, we are willing to go

to great ends to earn the esteem of others and achieve a lasting reputation. Indeed, he asserts men are even willing to attempt acts which will result in certain death if they believe they might achieve a sufficiently great and lasting reputation in the process:

Men have voluntarily thrown away life to acquire after death a renown which they could no longer enjoy. Their imagination, in the mean time, anticipated that fame which was in future times to be bestowed upon them. Those applauses which they were never to hear rung in their ears; the thoughts of that admiration, whose effects they were never to feel, played about their hearts, banished from their breasts the strongest of all natural fears, and transported them to perform actions which seem almost beyond the reach of human nature. (TMS, II.iii.2.5)

Despite the central nature of reputation and its importance to understanding human motivation, Smith is never explicit about how reputation should be treated under the law. We know Smith thinks we will go to great lengths to achieve a good reputation, but we do not know with certainty how the government should treat the reputation of individuals. The focal questions of this dissertation then, are first, whether Smith believed reputation was like property, which men can be said to have a right to defend with violence; and second, if he believed it should be protected by law.

Modern classical liberals like Murray Rothbard and Walter Block assert that to the degree reputation exists as a coherent thing, it exists in the minds of other men. Since we cannot have property rights over the minds of other men, we cannot have property over what they think, even if they happen to be thinking about us. Thinking about reputation as a thing that exists in the minds of other men, and therefore not subject to property rights or the protection of law was articulated by classical liberal thinkers such as Pufendorf, Carmichael, and Hutcheson, whom we know were influential on Adam Smith's own thinking about the role of law in society. I will explore Smith's texts in

search of evidence which would clarify whether Smith is a link in the libertarian tradition, or if he departs from it. Does he regard reputation as a thing which is not possible to define as property-like, leading to the explicit statements made by thinkers like Rothbard and Block? Or did he diverge on this subject; would he have supported the view that reputation should have been thought of as property-like? Or, even if not property-like, would it have been socially beneficial to protect it by law?

In the first essay, I consider Smith's jurisprudence, and the role of natural liberty. In The Theory of Moral Sentiments¹ Smith alludes to an intent to write a full book on jurisprudence ("TMS"), which presumably would have dealt fully with the issue of reputation. I discuss the nature of commutative justice and distributive justice, which becomes central to my exploration of Smith. I then discuss the role of natural liberty and natural jurisprudence, and conclude that Smith was optimistic about establishing a society that embraced a system of natural liberty based on classical liberal ideals. Such a system would likely have included a libertarian perspective on reputation.

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¹ I will use the abbreviations "TMS" for The Theory of Moral Sentiments, "WN" for An Inquiry into the Nature and Causes of the Wealth of Nations, and "LJ" for Lectures on Jurisprudence throughout this manuscript as is common in Smith scholarship.

explain why Smith might have opted to avoid an explicit libertarian position on reputation.

In the final essay, I continue my inquiry expanding beyond Smith's published works to a review of the *Lectures on Jurisprudence* ("LJ"), two collections of student notes taken down during Smith's lectures at Glasgow University. In this concluding paper, I explore some statements which seem on the surface to explicitly support the position that reputation is a perfect right, but also review many interesting statements Smith makes about related issues, such as dueling, that point to the opposite conclusion.

At first glance, the question of how Smith viewed reputation might appear to be of little significance; after all, he did not directly address it in either of his major published works. Nonetheless, I will attempt to demonstrate in this dissertation that reputation plays a fundamental role in human relations, both between individuals and between individuals and society. Furthermore, I will attempt to show that Smith believed reputation was largely beyond the scope of government regulation, and that it was good for society that it to be so.

1. TOWARDS NATURAL LIBERTY: SMITH'S HOPEFUL EFFORTS TOWARDS A HIGHLY LIBERTARIAN JURISPRUDENCE

1.1 Introduction

What was the nature of Adam Smith's jurisprudence? I will attempt to demonstrate that Smith believed civil jurisprudence was an evolving project, and that he saw there was a tendency for civil jurisprudence to evolve along a trajectory toward a highly libertarian state embodied by an ideal he referred to as natural jurisprudence. Natural jurisprudence is characterized by natural liberty, which emphasizes the presumption of individual liberty, and the minimal interference of the state in the affairs of individuals and between individuals. Smith advocated for this natural liberty approach to jurisprudence in his published works and in his lectures, showing his support for a highly libertarian jurisprudence. His theory of the ages of human society show how civil jurisprudence institutionalizes natural liberty principles as it advances from age to age. This foundational discussion will prepare the way for my analysis of Smith's approach to reputation in the following chapters.

A highly libertarian/classical liberal jurisprudence would hold that reputation is not a form of property because, to the degree that we can identify it, it is an amalgam of the perceptions and beliefs of other people. I will show that for Smith, property rights and what individuals can claim as their property evolves as civil jurisprudence becomes more refined and more widely applied. Nevertheless, I will show in later chapters that it

seems that even at society's most advanced point, for Smith a person's reputation would not rise to the definition of property. Instead, it seems that reputation should exist forever outside of the realm of property rights. It would follow that defamation laws are coercive and probably less than socially optimal, except where individuals violate some other right in order to commit their defamatory speech, such as trespass or the violation of confidentiality agreements.

1.2 Natural Jurisprudence and the Simple System of Natural Liberty

At the end of *The Theory of Moral Sentiments* ("TMS") Adam Smith states his intention to write another discourse which will "give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society, not only in what concerns justice, but in what concerns police, revenue, and arms, and whatever else is the object of law" (TMS, IV.37). In his introduction to the 6th edition of TMS Smith says that *An Inquiry into the Nature and Causes of the Wealth of Nations* ("WN") partially accomplishes the latter goals, but leaves jurisprudence incomplete. Thus, with regard to "what concerns justice" (beyond what we have in TMS and what we can distill from WN), the primary record of Smith's thinking is in the two sets of student notes that have been compiled in to the *Lectures on Jurisprudence* ("LJ"). What we find in the LJ, as well as in the WN and TMS, is evidence showing Smith was hopeful about the possibility of human society establishing a society governed by the principles of natural liberty, and establishing a civil jurisprudence that mirrors as closely as possible natural jurisprudence.

In the opening remarks of both sets of lectures in the LJ, Smith defines “jurisprudence” as a search for the general organizing principles of a just government:

Jurisprudence is the theory of the rules by which civil governments ought to be directed. It attempts to shew the foundation of the different systems of government in different countries and to shew how far they are founded in reason. (LJA, i.1)

Jurisprudence is that science which inquires into the general principles which ought to be the foundation of the laws of all nations. (LJB, 1)

Smith offers that the four “great objects of law” are “Justice, Police, Revenue, and Arms”, but that “The object of Justice is the security from injury, and it is the foundation of civil government” (LJB, 5). To get further clarification of what the object of jurisprudence is, we can refer back to the TMS: “It is the end of jurisprudence to prescribe rules for the decisions of judges and arbiters” (TMS, IV.8). Thus the object of justice and the object of jurisprudence are linked together: jurisprudence is the set of rules judges and arbiters use to ensure justice. Jurisprudence focuses on the rules and rights that a society can and should secure with force to ensure justice:

Those who write upon the principles of jurisprudence, consider only what the person to whom the obligation is due, ought to think himself entitled to exact by force; what every impartial spectator would approve of him for exacting, or what a judge or arbiter, to whom he had submitted his case, and who had undertaken to do him justice, ought to oblige the other person to suffer or to perform. (TMS, IV.8)

Furthermore, Smith states that the primary function of civil government is to preserve justice:

The first and chief design of all civil governments, is, as I observed, to preserve justice amongst the members of the state and prevent all encroachments on the individuals in it, from others of the same society.—That is, to maintain each individual in his perfect rights. Justice is violated whenever one is deprived of

what he had a right to and could justly demand from others, or rather, when we do him any injury or hurt without a cause. (LJA, i.10)

Therefore, jurisprudence is the science and study of the basic rules of society, which first and foremost are the principles of justice.

Smith emphasizes that the study of jurisprudence is an analytical enterprise that attempts to find what the basic rules of justice should be (LJA, 1) and to what degree they are “founded in reason” (LJA, i.1). In the TMS, he refers to the collection of natural rules which would be independently identified through reason without regard to actual, historical human civil law as “natural jurisprudence”:

It might have been expected that the reasonings of lawyers, upon the different imperfections and improvements of the laws of different countries, should have given occasion to an inquiry into what were the natural rules of justice independent of all positive institution. It might have been expected that these reasonings should have led them to aim at establishing a system of what might properly be called natural jurisprudence, or a theory of the general principles which ought to run through and be the foundation of the laws of all nations. (TMS, IV.37)

Thus natural jurisprudence is the set of rules that we would arrive at if we were able to hold the whole of human social behavior in our minds and consider which basic rules would result in the widest, most elegant concatenation. The process of discovery of these rules belongs to the “science of the legislator, whose deliberations ought to be governed by general principles which are always the same” (WN, IV.ii.39). The discovery of the common rules of human society is the main thrust of the lectures captured in the LJ. He distinguishes between the laws of justice (the basic rules which are the object of jurisprudence) and the laws of police (TMS, IV.37), and credits Grotius with being the first who attempted to systematize the laws of justice (LJB, 1). Smith claims that prior to

Grotius other thinkers, including the ancients such as Cicero and Plato, were primarily focused on the laws of police. Smith believes the laws of justice are foundational, essential for mutual coordination and security, and universal, whereas police are more society-specific.

The particular expressions of justice as embodied in a country's civil law (or "positive institutions" as he refers to them above) are emergent conventions for Smith. Natural jurisprudence represents an ideal expression of the rules of justice, and to a greater or lesser degree, societies in all times and places pursue the ideal of natural jurisprudence. Lieberman assigns Smith's natural jurisprudence "an explicitly normative and universalistic orientation" (Adam Smith on Justice, Rights, and Law, 2006, p. 224). Smith states: "Every system of positive law may be regarded as a more or less imperfect attempt towards a system of natural jurisprudence, or towards an enumeration of the particular rules of justice" (TMS, VII.iv.36). Thus, human society, in some sense, is "trying" to grow its positive institutions of law in such a way that they come to match the laws which would be laid down by a natural system of jurisprudence. Nonetheless, Smith says that no society has ever reached such a state:

In no country do the decisions of positive law coincide exactly, in every case, with the rules which the natural sense of justice would dictate. Systems of positive law, therefore, 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, VII.iv.36)

Natural jurisprudence gives central importance to a state of natural liberty in society by preparing the soil in which natural liberty can flourish. A system of natural jurisprudence is primarily concerned with protecting the basic rights of life, liberty, and

property. Human jurisprudence as codified by civil law makes progress toward natural jurisprudence when it strengthens basic individual rights and extends human freedom.

As the system of jurisprudence progresses toward natural jurisprudence, what emerges is the simple system of natural liberty. In considering the desirability of different systems of political economy, Smith writes:

All systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. (WN, IV.ix.51)

Natural liberty is characterized by the libertarian ideal of individual liberty and the removal of government interventions beyond the protection of life, liberty, and property, and the enforcement of contract. Natural liberty is an approach to organizing social interaction, rather than a specific set of institutions. Smith hoped to see progress towards this system of natural liberty, and contributed toward its advancement through his writings and lectures. Throughout his writings, we can see progress toward a system of natural liberty is a collaborative project between citizens as equals, and between citizens and their governments. It is natural in the sense that it is something we should accept, because it is a system that best conduces to the dignity of man and the flourishing of economic development. It allows for the spontaneous order of the market to determine where resources should flow, rather than trying to force particular outcomes through intervention. The goal of natural liberty is a potentiality that has never been completely realized, but it is a goal worthy of pursuit, and each step in the right direction is, usually, a benefit. Natural jurisprudence is the set of institutions that ensure the system of natural liberty. When civil jurisprudence approaches natural jurisprudence, it does so by

following the tenets of natural liberty. Individual liberty is not an absolute under this system, but a principle: Smith was not axiomatic. Instead, he allowed some exceptions to individual liberty, but these were limited exceptions.

1.3 Commutative Justice vs. Distributive Justice

Jurisprudence is the study of the foundational rules of society, focused primarily on the preservation of justice, but for Smith, there is a major distinction between types of justice: commutative justice, and beyond most notably distributive justice². In TMS he refers to commutative justice as “the main pillar that upholds the whole edifice” of society. If it is removed, the “immense fabric of human society... must in a moment crumble into atoms” (TMS, II.ii.3.4). Distributive justice by comparison “consists in proper beneficence” (TMS, 274 VII.iii.1.10). While Smith only uses the terms commutative and distributive in a single paragraph in TMS and in LJ, and not at all in WN, I believe they capture critical ethical categories he relies on throughout his writings, though he makes reference to these categories using other words and phrasing. The following passage from TMS provides his operating definitions of the two kinds of justice:

The first sense of the word coincides with what Aristotle and the Schoolmen call commutative justice, and with what Grotius calls the *justitia expletrix*, which consists in abstaining from what is another’s, and in doing voluntarily whatever we can with propriety be forced to do. The second sense of the word coincides with what some have called distributive justice, and with the *justitia attributrix* of

² In the TMS Smith makes note of a third type of justice which Daniel Klein (2012) and others refer to as “estimative justice”. Smith refers to this type of justice as “still more extensive than either” commutative justice or distributive justice, though “very much a-kin to” distributive justice in the sense that we comply with estimative justice when we give proper esteem (neither too little nor too much) to an object. I will focus on commutative and distributive justice in this paper, since ultimately the problem I am attempting to address is whether Smith saw reputation as governed by commutative justice or not, and estimative justice appears to envelop both commutative and distributive justice.

Grotius, which consists in proper beneficence, in the becoming use of what is our own, and in the applying it to those purposes either of charity or generosity, to which it is most suitable, in our situation, that it should be applied. In this sense justice comprehends all the social virtues. (TMS II.i.10)

Thus these two types of justice suggest two broad categories of behavior. The focus of commutative justice is on abstaining from what is another's – generally it involves refraining from acting against the person or property of another. Compliance with the rules of commutative justice can be forced by the superior and even by equals. Forcing compliance with the rules of commutative justice is just:

We feel, that is to say, that force may, with the utmost propriety, and with the approbation of all mankind, be made use of to constrain us to observe the rules of the one, but not to follow the precepts of the other. (TMS II.ii.1.5)

We comply with the rules of commutative justice when we do voluntarily what others could rightly force us to do. Commutative justice is primarily a “negative virtue” – a person can generally meet the requirements of commutative justice by abstaining from acting: “We may often fulfil[1] all the rules of justice by sitting still and doing nothing” (TMS II.ii.1.9). Again, the focus of commutative justice is to abstain from what is another's:

In one sense we are said to do justice to our neighbour when we abstain from doing him any positive harm, and do not directly hurt him, either in his person, or in his estate, or in his reputation. This is that justice which I have treated of above, the observance of which may be extorted by force, and the violation of which exposes to punishment. (TMS VII.ii.1.10)

We violate the rules of commutative justice when we intentionally injure someone:

the violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment. As mankind go along with, and approve of the violence employed to avenge the hurt which is done by injustice, so they much more go along with,

and approve of, that which is employed to prevent and beat off the injury, and to restrain the offender from hurting his neighbours. (TMS II.ii.1.5)

Commutative justice provides us the moral approval both to defend ourselves against unjustified assault as well as to pursue revenge after we have been the victims of unjustified attack. Smith insists that the rules of commutative justice are clear and can be laid out in much the same way as the rules of grammar:

The rules of justice may be compared to the rules of grammar; the rules of the other virtues, to the rules which critics lay down for the attainment of what is sublime and elegant in composition. The one, are precise, accurate, and indispensable. (TMS III.vi.6.11)

The rules of distributive justice, on the other hand, are more like those that govern the appreciation of fine art:

The other, are loose, vague, and indeterminate, and present us rather with a general idea of the perfection we ought to aim at, than afford us any certain and infallible directions for acquiring it. A man may learn to write grammatically by rule, with the most absolute infallibility; and so, perhaps, he may be taught to act justly. (TMS III.vi.6.11)

Klein (2009) condenses the distinctions into the following table:

Table 1. How the Two Justices Parallel Rules for Writing

How the two justices parallel rules for writing		
	Nature of rules	
	“Precise, accurate, and indispensable”	“Loose, vague, and indeterminate”
Ethics	Commutative justice	Distributive justice
Writing	Grammar	“rules which critics lay down for the attainment of what is sublime and elegant in composition”

The literary metaphor helps clarify that distributive justice is based on an aesthetic sensibility that is sensitive to time, place, and parties, whereas commutative justice is less sensitive to time and place. In both cases, these concepts imply an idea of “stuff” – commutative justice is defined by an abstaining from another’s “stuff”, while distributive justice is defined by a becoming use of your own “stuff” – whereas for distributive justice, “stuff” is broadly whatever resources an individual can be said to “have”.

Commutative justice represents a firm and clear obligation to leave other people and their property unmolested. As it is a negative obligation, there is nothing particularly praiseworthy about compliance with it:

Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit. He fulfils, however, all the rules of what is peculiarly called justice, and does every thing which his equals can with propriety force him to do, or which they can punish him for not doing. (TMS II.ii.1.9)

When we follow the rules of distributive justice, we make a “becoming use of what is our own.” Distributive justice is principally about how we use the things that are acknowledged to belong to us, and to which no one else can place a claim. Among equals, it must be voluntary: “Even the most ordinary degree of kindness or beneficence, however, cannot, among equals, be extorted by force” (TMS II.ii.1.7).

Smith cautions that we must continuously make the distinction between what among equals can be demanded under the tenets of commutative justice and what we can only hope for: “We must always, however, carefully distinguish what is only blamable, or the proper object of disapprobation, from what force may be employed either to punish or to prevent” (TMS II.ii.1.6). He distinguishes between behavior which is “blamable” or

behavior that “falls short of that ordinary degree of proper beneficence” and behavior which is punishable, which violates standards of commutative justice. The difference is between being the object of hatred and the object of resentment:

He is the object of hatred, a passion which is naturally excited by impropriety of sentiment and behavior; not of resentment, a passion which is never properly set forth but by actions which tend to do real and positive hurt to some particular persons. (TMS II.ii.1.3)

Thus, those people who fail to meet the ordinary level of beneficence can be met with disapprobation, but nothing more. Unlike commutative justice though, it is possible to achieve praise-worthiness with distributive justice. If we go beyond the ordinary beneficence, or propriety, it is possible to be considered praise-worthy (TMS II.ii.1.3).

Smith says that the rules of distributive justice are “loose, vague, and indeterminate” (TMS III.vi.6.11). A large part of the indeterminacy is a result of the circumstantial nature of distributive justice. Smith draws the circumstantial nature of beneficence out in this passage:

The difference between his character and yours, between his circumstances and yours, may be such, that you may be perfectly grateful, and justly refuse to lend him a halfpenny: and, on the contrary, you may be willing to lend, or even to give him ten times the sum which he lent you, and yet justly be accused of the blackest ingratitude, and of not having fulfilled the hundredth part of the obligation you lie under. (TMS III.vi.9)

If a man’s circumstance is such that he is desperately poor and a halfpenny is a large amount to him, then he might be regarded as conforming to rules of distributive justice in refusing a request for that half-penny, but if he is rich he might be regarded as miserly and inhumane if he were to deny a beggar a much larger sum which would still be infinitesimal to him. The difference lies in the circumstances of each of the parties. The

amount of money a wealthy man must give to a charity to be considered generous is much greater than the amount a poor man must give, but both would satisfy commutative justice by not assaulting each other.

Near the end of TMS, Smith offers a discussion of the casuists who tried to refine the exact rules of both commutative and distributive justice. He asserts that the exercise of discerning the exact rules of distributive justice is pointless because the situations they govern come about as a result of combinations of circumstances, with each combination requiring a different response:

It may be said in general of the works of the casuists that they attempted, to no purpose, to direct by precise rules what it belongs to feeling and sentiment only to judge of. How is it possible to ascertain by rules the exact point at which, in every case, a delicate sense of justice begins to run into a frivolous and weak scrupulosity of conscience? When it is that secrecy and reserve begin to grow into dissimulation? How far an agreeable irony may be carried, and at what precise point it begins to degenerate into a detestable lie? What is the highest pitch of freedom and ease of behaviour which can be regarded as graceful and becoming, and when it is that it first begins to run into a negligent and thoughtless licentiousness? With regard to all such matters, what would hold good in any one case would scarce do so exactly in any other, and what constitutes the propriety and happiness of behaviour varies in every case with the smallest variety of situation. (TMS VII.iv.33)

Thus, the realm of distributive justice is the realm of beneficence. We are judged on how generous we are with our property, our time, our attention, and so forth – or in Smith’s words, on “the becoming use of what is our own.” However, the thresholds of praiseworthy behavior are imprecise. Unlike the rules of commutative justice, these rules cannot be taught because there are an infinite number of them, with each new combination of circumstances requiring a different response.

A society governed by the principles of natural liberty has a system of jurisprudence that codifies commutative justice. Natural liberty carries the principles of commutative justice beyond the equal-equal relationship and brings them to the superior-inferior relationship: that is, it holds a strong presumption against messing with people's stuff even by the superior (the magistrate or the government). Natural jurisprudence represents the ideal of such a system. The laws under a system of natural jurisprudence would create a structure that minimized commutative justice violations, even by the government, while maximizing the opportunities for citizens to pursue the becoming use of what is their own.

Through his theory of the ages of human society, Smith shows how we progressively not only expand the circle of commutative justice to more objects, but we extend rights to commutative justice to a widening circle of people. Commutative justice is extended over more objects as society progressively recognizes expanded definitions of property and contract. Commutative justice is extended to a widening circle as we expand the community of human beings that we presume can claim commutative justice rights. Through the extension of commutative justice to both more objects and acknowledging the right to commutative justice by more people, society moves towards a system of civil jurisprudence more aligned with natural jurisprudence.

1.4 Mutual and Concatenate Coordination

Smith describes justice as the main pillar holding up the whole edifice of society. He also describes society as a fabric, which, without justice would crumble into atoms. The metaphor of the pillar implies something solid and distinct. It is something we can

describe with some specificity. Fabric, on the other hand, though solid and real enough in its own right, is made from a pattern of interwoven strands of thread. Fabrics are generally described as beautiful not because of the quality of the individual strands of thread, but because of the way those individual strands are woven together in a unity. It is the way the strands are coordinated that make the fabric beautiful. We appreciate the fabric when we see the way that the thread comes together to create a whole, the fabric. I think these two metaphors are useful for thinking about two types of coordination that are occurring in Smith's historical perspective on the evolution of jurisprudence, and the expansion of commutative justice.

I will use Daniel Klein's two concepts of coordination to illuminate the evolutionary process Smith describes jurisprudence going through in the LJ. These concepts are mutual and concatenate coordination. Klein describes mutual coordination as "commonly depicted as a coordination game in which there are least two coordination equilibria" (Klein, *Knowledge and Coordination*, 2012, p. 39), such as which side of the road people choose to drive on (right/right, or left/left). From a mutual coordination perspective, "everyone driving on the left is just as coordinated as everyone driving on the right." This is the form of coordination that has come to dominate the economics literature following from the influence of such thinkers as Thomas Schelling and the advent of game theory. Important to mutual coordination is intention and expectation. Mutual coordination is something the participants are aware of, or can easily be made aware of. Like the decision to drive on a particular side of the road, some forms of mutual coordination are planned, some are emergent, and some are a mix. The metric

system is an example of a planned convention. Emergent conventions include such things as languages or the gold standard (Klein, Knowledge and Coordination, 2012, p. 69). Road customs, a system of weights and measures, and a language are all examples of conventions that enhance mutual coordination. Mutual coordination, then is like the pillar. It is solid, it can be explained. Law is a way of organizing mutual coordination. For law to meet the standard of commutative justice, it must be grammatical in nature, consistent, easily understood. Law is like a pillar.

Concatenate coordination is a different use of the word coordination, and held sway in the economics literature from the beginning of the twentieth century until the 1960s. Concatenate coordination refers to the “the pleasing arrangement of activities within the entire economic system, like Smith’s discussion of all that goes into the making of the woolen coat” (Klein, Knowledge and Coordination, 2012, p. 37).

Concatenate coordination describes a concatenation, or a chain of events or ideas that come together and interconnect. The idea can describe a range of activities from the operations occurring within a firm to the flows of a global economy. Judging a concatenation implies a sort of aesthetic, where the interconnections come together in a more pleasing way. Better concatenate coordination results in a more pleasing interconnection and interaction of the parts. In this way, concatenate coordination is like fabric. Its elegance comes from the way its components come together and interact. Society is like a great concatenation of individual actors interacting. Smith says our aesthetic appreciation comes from seeing society as a system, and we take pleasure in contemplating its elegance and intricacy:

The same principle, the same love of system, the same regard to the beauty of order, of art and contrivance, frequently serves to recommend those institutions which tend to promote the public welfare. When a patriot exerts himself for the improvement of any part of the public police, his conduct does not always arise from pure sympathy with the happiness of those who are to reap the benefit of it... We take pleasure in beholding the perfection of so beautiful and grand a system, and we are uneasy till we remove any obstruction that can in the least disturb or encumber the regularity of its motions. (TMS, 203-4 IV.1.11)

The focus of the concatenation is at the system level, and how the individual act or actor fits into the overall great concatenation.

Unlike mutual coordination, the actors in the social concatenation are not necessarily trying to work together. In fact, Klein points out, some of them might even be competing: “Concatenate coordination will usually subsume numerous narrower scenes of mutual coordination (in addition to other things, such as competition)” (Klein, *Knowledge and Coordination*, 2012, p. 68). Within the concatenate coordination of the textile industry there will be farmers who raise sheep who sell wool to manufacturers who process the wool into yarn who then sell the yarn to manufacturers who make cloth who sell the cloth to manufacturers who make the cloth into woolen coats who sell the coats to merchants who sell the coats to farmers to wear while they tend their sheep. The chain is elegant, but it is not a mutual coordination all the way through. Each step in the chain involves mutual coordination, but also competition. For example, the farmers compete with one another to provide wool and coat makers compete with trouser makers for wool cloth. The price mechanism coordinates the concatenation, and the many instances of mutual coordination are subsumed in an un-designed, spontaneous order. The results of the concatenate coordination of the wool coat include its cheapness to the citizen.

For the concatenate coordination to form, there must be elements of mutual coordination which will guide the participants. A convention of weights and measures is critical for an economy to work and generate the benefits of a concatenate coordination. Such a convention helps the individuals coordinating their behavior communicate and negotiate their relationships. In Smith's writings, a system of justice is a mix of emergent and planned mutually coordinating conventions. As society progresses and becomes more complex, indeed, for society to advance and become more complex and achieve an ever greater concatenation, there must be more units of mutual coordination with which to guide the behavior of the individuals constructing the great concatenation. The content of civil jurisprudence must expand to accommodate the extension of the great concatenation of society. In fact, jurisprudence comes into being specifically to enable the growth of the concatenation. The spontaneous order of the market mutually coordinates on and around the pillar of justice.

1.5 Tending Toward a System of Natural Liberty

Smith defines jurisprudence as the body of principles to which the rules of society conform, and the study of jurisprudence is the study of which are the best rules. In the LJ, he presents a simple theory of progressive ages of development for human societies which apply across cultures. In these ages, we can see how Smith believed the rules that govern society emerged, and how they tend toward a libertarian form. Although Smith only gives the theoretical structure of the ages a passing mention in WN, we should not assume therefore that he had abandoned it after giving it extensive treatment in the LJ. Meek (1971) notes that the idea of four ages of human society was taken up by many of

the writers of the Scottish Enlightenment during Smith's lifetime and the idea of the four ages became a common way of viewing economic and social development. Smith's own jurisprudence lectures may have been the vehicle whereby the idea was popularized, though he gave them little attention in the TMS or WN (Lieberman, 2006). By examining Smith's use of the four ages, we can see the tendency toward liberty and libertarian jurisprudence that Smith thought naturally occurred in human relations. He believed that the same principles of justice emerge in all human societies and the extent of their emergence defines each period. The emergence and extension of these principles of justice gradually instantiate, secure, and extend individual liberty in the institution of the civil jurisprudence of each age. It is the civil jurisprudence of each society that institutionalizes the values of justice for that society. What we see as we progress through the ages is a civil jurisprudence that reflects progressively more libertarian arrangements/principles.

In each successive age, the mutually coordinating conventions of private property and contract are clarified and extended over more objects. At least as important from a libertarian perspective is that Smith indicates in each age more people are granted recognition that they have commutative justice rights. In the earliest ages, in the most primitive societies, commutative justice rights are extended only to community members, and that community is just the tiny band. As I will show, Smith believed it was not until the last age that commutative justice rights were extended universally to both the members of an extended community as well as to strangers.

Smith's theory of the ages is optimistic about human progress toward liberty, but by no means offers guarantees. The progress of jurisprudence through the accumulation and progressively impersonal institutionalization of more mutually coordinating conventions tends to lead to a richer concatenation including ever growing economic opulence. We should be cautious in implying that economic opulence alone represented an improvement in the human condition for Smith. Human beings are often fooled by material wealth, mistaking it for the source of happiness. Rasmussen states that Smith thought "the relentless pursuit of money tends to detract from people's happiness, for when people desire ever-more wealth and material goods, they often submit themselves to nearly endless toil and anxiety in the pursuit of them" (Rasmussen, 2006). Smith appears to believe that happiness does not require material wealth beyond the necessities, and ease of body and mind are more important, and can even be achieved by a beggar:

In what constitutes the real happiness of human life, they are in no respect inferior to those who would seem so much above them. In ease of body and peace of mind, all the different ranks of life are nearly upon a level, and the beggar, who suns himself by the side of the highway, possesses that security which kings are fighting for. (TMS, IV.1.11)

The last point of this passage, security, is important for my argument. Whereas we can mistake excess material wealth for well being, security does play a role in human happiness and the human condition for Smith. Commutative justice is ultimately expressed essentially as the right to be secure in one's person, freedom, and possessions. Progress through the ages brings material opulence, but more importantly it brings the extension of commutative justice to more people. In this sense, natural liberty increases through the course of progress through the ages.

According to Samuels, Smith “treats institutions not as inevitable, but as subject to redesign and change, as the product of past choice and subject to revised choices” (Samuels, 1977, p. 201). The institutions of justice, and in particular the legal code that is enforced, are continuously evolving. However, Smith does not imply that the progress is in any way guaranteed, nor that it is irreversible. Instead he sees the transition from one age of human development to another as a process, or as Fuller describes it, an “enterprise”: “[L]aw is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards the legal system as the product of sustained purposive effort” (Fuller, 106). The human pursuit of a better civil government, one that is more in accord with natural jurisprudence, is a progressive project for Smith. It is an effort at enhancing the coordination of the whole concatenation. The pillars of justice hold up more of the human community, enabling more of them to participate freely – a fundamentally libertarian ideal. In other words, each age represents a step towards natural jurisprudence which is characterized by a simple system of natural liberty.

The four ages of human society are: the age of hunters, the age of shepherds, the age of agriculture, and the age of commerce. Smith illustrates the four ages using historical and contemporary examples from Europe, North America, and Asia. All of humanity is not at any given time necessarily in the same age. Meek (1971) indicates that some of the fascination by the enlightenment thinkers with the idea of ages arose from the awareness that in the Americas whole societies were at a different stage of economic and political development. Differences in the ages are characterized by the

degree to which property rights are extended and the degree to which individuals may enter into contracts and expect those contracts to be respected and enforced. Property and contract rights represent conventions, and as the system of coordination extends each of them beyond immediate possession, a greater economic concatenation becomes possible.

The age of hunters is characterized by its lack of government: “in the age of hunters there was nothing which could deserve the name of government” (LJA, iv.19). To the degree that judicial power exists, it resides in the community “as one body”. All decisions are made by the community and “therefore the government is entirely democraticall” (LJA, iv.24). Jurisprudence, as a set of rules to guide society, in this period also consequently barely exists. Every situation is unique, every question of rights determined by the group. There are no fixed rules or structures, and the role of justice is simply to keep the peace between families. Generally Smith asserts that disputes within the family are resolved by the family. Disputes between families are resolved by the community as a whole. When problems arise that would disturb the peace of the community, “the whole community interferes to make up the difference” (LJA, iv.4). Regarding law in the age of hunters, Smith makes various statements in the LJ that there are either no laws in this period, “With regard to laws and legislative power, there is properly nothing of that sort in this period” (LJA, iv.35) or that there are just a few poorly enforced laws and regulations, “Few laws or regulations will be requisite in such an age of society, and these will not extend to any great length, or be very rigorous in the punishments annexed to any infringements of property” (LJA, i.33). In either case, he makes it clear that there is little we would recognize as law that makes explicit the kinds

of behaviors that are acceptable (or unacceptable). There is little or no institutionalization of justice. Justice is determined by a personal, democratic process, and if a resolution cannot be reached, the violators might be turned out from society or, in particularly heinous cases, “the whole body of the people lie in wait for him and kill him by an assassination in the same manner they would an enemy” (LJA, iv.5).

To the degree that property rights exist in the age of hunters, Smith believed the convention of the age limited property to the few possessions a person can carry on themselves. Critically, property terminates when a person is not in immediate possession of the object: “Among savages property begins and ends with possession, and they seem scarce to have any idea of any thing as their own which is not about their own bodies” (LJ B, 394). Thus, according to Smith’s theory, in the most primitive societies, people do not expect to be able to exclude other people from the use of resources other than the property they can carry – and property rights extend only as far as we can physically reach. In discussing the evolution of property, Smith quotes Charlevoix’ story of a Native American woman who leaves a belt of beads on a tree near her neighbor while she goes to tend a field of corn. When she walked away, her neighbor picked up the belt and claimed it for herself. Smith relates how the dispute over ownership is resolved:

The owner of the string demanded it from her, she refused, the matter was referred to one of the chief men of the village, who gave it as his opinion that in strict law the string belonged to the woman who took it off the tree, and that the other had lost all claim of property to it by letting it out of her possession. But that if the other woman did not incline to do very scandalous action and get the character of excessive avarice (an most reproachfull term in that country), she ought to restore it to the owner, which she accordingly did. (LJA, i.47)

Two points of interest come from this passage. First is the nature of the resolution. The chief does not use or threaten the use of force to resolve the conflict. As discussed earlier, he enters the conflict as an advisor and makes a recommendation to the women on how to end the conflict. Furthermore, the chief addresses the woman's sense of distributive justice, not commutative justice, when he shames her for excessive avarice. This passage reinforces the point that the government is essentially non-existent at this stage of development, the age of hunters is a society of undifferentiated equals. There are few laws and little enforcement: "The little of order which was preserved amongst men in this state was by the interposition of the whole community to accommodate such differences as threaten to disturb the peace of the state" (LJA, iv.19). Second, Smith uses it to demonstrate the most basic level of property rights. At its most basic level, property is defined by possession. Possession is an essential criteria for Smith's beliefs about property and what can be claimed as property. He always gives more strength to rights claims based on possession over any other claim, even when property is extended and even when promises become legally binding contracts. In this example, because of the hunter society's lack of developed rules of justice, possession is as far as property rights can extend. The very narrow definition of property in the age of hunters makes investments in any sort of property beyond what can be carried quite tenuous. As a result little is invested, the level of capital remains low, there is little division of labor or specialization, and consequently the quality of life in such a society remains low, and the concatenation of this society is simple. Everything is held in common, and everyone has a right to virtually everything, but there is so little that this

liberty is meaningless. This is a consistent theme with Smith: security of property rights is the first necessary condition for development. Once that is accomplished, there is a natural tendency for subdivision, specialization, and growing complexity.

According to Smith, property rights beyond possession emerge with the domestication of animals. Property rights that extend beyond possession represent the key dividing point between the age of hunters and the age of shepherds, and Smith regards the emergence of these rights as one of the most significant steps in the development of human society: “The step betwixt these two is of all others the greatest in the progression of society, for by it the notion of property is extended beyond possession, to which it is in the former state confined” (LJA, ii.97). The age of shepherds is “where government properly first commences” (LJA, iv.7). He goes on to say: “Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government” (LJB, 11). Since jurisprudence is the study of the rules by which civil government should be organized, we could say that the age of shepherds is when jurisprudence also first commences. The establishment of government to protect property rights represents the first step in the process of institutionalizing individual liberty. Smith considers the establishment of property rights as the most dramatic step in social evolution because it greatly increases the scope of what society considers the proper objects of ownership, and government is necessary to secure continuing ownership:

The appropriation of herds and flocks, which introduced an inequality of fortune, was that which first gave rise to regular government. 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. In this age of shepherds if one man possessed 500 oxen, and another had none at all, unless there were some government to secure them to him, he would not be allowed to possess them. (LJB, 20)

The idea that government comes into being to protect the rich from the poor may strike the modern reader as counter-intuitive, but on reflection, it is clear that the function of government in this stage is to provide security to property holders in order to ensure the incentive to accumulate wealth. In Smith's model, government is born libertarian, providing protection of the individual and his property from the urge of the mob to redistribute. Government has a constant role once property is extended:

When once it has been agreed that a cow or a sheep shall belong to a certain person not only when actually in his possession but where ever it may have strayed, it is absolutely necessary that the hand of government should be continually held up and the community assert their power to preserve the property of the individuals. (LJA, iv.21)

Theft, Smith says, is "not much regarded amongst people" in the age of hunters, as there are "but few opportunities of committing it, and these too can not hurt the injured person in considerable degree" (LJ, i.32). However, when people begin to accumulate wealth in the form of flocks and herds property becomes meaningful, extending well beyond what can be reconstructed in a few days or weeks, and theft can represent significant injuries to the victim. It is in "this state many more laws and regulations must take place; theft and robbery being easily committed, will of consequence be punished with the utmost rigour" (LJA, i.32). Without government to enforce property rights, people will "find themselves every moment in danger of being robbed of all they possess" and so they will "have no motive to be industrious" (LJB, 287).

The addition of many more laws represents the further effort to institutionalize relations of justice. Effective laws provide individuals with standards of mutual coordination, establishing patterns of interaction that only require external intervention by exception. As Evensky notes, “Smith makes the point that the emergence of this new societal construct with its much more complex issues of ownership... requires a much more complex system of laws” (Evensky, 2001). Economic development is a sign of the concatenation becoming more complex, but it is only possible once the mutually coordinating conventions of property rights are established, and government comes into being to protect those rights.

For Smith, the problem of economic development is linked to the accumulation of stock. An individual cannot afford to switch from hunting and gathering to farming until he is able to lay aside a year’s provisions while he waits for the first crops to be harvested. Without security, the accumulation of stock is not feasible. Without security, society is locked in economic stagnation : “[T]ill some stock be produced there can be no division of labour, and before a division of labour takes place, there can be very little accumulation of stock” (LJB, 287). The key to breaking this cycle is the enforcement of property rights which would protect “the industry of individuals from the rapacity of their neighbors” (LJB, 288). The cycle of stagnation is broken in the age of shepherds for the first time when a system of jurisprudence emerges that codifies the mutual recognition of property rights and a system of government to support those property rights. As Buchanan states:

Adam Smith was far too realistic to argue that markets would emerge and would function effectively in the absence of a legal framework. One of the most

important lessons of the 1776 masterpiece is the lineage between the general security of property (including the enforceability of contracts) and the functioning of markets, a security that could only be provided by the vigilant protection of the sovereign. (Buchanan, 1976, p. 273)

The system of laws that emerges represents an institution of mutual coordination. It is on this foundation of certainty that the spontaneous order of the market is able to generate the increased living standards of the age.

Secure property rights lead men to make investments: “when they are secure of enjoying the fruits of their industry, they naturally exert it to better their condition, and to acquire not only the necessaries, but the conveniencies and elegancies of life” (WN, III.iii.12) and “A man must be perfectly crazy who, where there is tolerable security, does not employ all the stock which he commands, whether it be his own or borrowed of other people...” (WN, II.i.30). The limits of property rights partially determine a limit on the extension of the market, the extension of specialization, and ultimately the limit on prosperity.

Nonetheless, although laws are beginning to emerge in the age of shepherds, there are still relatively few of them. Government at this stage is still weak and not able to legislate extensively. Though property is extended beyond possession, very little else in society is regulated:

In the periods of hunters and fishers and in that of shepherds, as was before observed, crimes are few; small crimes passed without any notice. In these ages no controversies arose from interpretations of testaments, settlements, contracts, which render our law-suits so numerous. For these were unknown among them. (LJB, 26)

Because there are few laws, there is less regulation of individual behavior in the age of shepherds than in later periods, but there is less economic opportunity in these early

periods as well. Limited property rights limit the degree to which the great concatenation of society can extend. The age of shepherds allows for the extension of the limits of property rights beyond immediate possession, but property does not extend to the land. This limits the kind of investments that can be made in this period strictly to those which it is possible to take physical possession of and move.

According to Smith, law generally is slow to evolve, and comes about only after judicial power becomes more formalized. When there is little property, there is little need for judges or laws. However, with the introduction of extensive property in the age of shepherds, judges become essential: “When any nation has retained its liberty, and property has been established amongst them, judges must soon be appointed to determine the many disputes which must occur concerning it” (LJA, v.109). There are too many disputes for the whole community to weigh in on each, therefore judges become a necessity. Whereas in the age of hunters judges are advisors without power to impose their will, with the extension of property things begin to change as judges’ power is formalized and strengthened. Although it is clear society needs judges, judges come to represent concentrated points of power to be feared:

The courts of justice when established appear to a rude people to have an authority altogether insufferable; and at the same time when property is considerably advanced judges can not be wanted. The judge is necessary and yet is of all things the most terrible. (LJA, v.110)

Smith says the people of the hunter society see laws as an imposition on their freedom. In the age of hunters fixed law is rejected in favor of communal decision making. Every dispute is personal and resolved by the tribe. However, as a consequence of the extension of property and the increasing volume of disputes related to it, judicial power

becomes more formal and focused in individual persons of judges. When the judge's role evolves from adviser to adjudicator, the people's perception of fixed law changes. They come to see the law as a check on the power of judges, rather than an imposition on their own freedom: "The growth of the judicial power was what gave occasion to the institution of a legislative power, as that first made them think of restraining the power of judicial officers" (LJA, v.112). After the development of property and the consequent need for judges, people come to perceive law as protective of liberty rather than an imposition on it: "afterwards they evidently appear to tend to the security of the people by restraining the arbitrary power of the judges, who are then become absolute or nearly so" (LJA, v.112). Smith sees absolute governments, whether of tribal chiefs or feudal monarchies, as destructive of natural liberty, and therefore inevitably detrimental to the great concatenation. Division of and checks on power are essential to sustain the subdivisions of society so important to growth. Thus, the institutionalization of justice only comes into existence with the extension of property beyond immediate possession, which is at the beginning of the age of shepherds: "Settled laws therefore, or agreements concerning property, will soon be made after the commencement of the age of shepherds" (LJA, iv.23).

Smith suggested that progress through the ages entailed the institutionalizing and depersonalizing of ever more human activity under the rule of law. More property makes human interactions more complex. New forms of property create new requirements for mutual coordination around the bounds of that property. The more complex our interactions become, the more we require conventions to create mutual expectations

about the extent of individual rights and proper behavior under those rights: “The more improved any society is and the greater length the several means of supporting the inhabitants are carried, the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of property” (LJA, i.35). Smith sees a tendency for more law to be created in each period to meet the needs of new situations for mutual coordination. Indeed, Smith asserts by the time we reach the age of commerce, laws are far more extensive: “In the age of commerce, as the subjects of property are greatly increased the laws must be proportionally multiplied” (LJA, i.35).

The institutions of contract are also primitive in the age of shepherds. Even though the institutions of contract are critical for the extension of the market in time and space, they are slow to develop, according to Smith. We naturally resist the requirements of contract, just like we resist laws. We have the same reflexive response to having our freedom of action restrained by laws that applies to contract: “The same tenderness for the liberty of individuals which made action on contracts so late of taking place, as all such obligations are a restraint on this liberty, inclined them to free those who were under such obligations, on a very slight ground” (LJA, ii.73). In order for society to move forward, this tendency to annul contract at the individual level has to be overcome, just like the tendency to redistribute property communally. Furthermore, contract is complicated by limitations of language. Smith asserts that in the first stages of commerce, contracts can only be made through face-to-face coordination, so that the intentions of the parties can be certain: “At this time no contract could be made but amongst those who actually uttered the words by which the contract was

comprehended... A written and signed oath is of no effect” (LJA, ii.54). As Europe came out of the dark ages, Smith asserts the only contracts that were enforced were those sworn by “solemn deed done in the presence of the court” (LJA, ii.72). According to Smith, this limited the extent of the market in time and place.

The economic success of the shepherds results in increases in population, which Smith says leads society to adopt fixed agriculture: “Then they would naturally turn themselves to the cultivation of land and the raising of such plants and trees as produced nourishment fit for them” (LJA, i.31). The transition between the age of shepherds and the age of agriculture is marked by the extension of property to land, but according to Smith the transition to agriculture predates property rights in land. While the age of shepherds begins when society acknowledges property rights extend to all movable capital, and ownership does not terminate with loss of immediate possession, the age of agriculture is marked by the extension of property rights over immovable capital. As our idea of *possession* had never been more than transient or impermanent, the propertization of land is a radical rethinking of the idea of property, and Smith considers it critical to economic development: “This last species of property, viz. in land, is the greatest extension it has undergone” (LJA, i.53). He traces the progress towards property rights in land through the gradual stabilization of shepherds. Smith asserts that shepherds “made their habitation somewhat more fixed”, and property in houses would have been the first extension of property rights to immovable property. The idea that land could be owned by an individual was a difficult step for society to accept: “They would not easily conceive a subject of such extent as land is, should belong to an object so little as a single

man. It would more easily be conceived that a large body such as a whole nation should have property in land” (LJA, i.49).

Smith believed that property in land follows extended agricultural cultivation. He states that the emergence of individual ownership in land actually gains strength, not through the establishment of agriculture, but first within the city itself, then the land surrounding the city, then extending beyond (LJA, i.52). Thus, he believes agriculture is already well under way, and cities are appearing, before property is extended to the land. Nonetheless, he is quite clear that extensive improvements in land are not undertaken until property rights in land are secure. Once again we see an expansion of law to deal with the enhancements in property rights, particularly because there are many more ways “added in which property may be interrupted as the subjects of it are considerably extended” (LJA, i.34).

Smith does not identify a particular change in property rights or contract with the transition between the age of agriculture and the age of commerce. Instead, it appears to be a matter of who may claim property rights and have that claim acknowledged by the community. In the ages before the age of commerce, the rights of non-citizen outsiders (he refers to them as aliens) were tenuous at best:

The disabilities and incapacities which aliens lie under are also very different in different countries. In the first ages of Rome, in the kingdom of Morocco, in Turkey, and in Corea in ... part of Asia, and in a word in all the barbarous nations in the four quarters of the world, a stranger who came within the territory of the kingdom was seized and made a slave. (LJA, v.94)

The poor treatment of outsiders in earlier periods is not surprising, as Smith notes that in cultures representing the ages preceding the age of commerce, the words for stranger and

enemy were the same: “But the fact really was that they considered strangers and enemies as one and the same thing; so that we might with greater justice say that strangers had the same name as enemies” (LJA, v.94). Thus, in the ages leading up to the age of commerce, even the most basic natural rights were not recognized for outsiders. There were few mechanisms of mutual coordination between the local community and the outside world, because the rights of outsiders were not recognized and could be annulled without legal penalty. This lack of mutual coordination limited the extent of the market, and the great concatenation. It also represented a less libertarian jurisprudence because it failed to institutionalize outsiders’ basic liberties.

The move to the age of commerce is represented by an increasing amount of trade, particularly extending beyond the local community to between countries and over long distances - in other words, with outsiders:

This exchange of commodities extends in time not only betwixt the individuals of the same society but betwixt those of different nations. Thus we send to France our cloths, iron work, and other trinkets and get in exchange their wines. To Spain and Portugall we send our superfluous corn and bring from thence the Spanish and Portuguese wines. Thus at last the age of commerce arises. (LJA, i.31)

In order to make these transactions possible, the extension of the rule of law to foreigners – securing their freedom and property, and enforcing their contracts – is perhaps the most important part of this transition. Smith states that when specialization progresses to the point where there are significant excesses, communities will “begin to find the benefit of having foreigners coming amongst them, who carry out what is superfluous of the product of the country and importing the superfluities of their country”, which naturally leads to greater opportunities for specialization and access to luxury. To

encourage the process of foreign merchants establishing trade within a community “it will be absolutely necessary to give them the protection of the laws, both to their persons and their goods” (LJA, v.94). Thus the age of commerce is the point at which property rights and contract enforcement are institutionalized not only for the community, but for outsiders as well, enabling the widest movement and trade. The age of commerce represents the final stage of Smith’s historical model and the recognition, at least in principle, that basic rights extend not only to those who are part of our community, but to all human beings.

As these passages show, to conceptually bring society to this state of classical liberal ideal where all people are protected by the law, Smith is not appealing to some higher power, or to some abstract philosophical position, but simply to interest. Interest leads us as to do things which are advantageous for society as a whole, whether it is the pursuit of a particular profession, or the granting of foreign traders property rights:

Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily leads him to prefer that employment which is most advantageous to the society. (WN, IV.ii.4)

Smith’s theory of the ages sees the desire for material well-being as a driving force. Each age represents a refinement and expansion of law that, in Smith’s view, facilitates mutual coordination around property and contract. The progress Smith describes through the ages is an evolution of jurisprudence which provides ever greater certainty about transactions between individuals, and between individuals and the government. Commutative justice is progressively institutionalized and its protection

applied to more people. The advancement of mutual coordination tends to recommend the libertarian idea of extended rule of law and individual freedom within the rule of law – a simple system of natural liberty. We see through this process a gradual enrichment of and refinement in mutual coordination in the form of laws over more and more of the objects of human society. These advances represent and allow for greater subdivision of human endeavor. Smith demonstrates through his history of the ages that it is only when society successfully institutionalizes impersonal liberty that society can advance.

1.6 Subdivision

The key to opulence for Smith is the division of labor, but throughout Smith's writing, the theme of subdivision goes far beyond the matter of labor. We can see him thinking about subdivision of labor, capital, knowledge, religion, property, education, religious sects, and political power. Subdivision, particularly the division of labor, generally brings about improvement in all the fields it touches, and it proceeds best when restraints on liberty have been removed. Subdivision happens spontaneously and to a degree related to the extent of natural liberty.

The division of labor is the most frequently cited aspect of subdivision in Smith's writing, as it drives economic development: "It is the great multiplication of the productions of all the different arts, in consequence of the division of labour, which occasions, in a well-governed society, that universal opulence which extends itself to the lowest ranks of the people" (WN, I.i.10). Smith asserts even in the age of hunters we see the first glimmerings of subdivision:

By this disposition to barter and exchange the surplus of ones labour for that of other people, in a nation of hunters, if any one has a talent for making bows and

arrows better than his neighbours he will at first make presents of them, and in return get presents of their game. By continuing this practice he will live better than before and will have no occasion to provide for himself, as the surplus of his own labour does it more effectually. (LJB, 220)

Smith holds that there is something about human beings that naturally leads them to truck and barter. In the WN, he notes that trade is not observed in any other animal (WN, I.ii.2). As soon as we detect a comparative advantage, we begin to exploit it for profit. The difference does not have to be much initially. Smith believes differences are cultivated over time, and the majority of us are born with equal potential, but with practice and repetition, we differentiate, and the differentiation leads to the powerful benefits of trade. Nonetheless, little of this is intentional. Instead it is a tendency deeply rooted in us, something nearing instinct: “Genius is more the effect of the division of labour than the latter is of it” (LJB, 221).

The division of labor applies not only to economic pursuits, but to virtually every human pursuit, even philosophy:

In the progress of society, philosophy or speculation becomes, like every other employment, the principal or sole trade and occupation of a particular class of citizens. Like every other employment too, it is subdivided into a great number of different branches, each of which affords occupation to a peculiar tribe or class of philosophers; and this subdivision of employment in philosophy, as well as in every other business, improves dexterity, and saves time. Each individual becomes more expert in his own peculiar branch, more work is done upon the whole, and the quantity of science is considerably increased by it. (WN, I.i.9)

Smith’s observation is that the division of labor is spontaneous, and not “originally the effect of any human wisdom”, but instead a “gradual consequence of a certain propensity in human nature... the propensity to truck, barter, and exchange one

thing for another” (WN, I.ii.1). Smith is rather clear in the opinion that the division of labor should not be forced nor prevented by government:

The law which prohibited the manufacturer from exercising the trade of a shopkeeper, endeavoured to force this division in the employment of stock to go on faster than it might otherwise have done. The law which obliged the farmer to exercise the trade of a corn merchant, endeavoured to hinder it from going on so fast. Both laws were evident violations of natural liberty, and therefore unjust; and they were both too as impolitick as they were unjust. It is the interest of every society, that things of this kind should never either be forced or obstructed. (WN, IV.v.16)

Thus we see again the spontaneous nature of the division of labor. Using government to force division faster than society is prepared to go, or to prevent the division from happening is a generally a violation of natural liberty. The choice of trade is a basic right for Smith, and I believe he would have had us presume the right to claim it unless there was some pressing community interest the choice would harm.

Smith writes at length about the benefits of the division of labor for farming and manufacture, but he is also concerned about the division of land. He rails against the custom of entails, the tradition of making lands indivisible and unalienable. In the LJ he says plainly: “there can be nothing more absurd than this custom of entails” (LJA, i.164). In the WN, he speaks generally about the laws of primogeniture and entails, making the point that they have long outlived their original purpose: “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” and then goes on to explain that entails are an outdated tradition built on the historical insecurity of the dark ages:

When great landed estates were a sort of principalities, entails might not be unreasonable. Like what are called the fundamental laws of some monarchies, they might frequently hinder the security of thousands from being endangered by

the caprice or extravagance of one man. But in the present state of Europe, when small as well as great estates derive their security from the laws of their country, nothing can be more completely absurd. They are founded upon the most absurd of all suppositions, the supposition that every successive generation of men have not an equal right to the earth, and to all that it possesses; but that the property of the present generation should be restrained and regulated according to the fancy of those who died perhaps five hundred years ago. (WN, III.ii.6)

According to Smith, entails represent the idea of taking property rights to an illogical extreme: “The greatest of all extensions of property is that by entails. To give a man power over his property after his death is very considerable, but it is nothing to an extension of this power to the end of the world” (LJB, 167). The discussion of entails is enlightening because it puts a limit on how far Smith believed property rights could be expanded.

Entails and the right of primogeniture came into use in Europe, according to Smith, after the collapse of the Roman Empire when small land holdings lacked the resources necessary to defend themselves against the reigning chaos. A land subdivided would likely be taken by force by a stronger neighbor; therefore the custom of passing ownership of all of the land to the eldest son became customary. The custom of entailing further allowed the owner to put into his will that the land could never be divided nor ownership transferred out of the family. Smith regarded both primogeniture and entails as “unnatural” (LJA, i.167), and adds in the WN: “nothing can be more contrary to the real interest of a numerous family, than a right which, in order to enrich one, beggars all the rest of the children” (WN, III.ii.4). He sees entails as a mistaken extension of property, stating that “There is no maxim more generally acknowledged than that the earth is the property of each generation” (LJA, i.164). This maxim seems to provide a

guideline for the natural jurisprudence of property. And this maxim is authorized by interest: “Entails are disadvantageous to the improvement of the country, and these lands where they have never taken place are always best cultivated. Heirs of entailed estates have it not in their view to cultivate lands and often they are not able to do it” (LJB, 169). The inability to subdivide or alienate property prevents the land from entering the market and going to the individuals who would make the best use of it. Treating land as divisible and alienable is critical to ensuring it is best managed: “When land is in commerce and frequently changes hands it is most likely to be well managed” (LJA, i.167).

Smith also believed that the public would have been better served by a more divided religious establishment, and that the subdivision of religion had been subverted by its misuse by politicians. If political leaders had not attempted to use religion to aid their causes, Smith claims there would have been “a great multitude of religious sects”, each competing with the other for adherents. Competing sects would be good for society for several reasons. First, each religious leader would be forced to employ the “utmost exertion” to “preserve and to increase the number of his disciples”, and therefore the quality of religious experience would be higher. Second, and perhaps more importantly, if religion is subdivided across society, it cannot be abused as an organizing force by political leaders, nor can the religious leaders themselves become political influencers. The result is that no religious leader would command the loyalty of enough followers that they could “disturb the publick tranquility”. Instead:

The teachers of each sect, seeing themselves surrounded on all sides with more adversaries than friends, would be obliged to learn that candour and moderation

which is so seldom to be found among the teachers of those great sects, whose tenets being supported by the civil magistrate, are held in veneration by almost all the inhabitants of extensive kingdoms and empires, and who therefore see nothing round them but followers, disciples, and humble admirers. (WN, V.i.g.8)

Here we clearly see Smith's preference for a separation of the power of the state and religion. Without the power of the state, religion would fail to be a useful tool for political organization. Smith saw the merger of the church and government, as was common during the middle ages, as having caused great damage to natural liberty:

In the state in which things were through the greater part of Europe during the tenth, eleventh, twelfth, and thirteenth centuries, and for some time both before and after that period, the constitution of the church of Rome may be considered as the most formidable combination that ever was formed against the authority and security of civil government, as well as against the liberty, reason, and happiness of mankind, which can flourish only where civil government is able to protect them. (WN, V.i.g.24)

Thus, in Smith's view, preferential treatment of one religious group over another by the government is a violation of natural liberty. The consolidation of religious followings is only possible through the power of the state. It is because political leaders call on the "aid of religion" and in return, the political leader endorses a particular religious sect that one sect gains disproportionate influence in society. Whelan (1990) notes religious concentration would not happen if "political factions had not historically called on the assistance of religion through establishment". Without the reciprocal supporting relationship between the particular political leaders in the state and a particular religious sect, Smith asserts there would be a "great multitude of religious sects" (WN, V.i.g.8). If political leaders did not owe a particular sect a debt in order to gain power, the political leaders would be more likely to "have dealt equally and impartially with all the different sects, and have allowed every man to chuse his own priest and his own religion as he

thought proper” (WN, V.i.g.8). Religious subdivision is natural and would proceed in a climate of natural liberty.

Finally, Smith frowns on highly concentrated government power, calling it absolute, and contrasting it with liberty which corresponds with subdivided power. In the LJ, Smith traces the progress of government in England following the fall of the Roman Empire from a state of relative chaos to the allodial, from the allodial to feudal, feudal to absolute monarchy, and finally from absolute monarchy to a constitutional monarchy balanced by the parliament. Following the fall of the Empire, there was little law and “depredations were continually committed up and down the country and all kinds of commerce stopped” (LJB, 50). The advances toward a libertarian jurisprudence reversed during this period, and society regressed in terms of the institutionalization of justice. This slide into chaos was replaced by an initial concentration of power in the allodial government, where local lords gained sufficient power to stabilize some degree of order, but not enough power to overwhelm all of the people around them, nor to conquer each other. In this period, the subdivision of power actually led to what Smith describes as a pluralistic outcome, with “a great number of free people, who were allowed to consult about justice in their own spheres” (LJB, 52). Smith describes a hierarchy of courts which ultimately culminated in the “Wittenagemot or assembly of the whole people” – a structure of justice similar to what he describes in the age of shepherds or hunters. The allodial period represents a movement toward natural jurisprudence, as government began to provide security - its most basic function. Power was distributed between the king and the great lords, and the result was a certain balance. However, the lords were

often at war with each other, and in order to instill loyalty, the lords gave life leases to their followers with the right of inheritance, called feuda. The feuda were the basis of the feudal system. It is with the growing dominance of the feudal system that any semblance of popular government collapsed:

The introduction of the feudal system into all Europe took away every thing like popular government. The popular courts were all removed. Neither decemary, hundered, nor county courts were allowed. All public affairs were managed by the king and the great feudal lords. No commoners, none but hereditary lords had a right to sit in Parliament. (LJB, 56)

Thus the feudal system represented a further concentration of power, and a removal of the subdivisions which had previously existed. The many free people were swept up under lords, and lost their independence, both in terms of property rights independent of a particular lord, and independent political/judicial power. It is clear Smith found the feudal system to have failed to protect a variety of natural liberties. As the feudal government concentrated formerly divided power, property rights became less certain for all except the elite, and the elite attempted to expropriate what they could:

But when the feudal government was established, which was the foundation and still prevails in some measure in all the governments in Europe, the king and his nobles appropriated to themselves every thing they could, without great hazard of giving umbrage to an enslaved people. (LJA, i.55)

Although the feudal system was bad for natural liberty in England, it only became worse as power became more concentrated, ironically as a result of the advance of luxury. As nobles were able to spend their wealth on luxury goods, they had to choose between luxury and retainers. According to Blecker (1997), Smith thought feudalism began to collapse as a result of “the growth of international trade in manufactures”:

But what violence of the feudal institutions could never have effected, the silent and insensible operation of foreign commerce and manufactures gradually brought about. These gradually furnished the great proprietors with something for which they could exchange the whole surplus of their lands... thus, for the gratification of the most childish, the meanest and most sordid of all vanities, they gradually bartered their whole power and authority. (WN, III.iv, p. 432)

However, the king, according to Smith, had sufficient funds to choose both for a time.

As a result, the nobility gradually spent themselves into bankruptcy while the king remained alone in power: “Luxury must therefore sink the authority of the nobility whose estates are small in proportion to that of the king, and as his continues unaffected his power must become absolute” (LJB, 61). Ultimately liberty was again restored to England as a result of economics. Smith says that Elizabeth sold her land in order to fund her rule, rather than raise taxes. This left her successors dependent on Parliament for funds, and as a result a subdivision of power once again returned.

The ebb and flow of absolutism in England illustrates the risk of growing government power. Although Smith saw the necessity of having a government to enforce property rights and contract for economic growth, he also observed that there was always an accompanying risk of centralizing power. Smith’s review of this history also makes the point that though there is a tendency in human affairs toward a libertarian jurisprudence, there is no guarantee that events always go in the right direction.

Smith seemed to see subdivision as the course of human society. When society is able to establish mutually coordinating expectations conditioned by natural liberty, such as protection of property rights, in most cases subdivision is naturally spontaneous as we can see in the division of labor, land, and religion. In Smith’s writings subdivision is by and large good. Mutually coordinating institutions that support subdivision tend to

enhance coordination of the great concatenation, as the examples above show. The natural tendency toward specialization and subdivision tends to favor and drive society toward a libertarian jurisprudence that guarantees individual rights. But political developments do not necessarily remain on any libertarian trajectory, and the dark ages saw retrogression toward absolutism. Only when the right institutions are restored, can the trajectory be recovered.

1.7 Restoration

Restoration is the final theme I will discuss from Smith's writings. As we read Smith, we have a sense that while his perspective on England and much of Europe is optimistic, there are parts of society that do not operate according to the principles of natural liberty. There are at least two ways to read his use of "restoration". First, he points to specific policies and laws such as the Acts of Settlement and the Corn Laws which are destructive of natural liberty. He identifies a need to restore the freedoms individuals had previously enjoyed prior to the imposition of these and other laws. The second way to read his use of restoration is to read it as an appeal to a universal principle – a timeless approach to an ideal represented by natural liberty. From this perspective, the references to the Acts of Settlement or Corn Laws are simply examples of a broader problem. Such laws represent divergences in civil jurisprudence from a course of increasing conformance to natural liberty principles. It is not natural liberty itself that has been undone and needs to be restored, but the civil jurisprudence which has deviated from the approach to natural liberty. It is civil jurisprudence which needs to be restored

to the values of natural liberty. Reading restoration this way is reminiscent of

Montesquieu:

Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust, but what is commanded or forbidden by positive laws, is the same as saying that, before the describing of a circle, all the radii were not equal. (Montesquieu, 2010 (1748), p. 32)

Viewing natural liberty as a set of principles similar to mathematics, we could imagine these principles being applied to different circumstances of time and place and resulting bodies of civil law emerging that differ in local specifics, but are equally free. Clark summarizes Montesquieu's thinking in precisely this way – that there was a natural order independent of circumstance, but that “laws and social institutions were based on relative, and not absolute, factors, such as material conditions and other existing social institutions that previously or currently existed” (Clark, 1990). Clark goes on to quote Dougald Stewart's biography of Smith, who assigned to Smith the same sort of integrative approach:

In Mr. Smith's writings, whatever be the nature of his subject, he seldom misses an opportunity of indulging his curiosity, in tracing from the principles of human nature, or from the circumstances of society, the origin of the opinions and institutions which he describes. (Stewart, 1793 (2007))

Smith states that we merely need to remove the preferences and restraints imposed by civil law, and a simple system of natural liberty asserts itself. It is excessive interference by political leaders that derails the institutions of mutual coordination into areas that reduce natural liberty and violate commutative justice and natural jurisprudence, or destroys them altogether. As Reisman puts it, “Smith wanted the state to protect. He did not want the State to invade. Believing, indeed, that the State in the

past had overstepped the mark, he often presented the case for economic liberalization in the language of righting a previous wrong” (Reisman, 1998, p. 370).

Two areas of restoration Smith pays particular attention to are freedom of movement and freedom of trade. Both movement and freedom of trade fit into the natural liberty, and Smith believed that in his time, as well as in times past, political leaders had put in place laws and policies that violated the natural liberty.

With regard to the freedom of movement, Smith was critical of the Acts of Settlement which restricted men from moving between parishes. According to Reisman (Reisman, 1998), he went beyond an efficiency argument to declare the Acts inequitable. A man could not move between parishes unless the losing parish provided him with a certificate that they would pay his expenses if he were to lose his work while in the new parish. Smith notes that soldiers and sailors who were discharged from the king’s service were not subject to these laws, and were “at liberty to exercise any trade, within any town or place of Great Britain or Ireland”. Smith goes on to argue that this natural liberty should be extended beyond the former servicemen to all the king’s subjects:

Let the same natural liberty of exercising what species of industry they please *be restored* to all his majesty’s subjects, in the same manner as to soldiers and seamen; that is, break down the exclusive privileges of corporations, and repeal the statute of apprenticeship, both which are real encroachments upon natural liberty, and add to these the repeal of the law of settlements, so that a poor workman, when thrown out of employment either in one trade or in one place, may seek for it in another trade or in another place, without the fear either of a prosecution or of a removal, and neither the publick nor the individuals will suffer much more from the occasional disbanding some particular classes of manufacturers, than from that of soldiers. (WN, IV.ii.42; emphasis added)

In the above passage we see first that Smith wants to remove the barriers to the free movement of labor, and the freedom of choice in occupation for all individuals.

Second, we see that he wants to do so because he believes that, by and large, the poor will be relieved of artificially imposed suffering, and others will be minimally harmed. He asserts that changes in employment would allow adjustments to the utilization of capital such that all people would ultimately be re-employed: “though a great number of people should, by thus *restoring* the freedom of trade, be thrown all at once out of their ordinary employment and common method of subsistence, it would by no means follow that they would thereby be deprived either of employment or subsistence” (WN, IV.ii.42; emphasis added).

He notes that otherwise reasonable people are often myopic about their own liberty in supporting policies such as the poor laws:

To remove a man who has committed no misdemeanour from the parish where he chuses to reside, is an evident violation of natural liberty and justice. The common people of England, however, so jealous of their liberty, but like the common people of most other countries never rightly understanding wherein it consists, have now for more than a century together suffered themselves to be exposed to this oppression without a remedy. (WN, I.x.c.59)

Smith believes that we often fail to understand or recognize the extended effects policies have on the interest of society or even our own interest. We are often myopic about the policies we pursue to the detriment of the great concatenation. Unlike pursuit of interests through economic competition where individuals seeking their own ends tend to contribute to the well being of all of society generally without meaning to (WN, IV.ii.4), the pursuit of interests through policy is not as self-correcting. In the WN he examines how each of the three great orders (land owners, laborers, and businessmen or “those who live by rent, those who live by wages, and those who live by profit” (WN, I.xi.p.7)) fail to develop an understanding of how various policies affect the interests of

society as a whole. The interests of labor and land owners, Smith concludes, are directly linked to the “general interest of society”. Nonetheless, neither of these orders tends to develop the capacity to “foresee and understand the consequences of any public regulation”, land owners because they are indolent, laborers because their “education and habits are commonly such as to render him unfit to judge even though he was fully informed” (WN, I.xi.p.9). Businessmen, particularly “merchants and master manufacturers”, know their own interests only too well, but according to Smith their interests are tied to particular industries, not society as a whole as laborers and land owners are. Smith anticipates public choice and theories of regulatory capture when he says that after long practice and focus in their own industries, even when they are acting with the “greatest candor”, businessmen see the world through the lens of their respective industries. As a result they seek policies that support their industries, even at the expense of society as a whole, because they are incapable of differentiating the interest of their industry from the interest of society. It is the pursuit of privilege for an individual or group through either preference over or restraint of the rest of society that Smith frowns on when he speaks of a simple system of natural liberty. The tendency of merchants and manufacturers to seek out monopoly privileges is of particular concern to Smith, and he sees businessmen, not laborers or land owners primarily seeking these privileges: “Country gentlemen and farmers are, to their great honour, of all people, the least subject to the wretched spirit of monopoly. The undertaker of a great manufactory is sometimes alarmed if another work of the same kind is established within twenty miles of him” (WN, IV.ii.21). Smith gives the strongest caution against trusting any policy

recommendation from the business community because “It comes from an order of men, whose interest is never exactly the same with that of the publick, who have generally an interest to deceive and even to oppress the publick, and who accordingly have, upon many occasions, both deceived and oppressed it” (WN, I.xi.p.10).

Other policies of the mercantilist system, including restrictions on the movement of precious metal currency, are built on myopic misunderstandings of policy that appears on the surface to be in society’s general interest, but is actually harmful to society as a whole:

Money is not the ultimate object of any mans desires. But as we generally look no farther than money, and commonly say we want money, they [referring to political leaders] have been of opinion that the great quantity of money should be the view of a nation also. This system has occasioned many errors in the practise of this and other nations which are partly ineffectuall and partly prejudiciall, as they tend to increase that in endeavouring to raise the quantity of money, which can be of no service farther than as a medium of circulation; and whatever is above that is a dead stock, which had it been sent abroad would have given returns which would have increased the industry and wealth of the nation. (LJA, vi.146)

Here we see another error-based policy that is at best ineffective, and at worst harmful to social welfare. The error is based on the assumption that what works for the individual is good for government. Smith’s answer is to remove the barriers and allow the system of natural liberty to manage the supply of money. Another set of policies Smith suggests should be removed are the corn laws. If freedom of trade with regard to corn could be restored, the perceived problems of speculation would be removed: “The law which should *restore entire freedom* to the inland trade of corn, would probably prove as effectual to put an end to the popular fears of engrossing and forestalling” (WN, IV.v.b.26; emphasis added). Here again we see a theme of restoring rights of liberty.

When government tries to force the concatenation in a particular way, it almost always fails. Government's proper role is generally restricted to respecting and securing commutative justice. If a government can develop laws that help citizens mutually coordinate on respect for life, liberty, and property, the concatenation tends to grow of its own accord. Smith recognized that the restrictions around which the mercantilist system centered are particularly difficult to undo because people make investments, sometimes large investments, which would lose value if free trade is restored.

The case in which it may sometimes be a matter of deliberation, how far, or in what manner it is proper *to restore* the free importation of foreign goods, after it has been for some time interrupted, is, when particular manufactures, by means of high duties or prohibitions upon all foreign goods which can come into competition with them, have been so far extended as to employ a great multitude of hands.(WN, IV.ii.38; emphasis added)

He proposes gradualism for these circumstances. He discusses removing trade barriers between the colonies and other countries: "by gradually diminishing one branch of her industry and gradually increasing all the rest, can by degrees restore all the different branches of it to that natural, healthful, and proper proportion which perfect liberty necessarily establishes, and which perfect liberty can alone preserve" (WN, IV.vii.c.44).

The policy of limiting the colony trade creates detrimental distortions in the economy.

For Smith, it is the policy that creates the harm, and the cure is to remove the policy and allow individuals liberty, rather than trying to direct the flow in favor of some small group. He recognizes that a sudden removal of the policy would cause the capital to lose value, and might itself create painful disruptions, nonetheless, he suggests that restoring liberty is the right policy:

Such are the unfortunate effects of all the regulations of the mercantile system! They not only introduce very dangerous disorders into the state of the body politick, but disorders which it is often difficult to remedy, without occasioning, for a time at least, still greater disorders. In what manner, therefore, the colony trade ought gradually to be opened; what are the restraints which ought first, and what are those which ought last to be taken away; or in what manner the natural system of perfect liberty and justice ought gradually to be *restored*, we must leave to the wisdom of future statesmen and legislators to determine. (WN, IV.vii.c.44; emphasis added)

The progression towards a system of natural liberty, which I associate with a system of natural jurisprudence built to support commutative justice, is just a tendency because society can fall back to worse arrangements as has been discussed. The risk of falling back arises largely from government trying to control the greater concatenation to favor a particular group or direction. Sometimes the attempt to control is simply a mistaken belief born of ignorance, such as the pursuit of a monetary policy that is possibly good for an individual, but inappropriate for a national government. Sometimes it is the government trying to direct the activity of the economy in service of a particular interest group, such as when political leaders are influenced by businessmen and their pursuit of monopoly privileges. In both cases, liberty is harmed, and the civil law diverges from what would be dictated by natural jurisprudence. In both cases, and in general, the right answer, according to Smith is to restore healthy mechanisms to the economy by removing the impediments to liberty.

Smith's desire for restoration was not limited to economic activity. He wanted to remove restraints on individuals generally so that they could pursue their own ends. His desired state for men in society was preponderantly one of liberty: "Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest

his own way, and to bring both his industry and capital into competition with those of any other man, or order of men” (WN, IV.ix.51). Given the context, the justice he refers to here is commutative justice. Again, Smith did countenance some exceptions. But the jurisprudence of the restored ideal society is natural jurisprudence, which provides the guides by which individuals in society can live without violating commutative justice. So long as men in society can avoid violating commutative justice and the government can avoid violating natural liberty by creating systems of preference, individuals acting in pursuit of their own ends will generally create the best outcomes for society.

Consistent with Smith’s view about distributive justice, he says that it is impossible for any sovereign to make all the decisions necessary to manage society in the most suitable manner. He says “no human wisdom or knowledge could ever be sufficient” to achieve the goal from a central point of control. Instead, the ideal sovereign will let go of the delusion that he can plan and let the great concatenation emerge. When liberty is restored such that individuals can pursue their own ends, the government is taken out of the business of trying to direct them, and by extension society, to particular ends other than liberty. Smith says the government is left with three functions:

first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain publick works and certain publick institutions... (WN, IV.ix.51).

When the sovereign takes on these duties and little more, individuals will pursue their own ends and, through competition, through trial and error, a more elegant concatenation

will emerge as individuals find the best uses of their available capital. As Cohen summarizes Smith: “Without the enforcement of the rules of natural justice, the pursuit of self-interest would be turned in different directions, and the development of the division of labor, competitive markets, and opulence would be frustrated” (Cohen, 1989).

The theme of restoration show’s that “Smith believed it to be in the interests of justice to roll back the frontiers of the State” (Reisman, 1998). The theme is about restoring freedoms that have been lost as a result of the divergence of civil jurisprudence from the principles of natural liberty, as well as restoring natural liberty as the guiding principle for civil jurisprudence.

1.8 Conclusion

Ultimately Smith did not believe that we could achieve true freedom of trade. This is consistent with his statement that civil law approaches natural jurisprudence, but can never quite get to it:

To expect, indeed, that the freedom of trade should ever be entirely restored in Great Britain, is as absurd as to expect that an Oceana or Utopia should ever be established in it. Not only the prejudices of the publick, but what is much more unconquerable, the private interests of many individuals, irresistibly oppose it. (WN, IV.ii.43)

The progress through the ages is a result of our coming to mutually coordinating institutions built on principles of natural liberty. The system of law we use to coordinate our behavior is such an emergent institution, and government enforcement is, for Smith, a necessary component of that institution. The core institutions are property and contract. As these institutions gain strength, the market is extended. Individuals have a natural tendency to specialize and invest in physical and human capital, and that tendency is

limited only by the extent of the market. As we advance and construct more complex social forms, we create opportunities for individuals that were unimaginable in the preceding age. The natural process of subdivision creates pressure which tends to lead to an institutionalization of natural liberty. It is our desire to specialize and to trade that leads to our willingness to respect property rights. It is our desire to trade over longer distances and make more complex transactions that leads us to respect contract. It is ultimately our desire to be able to ship abroad our excess produce and take advantage of the excess produce of peoples outside our community that leads us to recognize their rights to natural liberty as well. The pursuit of what seems to be our own interests tends to lead toward a more libertarian civil jurisprudence.

The importance of civil jurisprudence is its role in setting the foundation for society. Civil jurisprudence emerges as a convention, but is susceptible to political manipulation. When civil jurisprudence functions well, it institutionalizes natural liberty. When it institutionalizes natural liberty, it allows individuals to pursue their own ends, and generally society benefits as a great concatenation arises. The closer civil jurisprudence is to natural jurisprudence, the more natural liberty is respected and allowed to flourish. Under Smith's conception of natural liberty, individuals pursuing their own ends will generally lead society toward a greater state of opulence and liberty. Smith believed there are human tendencies which both push society towards a system of civil jurisprudence that supports the growth of concatenate coordination and pull it back. The same instinct to pursue our self-interest in the public sphere can lead to harmful institutions and a collapse of natural liberty, as seen in the feudal system and

mercantilism. Nonetheless, Smith seemed to think our innate tendency to truck and barter tends to lead to institutions which support progress toward liberty.

In the following chapters I will focus on Smith's perspective on reputation. I believe for Smith reputation is both an end and a means. Human actors pursue reputation as an end in itself, in the form of approbation or at an extreme, glory. Reputation also plays a central role in economic activity. I will attempt to show Smith believed a freely established reputation was critical for effective economic activity.

2. ADAM SMITH IN HIS PUBLISHED WORKS: IS REPUTATION PROPERTY? SHOULD THERE BE LAWS AGAINST DEFAMATION?

Abstract: Confining attention to Smith's published works, this paper examines Adam Smith on reputation. We explore whether Smith held that reputation is like property, and whether he thought laws which protect reputation are desirable. We find that his treatment of reputation is inconsistent. We would suggest that Smith's treatment shows some tendency toward libertarian views that reject reputation as property and that doubts the desirability of defamation laws.

2.1 Introduction

This paper will explore Adam Smith's position on the issue of reputation. Smith writes or speaks about reputation in both of his major works. Specifically we will examine Smith's writings to weigh whether he considered libel and slander are matters of commutative justice, or whether there is evidence that he thought a man's right to his reputation was more metaphorical, and therefore falling within the distributive justice category.

We will draw our references from Smith's published works only. Although Smith makes numerous references to reputation and related subjects in the Lectures on Jurisprudence, and to a lesser degree in his correspondence, and lectures on rhetoric, we will set those texts aside for this paper. We will not consider the LJ or his other works for this paper for several reasons. First, while The Theory of Moral Sentiments (TMS) and An Inquiry into the Nature and Causes of the Wealth of Nations (WN) were written (and rewritten) for publication, the LJ are student recordings of his lectures which were

not meant for publication. Second, the LJ are to some extent Smith's presentation of legal systems as they had existed or still currently were in existence. Thus, he described how reputation was treated within such systems, and sometimes it is hard to distinguish Smith's own judgment from his merely describing the legal rules. Third, Smith's discussion in the LJ is ripe with discussions of "rights" which grows very abstruse. Our method here does not mean to deny the importance of the LJ for the questions addressed. The method, rather, is to reach a tentative set of conclusions based solely on the published works, and to take up the LJ in chapter three of this dissertation.

In order to parse these questions, we will examine the textual evidence in two ways. First we will consider how Smith addresses the issue of reputation within the commutative justice/distributive justice framework. We will ask whether Smith regards reputation more or less like he regards property. Is reputation a form of property? Does Smith see reputation as part of our "stuff," the way our body is, or our shoes are, or any other physical thing we can possess? Or would he have supported a more libertarian perspective as suggested by writers such as Walter Block: "A man does not own his reputation any more than he owns the thoughts of others - because that is all his reputation consists of" (Block, *Defending the Undefendable*, 2008, p. 49). We will query the text for evidence of whether Smith unequivocally supports the idea that an individual's reputation is that individual's property, or if there is evidence that Smith does not regard reputation as belonging to an individual, but perhaps something external to the individual and not fitting the definition of property at all.

The second way we will examine the question of reputation is to consider Smith’s statements concerning libel and slander laws. We will query the text to assess Smith’s support of these laws. Did Smith believe these laws were desirable? Is there evidence that he thought they were undesirable?

Our approach can be summed up in the following table:

Table 2. Possible interpretations

		Are defamation, libel, and slander laws desirable?	
		Yes	No
Is reputation covered by commutative justice? For example, is it like property?	Yes – commutative justice perspective.	Cell 1: Reputation is part of one’s natural stuff, defamation laws are not coercive. Defamation laws are like laws against robbery, there should be laws against robbery.	Cell 2: Reputation is like property, but laws to protect it are undesirable. This position is not coherent.
	No – distributive justice perspective.	Cell 3: Reputation is not part of one’s “natural stuff” – defamation laws are coercive, but they are desirable.	Cell 4: Reputation is not part of one’s “natural stuff”; defamation laws are coercive – they are like minimum wage laws. Defamation laws should not exist.

The combination of these two questions leads to four possible interpretations of Smith’s position on reputation. Cell 1 would represent the accepted legal interpretation

of the time – that reputation was covered by commutative justice and therefore laws protecting reputation were legitimate. Cell 4 represents the libertarian position that reputation is not covered by commutative justice and defamation laws are unjustifiably coercive and should not exist. In between these positions are cells 2 and 3. We do not believe cell 2 represents a coherent position. It would be a contradiction to say that a thing is covered by commutative justice, but that the laws protecting it are not legitimate. We do believe that cell 3, however, does represent a highly coherent position. Smith of course made exceptions to the liberty principle, condoning laws that restrict private activity, such as a ceiling on interest rates. Cell 3 would correspond to an exception to the liberty principle, and we know Smith admitted exceptions.

Smith made statements throughout his writings indicating that reputation, like property, came under commutative justice. We will show that there is, however, textual evidence that his position on reputation and the legal protection of it is not consistent. The inconsistencies could represent several possibilities. It is possible that Smith's position on reputation evolved over time. It is possible that his opinions as set down in the LJ or his other unpublished work were inaccurately recorded by his students. A third possibility is that Smith was writing esoterically, as described by Strauss (1952), or taking on a "bargainer" position, as described by Klein (Klein, *Mere Libertarianism: Blending Hayek and Rothbard*, 2004, p. 35).

2.2 Measured Words

Strauss claims that writers who oppose the orthodox view sometimes write as if they support it, but then subvert those views surreptitiously:

[I]f an able writer who has a clear mind and a perfect knowledge of the orthodox view and all of its ramifications, contradicts surreptitiously and as it were in passing one of its necessary presuppositions or consequences which he explicitly recognizes and maintains everywhere else, we can reasonably suspect that he was opposed to the orthodox system as such and we must study his whole book all over again, with much greater care and much less naiveté than ever before (Strauss, 1952, p. 32).

Strauss described writers as writing esoterically when they have reason to fear some form of persecution – whether it be the extreme of physical harm or milder social pressures.

Smith may not have feared full ostracism for airing the libertarian position that reputation is not a matter of commutative justice and that libel and slander laws are not desirable.

He may, however, have been concerned to reach and speak to people who would have been quite startled by libertarian views on the matter. We must bear in mind that this is a time period when dueling was still an accepted response to perceived violations of reputation. Given this fact, he might have chosen to hedge his statements or introduce inconsistencies so as to avoid closing the minds of some of his audience.

According to Klein, people who seek to persuade an audience can take at one extreme a “bargainer” approach, or at the other, a “challenger” approach. Challengers attack deep-seated beliefs directly, with the hope of influencing those people whose belief set has not necessarily been crystallized. Their approach is direct and open – exoteric in Strauss’s terms. Bargainers on the other hand begin their critique of erroneous beliefs by pointing out the erroneous conclusions reached, and then backing the audience up to more basic beliefs which had lead to the erroneous conclusion. Klein diagrams the positions and issues as a tree, with the more fundamental issues at the “trunk” and the secondary issues the “branches”. The bargainer seeks to make changes at

the branches, not the trunk, so as not to trigger strong resistance from those whose beliefs are crystallized. The bargainer may not show the true depth of his feeling, just like the esoteric writer may not show his. The bargainer seems to accept the orthodox opinion, but if we read his words carefully enough, we might suspect that he in fact disagrees with the “trunk” assumptions from which the branch extends.

2.3 Application of the Taxonomy to the Texts

In this section we will apply the commutative justice/distributive justice dichotomy as discussed in the previous chapter to reputation.

A. Is reputation covered by commutative justice? Is it like property?

1) The case for reputation being covered by commutative justice.

In this section we examine the evidence in TMS and WN that Smith thought our reputation was covered by CJ, that it was part of our “stuff”, like property. This view would fit to some extent the standing legal rules against libel and slander.

First, returning to the quote we used earlier concerning commutative justice, Smith includes reputation in the things that a person must abstain from harming in order to conform with the standards of that justice: “The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit” (TMS II.ii.1.9). This is perhaps Smith’s clearest statement that reputation is part of the other’s stuff we must abstain from in satisfying commutative justice. Given that it is listed along with person and property, it appears that he gives it the same status.

Next we can turn to WN for a similar statement. Even in the age of hunters, Smith says that we could be injured in our body and our reputation:

Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days labour; so there is seldom any established magistrate or any regular administration of justice. Men who have no property can injure one another only in their persons or reputations. (WN v.i.b.2)

Recall that Smith says a real injury done with malicious intent is a violation of justice (TMS, II.ii.1.6). Here he appears to be putting harm to reputation in the same category of injury as to the person's body or property, and subject to the same category of justice.

The following segment is slightly less direct, but implies that reputation is property:

The proud man... wishes you to view him in no other light than that in which, when he places himself in your situation, he really views himself. He demands no more of you than, what he thinks, justice. If you appear not to respect him as he respects himself, he is more offended than mortified, and feels the same indignant resentment as if he had suffered a real injury. (TMS, VI.iii.35)

Despite the fact that the proud man has an inflated sense of himself and the value of his reputation, Smith says he experiences resentment rather than mortification if you do not act in such a way as to concur with his own self appraisal. Smith associates the sentiment of resentment with the violation of commutative justice, so this passage suggests that the proud man would be correct in feeling he had suffered a violation of commutative justice if his self-appraisal had been correct. We dislike proud people because they act as if we have violated commutative justice by not giving them the recognition and respect they think they deserve, but this passage could lead us to believe Smith associated the violation of reputation with commutative justice. A different reading of this passage,

however, could show that our very dislike of the proud man comes from his desire to have a thing treated as property which is not.

It is not just proud people who Smith says respond to violations of reputation, but everyone must always be ready to defend violations of their reputation: “In order to live comfortably in the world, it is, upon all occasions, as necessary to defend our dignity and rank, as it is to defend our life or our fortune” (TMS, VI.iii.16). Again we can see Smith associating life and property with reputation.

Both of the preceding passages could be read as treating reputation as metaphorical property, which is the assumption we will proceed with in the next section. However, a final quote to show that reputation is a thing of value in and of itself, a thing which is worthy of being defended, is the evidence that people sometimes pursue it by “unfair means”: “If praise were of no consequence to us, but as a proof of our own praise-worthiness, we never should endeavour to obtain it by unfair means” (TMS, III.ii.24). In fact reputation is something worth having because it yields other real benefits, much like property.

2) The case against reputation being covered by commutative justice.

We now will consider passages which appear to weaken or contradict the point of view that Smith concurred with the common interpretation that reputation is covered by commutative justice, or like property. The following passage highlights Smith’s thinking about rights and ownership, and connects that thinking to justice:

The most sacred laws of justice, therefore, those whose violation seems to call loudest for vengeance and punishment, are the laws which guard the life and person of our neighbour; the next are those which guard his property and

possessions; and last of all come those which guard what are called his personal rights, or what is due to him from the promises of others. (TMS, II.ii.2.2)

Here Smith is defining the proper objects of commutative justice. We know he is speaking of commutative and not distributive justice because he is talking about those things which we can extract “vengeance and punishment” for. It is worth noting that in this statement of the “most sacred laws of justice” he makes no mention of reputation. It is also worth noting that Smith uses the word “sacred” 22 times in TMS, six of which are in reference to the rules or laws of justice (TMS, II.ii.2.2; VI.i.15; VI.iii.11; VII.iv.8, 9, 11). Of those six references explicitly to rules and/or laws of justice, the passages variously refer to murder, theft, and violation of promises – none refer to the violation of reputation. Of the remaining 16 uses of “sacred”, 13 also refer to rules, laws, or obligations – and none of the associated passages explicitly refer to reputation. His choice of the word sacred, which indicates a special space or status, would seem to indicate that he is trying to be clear that he is not speaking metaphorically. The repeated use of the word “sacred” in conjunction with justice, laws, rules, and obligations without reference to reputation seems to support the idea that the absence of reference to reputation in this hierarchy was more than just a casual result.

Why does Smith not include reputation in his hierarchy of most sacred justice? Recall that commutative justice is precise, following rules like grammar. Therefore, we expect a high degree of consistency with those things which are governed by commutative justice. The following passage shows a degree of variance in Smith’s regard for how we approve of the response to a violation or attempted violation of reputation:

We often esteem a young man the more, when he resents, though with some degree of violence, any unjust reproach that may have been thrown upon his character or his honour. The affliction of an innocent young lady, on account of the groundless surmises which may have been circulated concerning her conduct, appears often perfectly amiable. Persons of an advanced age, whom long experience of the folly and injustice of the world, has taught to pay little regard, either to its censure or to its applause, neglect and despise obloquy, and do not even deign to honour its futile authors with any serious resentment. This indifference, which is founded altogether on a firm confidence in their own well-tried and well-established characters, would be disagreeable in young people, who neither can nor ought to have any such confidence. It might in them be supposed to forebode, in their advancing years, a most improper insensibility to real honour and infamy. (TMS, III.iii.19)

This passage shows Smith approving of two dramatically different responses to an attack on reputation. He says we approve of a young person reacting “with some degree of violence” to an attack on his reputation, and even surmise that a lack of response would imply a defect of character which would only grow worse as he aged. On the other hand, we approve of an older person giving little regard for an attack on his reputation, and even surmise in his case that he has achieved a degree of confidence and self-assurance in his life that allows him to rise above such petty things as defamation. We approve of responding violently in one case and we approve of not responding at all in the other, depending not on the motives of the violator, but on the age of the victim. The lack of precision concerning the appropriate response in this passage conflicts with the idea that reputation is governed by clear rules. The fact that the appropriate response is age dependent leaves us pondering such questions as, at what point does the appropriate response shift from one of violence to indifference? This mirrors Smith’s objection to the casuists we quoted in chapter one, where he ridicules the idea that we can have precise rules about when an irony becomes a “detestable lie.”

For a thing to be the proper object of commutative justice there has to be a high degree of certainty around it. With a high degree of certainty, we can establish consistency. Smith establishes a hierarchy of justice with those things which we have the most control over, and therefore the most certainty of, being the most sacred, and those things which we have to rely on receiving from others less so:

To be deprived of that which we are possessed of, is a greater evil than to be disappointed of what we have only the expectation. Breach of property, therefore, theft and robbery, which take from us what we are possessed of, are greater crimes than breach of contract, which only disappoints us of what we expected. (TMS, II.ii.2.2)

Thus, the things we should be most certain about and have the strongest expectations to – life and liberty – come first in the hierarchy. Things which we have less certainty about, things which we rely on society to recognize and ensure certainty for, namely property, come after life and liberty. Things which we rely on other individuals to provide to us, personal rights³, come last in this hierarchy because we have the least certainty about them. When we have to rely on someone else delivering us a good or service, we can never be as confident as if we had the good or performed the service ourselves.

If we want to include reputation in the reading of this hierarchy of most sacred justice, we could argue that Smith means to include reputation as property – that he meant to include reputation in the category of “property and possessions.” To consider this argument, we should consider how Smith says we actually come to acquire a reputation. If we want to achieve a reputation for a particular virtue, Smith says the best way to establish that reputation is to actually strive for and achieve virtue:

³ Smith defines “personal rights” in the LJ as contract, quasi-contract, or the right to recover our property, and delinquencies, or the right to restitution when we are harmed.

But the best, the surest, the easiest, and the readiest way of obtaining the advantageous and of avoiding the unfavourable judgments of others, is undoubtedly to render ourselves the proper objects of the former and not of the latter. 'Do you desire,' said Socrates, 'the reputation of a good musician? The only sure way of obtaining it, is to become a good musician. Would you desire in the same manner to be thought capable of serving your country either as a general or as a statesman? The best way in this case too is really to acquire the art and experience of war and government, and to become really fit to be a general or a statesman. And in the same manner if you would be reckoned sober, temperate, just, and equitable, the best way of acquiring this reputation is to become sober, temperate, just, and equitable. If you can really render yourself amiable, respectable, and the proper object of esteem, there is no fear of your not soon acquiring the love, the respect, and esteem of those you live with.' (TMS, VII.ii.2.13)

The argument Smith is making here is that if a man wants to acquire a good reputation for some virtue, first he has to strive for and actually attain that virtue. An individual earns a good reputation as a result of repeated observations of his virtuous behavior:

When we denominate a character generous or charitable, or virtuous in any respect, we mean to signify that the disposition expressed by each of those appellations is the usual and customary disposition of the person. But single actions of any kind, how proper and suitable soever, are of little consequence to show that this is the case. If a single action was sufficient to stamp the character of any virtue upon the person who performed it, the most worthless of mankind might lay claim to all the virtues; since there is no man who has not, upon some occasions, acted with prudence, justice, temperance, and fortitude. (TMS, VII.ii.1.13)

When we actually achieve a high level of skill as a musician, general, or statesman, we increase the probability of being observed acting in those roles in a manner worthy of a good reputation. One successful performance, whether on the stage, battlefield, or court does not guarantee us a reputation for greatness. The surety of good reputation comes about because if we actually possess the virtue we want a reputation for, it is almost inevitable that we will be seen in that light. This is why Smith claims that real

accomplishment is not only the best but also the easiest way to gain positive reputation.

In the same vein he says:

The man who esteems himself as he ought, and no more than he ought, seldom fails to obtain from other people all the esteem that he himself thinks due. He desires no more than is due to him, and he rests upon it with complete satisfaction. (TMS, VI.iii.50)

In this passage there is an element of uncertainty, implying that the link between character and reputation is loose, but correlated over time. Furthermore, if we look back to the previous passage (TMS, VII.ii.2.13), Smith says it is the “best” and “surest” way – but not a guaranteed way. We still rely on our behaviors being observed and remembered by others, processed by society, and ultimately judged as worthy. Can we be said to “own” our character, if our character consists of a pattern of behavior that has been observed by others? He says that the man who esteems himself as he ought “seldom fails” to get the esteem he thinks he deserves. He does not say that the man who esteems himself as he ought always gets the esteem he thinks he deserves. So even if the man has a perfect knowledge of his relative worth, he still may not receive all of the esteem he thinks he is due, nor what he is in fact due. With enough opportunities, the virtuous man should eventually be recognized as virtuous. However, Smith says Fortune governs the world and has some influence “where we should be least willing to allow her any” (TMS, II.iii.3.1), intruding in the process between intentions and outcomes:

That the world judges by the event, and not by the design, has been in all ages the complaint, and is the great discouragement of virtue. Every body agrees to the general maxim, that as the event does not depend on the agent, it ought to have no influence upon our sentiments, with regard to the merit or propriety of his conduct. But when we come to particulars, we find that our sentiments are scarce in any one instance exactly conformable to what this equitable maxim would direct. (TMS, II.iii.3.1)

Thus, despite the fact that Smith says there is “no fear” of achieving that coveted reputation, he clearly holds there is a great deal of uncertainty about the reputation any person may achieve. We may attempt and accomplish some great feat, but not get credit for it because of some random turn of luck. Perhaps with time we would have another opportunity, but perhaps not:

The general who has been hindered by the envy of ministers from gaining some great advantage over the enemies of his country, regrets the loss of the opportunity for ever after. Nor is it only upon account of the public that he regrets it. He laments that he was hindered from performing an action which would have added a new lustre to his character in his own eyes, as well as in those of every other person. (TMS, II.iii.2.3)

In TMS he makes reference to the common belief in an afterlife when our true character will be judged with certainty:

That there is a world to come, where exact justice will be done to every man, where every man will be ranked with those who, in the moral and intellectual qualities, are really his equals; where the owner of those humble talents and virtues which, from being depressed by fortune, had, in this life, no opportunity of displaying themselves; which were unknown, not only to the public, but which he himself could scarce be sure that he possessed, and for which even the man within the breast could scarce venture to afford him any distinct and clear testimony; where that modest, silent, and unknown merit, will be placed upon a level, and sometimes above those who, in this world, had enjoyed the highest reputation, and who, from the advantage of their situation, had been enabled to perform the most splendid and dazzling actions; is a doctrine, in every respect so venerable, so comfortable to the weakness, so flattering to the grandeur of human nature, that the virtuous man who has the misfortune to doubt of it, cannot possibly avoid wishing most earnestly and anxiously to believe it. (TMS, III.ii.33)

If reputation were like property, we would be able to draw exact and certain rules of conduct around it. If it were like property, there would not be questions of whether we received all the recognition we deserved. If it were like property, we would not have to hold to beliefs of an afterlife where our character would be judged precisely. If it were

like property, we would receive a precise measure of recognition if reputation were like property and governed by the rules of commutative justice. Perhaps most importantly, if it were like property, it would be capable of having an existence independent of external observers. None of Smith's arguments indicate that reputation is capable of an independent existence.

Smith makes a second, more negative argument about the way reputation is established. Smith says that most people are not capable of perceiving real virtue:

They are the wise and the virtuous chiefly, a select, though, I am afraid, but a small party, who are the real and steady admirers of wisdom and virtue. The great mob of mankind are the admirers and worshippers, and, what may seem more extraordinary, most frequently the disinterested admirers and worshippers, of wealth and greatness. (TMS, I.iii.3.2)

This is an important indicator that he does not think reputation is the subject of commutative justice. If the rules are not clear and cannot be taught in a precise and simple fashion, then commutative justice does not apply. Remember Smith's dismissal of the casuists' efforts we discussed earlier. If the rules are based on the formulating and reformulating of relationships, Smith does not believe they are governed by commutative justice. Ideally, Smith says the "first of those causes" of rank and distinctions between people in society are what we would hope they would be: strength, wisdom, agility, beauty, virtue, justice, prudence, fortitude, and moderation of mind (WN V.i.b.5). The most important of these qualities are the qualities of the mind, and those are "invisible qualities; always disputable, and generally disputed." However, Smith says that because the most important qualities are invisible, the average person cannot distinguish the truly virtuous from the ordinary or even the less than ordinary. As a result the social rank

structure of society is not based on the qualities of the mind, but “according to something more plain and palpable” (WN V.i.b.5). The palpable – or we might say today, focal - qualities he sets out as the primary source of social rank are “birth and fortune” (WN, V.i.b.11). In TMS Smith says that however offensive the idea is, we have to admit to ourselves that “mere wealth and greatness” are “in some respects, the natural objects” of our respect because they “almost constantly obtain it” (TMS I.iii.3.4). Again in this passage we see that Smith believes reputation is highly imprecise. But it is wealth and riches that generate great reputations:

We desire both to be respectable and to be respected. We dread both to be contemptible and to be contemned. But, upon coming into the world, we soon find that wisdom and virtue are by no means the sole objects of respect; nor vice and folly, of contempt. We frequently see the respectful attentions of the world more strongly directed towards the rich and the great, than towards the wise and the virtuous. We see frequently the vices and follies of the powerful much less despised than the poverty and weakness of the innocent. To deserve, to acquire, and to enjoy the respect and admiration of mankind, are the great objects of ambition and emulation. (TMS, I.iii.3.2)

Later in TMS he adds:

Nature has wisely judged that the distinction of ranks, the peace and order of society, would rest more securely upon the plain and palpable difference of birth and fortune, than upon the invisible and often uncertain difference of wisdom and virtue. The undistinguishing eyes of the great mob of mankind can well enough perceive the former: it is with difficulty that the nice discernment of the wise and the virtuous can sometimes distinguish the latter. (TMS, VI.ii.1.20)

In Smith’s thinking, we tend to give reputation for virtue to the wealthy and high born, not the truly virtuous. He uses the example of King Louis XIV, who he says is remembered as being a great king. Smith asks, “But what were the talents and virtues by which he acquired this great reputation?” He then goes on to ask rhetorically if Louis’s reputation was based on admirable virtues such as wisdom and courage. He answers

himself saying, “It was by none of these qualities.” Instead, Louis’s reputation was based on his physical appearance, commanding voice, and “a step and a deportment which could suit only him and his rank, and which would have been ridiculous in any other person” (TMS, I.iii.2.4).

We have explored two arguments that Smith’s writings challenge the idea that he thought reputation can be conceived of as property, or fit into his hierarchy of “most sacred rules of justice.” The first argument was that generally being virtuous will lead to a good reputation does not provide a basis for the application of commutative justice rules to reputation. There is too much uncertainty about reputation. The second argument, that one’s reputation is generally not based on wisdom and virtue, except by some circuitous path, supports this conclusion. Neither argument leads to the conclusion that reputation should be thought of as subject to the precise rules of commutative justice.

Returning to Smith’s hierarchy of the most sacred, it seems that reputation is governed by the lesser category of expectations, rather than “what we are possessed of.” Whereas commutative justice generally represents a negative obligation, to abstain from acting, Smith seems to think of reputation as a positive obligation, more properly the realm of distributive justice:

In another sense we are said not to do justice to our neighbour unless we conceive for him all that love, respect, and esteem, which his character, his situation, and his connexion with ourselves, render suitable and proper for us to feel, and unless we act accordingly. It is in this sense that we are said to do injustice to a man of merit who is connected with us, though we abstain from hurting him in every respect, if we do not exert ourselves to serve him and to place him in that situation in which the impartial spectator would be pleased to see him. (TMS, VII.ii.1.10)

This passage describes an implied obligation we have to render “love, respect, and esteem” to worthy people. This conception of obligation is positive because it requires us to “exert ourselves”, rather than abstain from another’s stuff. We meet the commutative justice requirements when we “abstain from hurting him in every respect”. However, he identifies this expectation that we are required to go beyond merely abstaining to providing honors to a person whose reputation we recognize as worthy, or else we do him injustice. In the following passage, he says that if we do not recognize a worthy man with honors he is entitled to, we do him injury:

The man who desires esteem for what is really estimable, desires nothing but what he is justly entitled to, and what cannot be refused him without some sort of injury. He, on the contrary, who desires it upon any other terms, demands what he has no just claim to. (TMS, VII.ii.4.9)

In the above passage he declares the man’s claim to be legitimate. The man who is really virtuous is entitled to honors. Furthermore, a “good man” will believe he has a duty to render those honors:

It may frequently happen that a good man ought to think himself bound, from a sacred and conscientious regard to the general rules of justice, to perform many things which it would be the highest injustice to extort from him, or for any judge or arbiter to impose upon him by force. (TMS, VII.iv.9)

The obligation to exert ourselves in some way indicates we have an obligation to give the man something, some of our “stuff”, whether that stuff is real property, or time, attention, approbation, and service. Not only do we have some sort of obligation, Smith says we have a natural inclination to want to serve those who we regard as our superiors:

We are eager to assist them in completing a system of happiness that approaches so near to perfection; and we desire to serve them for their own sake, without any other recompense but the vanity or the honour of obliging them. (TMS, I.iii.2.3)

In the passages which speak of obligation, it is worth noting that Smith always inserts a qualifying word or two which make the obligation less than certain: “in this sense that we are said to do injustice”, “what cannot be refused him without some sort of injury”.

These qualifying words make the obligation Smith speaks of indeterminate. We are “said to do injustice” is different from “we do injustice”; we do “some sort of injury” is different from “we do injury.” We are eager to help those we admire complete their system of happiness, but we cannot be forced to do so. We may feel bound to do so out of distributive justice, but we do not violate commutative justice by not doing so.

In the quote from VII.ii.1.10 of TMS, Smith emphasizes the circumstantial nature of the obligation by referencing “our neighbor” and his “connexion with ourselves”, then “a man of merit who is connected with us.” The obligation to reputation is tied up with familiarity and knowledge of an individual. Performing our obligations to reputation requires that we have a connection with the counterparty so that we can determine the nature of the obligation. To fully understand the obligation, we have to establish the other person’s character, and our relative rank with respect to him. Do we have a reputation for being a person of greater virtue than him? Then they owe us something. Are they more virtuous than us? Then we owe them admiration. If we fail to give them all the praise they deserve, we do them “some sort of injury”. What we would have to do to keep from doing this injury is loose, vague, and indeterminate. There is an obligation there, but it is not precise. Furthermore, the nature of the obligation is relative, and it is ultimately metaphorical. If we are good people, we feel the obligation, but no one can use force to make us fulfill it. Smith makes it clear commutative justice obligations are

precise, and the direction of the obligation is clear. Commutative justice rules tell us for example that it is wrong to kill another man unless he is threatening us. The rule is precise, and the exception is precise. It is like grammar. There is no quibbling over relative rank or accomplishments or patterns of behavior. To conform to the rules of commutative justice we need never have met the man before, we only need to know that he is a fellow human being. One of the reasons the rules of commutative justice are capable of being compared to a grammar is that they are tied to objects which have high degrees of certainty. On the other hand, Smith is explicit about the fact that reputation always has a high degree of uncertainty to it. We seek out feedback from others because we are almost always uncertain about it: “Our uncertainty concerning our own merit, and our anxiety to think favourably of it, should together naturally enough make us desirous to know the opinion of other people concerning it.” Smith says we love praise, but we really want to be praise-worthy: “The love of praise is the desire of obtaining the favourable sentiments of our brethren. The love of praise–worthiness is the desire of rendering ourselves the proper objects of those sentiments” (TMS, III.2.25). We desire the favorable sentiments of our brethren precisely because we are uncertain about our own praise-worthiness. Favorable sentiments, favorable reputation, is the best gauge we have for our own true praiseworthiness – but the fact that we use it as a gauge does not create a protected space – it does not make it certain. The proper treatment of a man’s reputation is relational and requires a fine knowledge of specifics, all of which vary depending on the situation. The proper treatment of a man’s reputation is uncertain.

In this section we examined how Smith regards reputation and showed that there is evidence in the TMS and WN that while he makes a few statements which appear to support reputation as a form of property, he in fact regards it as far too nebulous and uncertain a concept to be governed by commutative justice in the way that property is. First, he shows that the appropriate response to attacks on reputation varies depending on aspects of the victim, rather than the actions and intentions of the offender. Second, we have shown that Smith does not include reputation in his hierarchy of “most sacred justice”, and that exclusion appears to be purposeful. Third, we have shown that Smith believed we used surrogate variables to judge the worthiness of a person’s reputation (namely, wealth, birth, and power). Finally, we examined the nature of the obligation reputation generates, and conclude that the obligation is loose, vague, and indeterminate – more fitting of distributive rather than commutative justice.

B. Are defamation laws desirable?

Having concluded the examination of whether Smith thought of reputation as property or property-like such that it should be governed by the rules of commutative justice, we move on to consider the second axis of our table, whether Smith favored defamation laws. It is important to note that he never explicitly approves or disapproves of defamation laws in either TMS or WN. Therefore, in this section, we present evidence from the text indicating whether Smith favored defamation laws as socially efficient and an appropriate use of government power.

Whether one regards reputation as property-like or not, it is possible to make an argument that defamation laws are socially beneficial. If one does regard reputation as

property, the arguments in favor of defamation laws are somewhat redundant, since if it is property, it should be protected by property laws. This position would be represented by cell one in our taxonomy, since we view cell two as incoherent. If reputation is a form of property, one could invoke property laws if one's reputation was to be violated. Nonetheless, in this section we will examine passages first which indicate Smith was in favor of social welfare-based arguments for government intervention in matters of defamation, then passages which show Smith thought defamation was so socially costly that government laws against it would have been justified.

1) The case showing Smith seemed to favor defamation laws.

Smith says that while we only approve of individuals inflicting punishment on other individuals when one individual has harmed the other in violation of commutative justice, we may approve of the punishment of individuals by society when such punishment supports the welfare of society:

Upon some occasions, indeed, we both punish and approve of punishment, merely from a view to the general interest of society, which, we imagine, cannot otherwise be secured. Of this kind are all the punishments inflicted for breaches of what is called either civil police, or military discipline. Such crimes do not immediately or directly hurt any particular person; but their remote consequences, it is supposed, do produce, or might produce, either a considerable inconveniency, or a great disorder in the society. (TMS, II.ii.3.11)

Here we see Smith approving of the punishment of actions where there was no immediate harm to an individual. These loose connections of possible harm are insufficient for reprisal between individuals under commutative justice, but Smith clearly sees them as sufficient when the relationship in question is between an individual and a "superior" or sovereign power. Smith presumes the superior or sovereign has both the right and

responsibility to enforce a degree of compliance with behaviors which would properly be categorized under distributive rather than commutative justice:

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 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 orders, 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, could not have been omitted without the greatest blame, it surely becomes much more punishable to be wanting in obedience. (TMS, II.ii.1.8)

Thus, Smith endorses the idea that the superior/sovereign/government, has the right and responsibility to force compliance with some rules which fit into the distributive justice category because compliance with those rules tends to bring about a higher state of social welfare among the mass of citizens. Whereas it would be wrong for individuals as equals to force each other to perform “mutual good offices,” it is acceptable in some cases for the government to do so, “to a certain degree.” Smith strongly cautions the use of any argument for the use of force against the individual in favor of the collective:

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 judgment. 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. (TMS, II.ii.1.8)

Given that Smith is willing to cede to the government a limited license to use force to impose compliance with rules of distributive justice as “a part of a system of behaviour which tends to promote the happiness either of the individual or of the society” (TMS,

VII.iii.3.16), what evidence do we have from either TMS or WN that he supported allowing government to protect reputation? (Again, this argument presumes reputation is not a form of property, since such an argument would be redundant with other property laws.)

Perhaps the strongest point of evidence that Smith considers defamation laws as socially beneficial comes from the WN, where Smith declares that whereas property theft is a form of social welfare transfer, physical assault and defamation always results in social losses:

But when one man kills, wounds, beats, or defames another, though he to whom the injury is done suffers, he who does it receives no benefit. It is otherwise with the injuries to property. The benefit of the person who does the injury is often equal to the loss of him who suffers it. (WN, V.i.b.2)

These cursory sentences highlight the social loss in defamation, and we therefore might infer that Smith therefore would support defamation laws. Without defamation laws, such an act might be relatively costless. If we interpret this passage as Smith regarding defamation as creating a social loss, we could reason that he would have supported defamation laws, since defamation laws ideally increase the cost of such conduct. Since the defamer does not stand to gain by this definition, he should be “merely indifferent” (TMS, II.ii.1.8) to a law not to defame. Without defamation laws, such an act would have been a violation of distributive justice, but with defamation laws, such acts become punishable because they have been forbidden by the government.

Smith regards the undeserved loss of reputation (whether from defamation or bad luck) as the greatest misfortune an innocent man can experience:

As, of all the external misfortunes which can affect an innocent man immediately and directly, the undeserved loss of reputation is certainly the greatest; so a considerable degree of sensibility to whatever can bring on so great a calamity, does not always appear ungraceful or disagreeable. (TMS, III.3.19)

Furthermore, not only is it the greatest misfortune to lose one's reputation, but it is easy for a person to perpetrate an assault:

Treachery and falsehood are vices so dangerous, so dreadful, and, at the same time, such as may so easily, and, upon many occasions, so safely be indulged, that we are more jealous of them than of almost any other. (TMS, VII.iv.13).

From these passages we can see that Smith regarded defamation as potentially have terrible consequences at a relatively low cost to the defamer. How does this result in harm to the individual and to society? There are three ways we can identify from the text. First, Smith makes it clear that we tend to overreact to certain losses, one of those being a loss of reputation:

Those private misfortunes, for which our feelings are apt to go beyond the bounds of propriety, are of two different kinds. They are either such as affect us only indirectly, by affecting, in the first place, some other persons who are particularly dear to us; such as our parents, our children, our brothers and sisters, our intimate friends; or they are such as affect ourselves immediately and directly, either in our body, in our fortune, or in our reputation; such as pain, sickness, approaching death, poverty, disgrace, etc. (TMS, III.3.12)

Smith distrusted our ability to judge our resentment when the source of our resentment was harm done to ourselves or people close to us. The more partial we are toward the object, the less we are able to modulate our own responses:

There is no passion, of which the human mind is capable, concerning whose justness we ought to be so doubtful, concerning whose indulgence we ought so carefully to consult our natural sense of propriety, or so diligently to consider what will be the sentiments of the cool and impartial spectator. (TMS, I.ii.3.8)

Because of this tendency, we could infer Smith thought it was beneficial to have laws that provide reasonable punishment for acts of defamation, and courts that enforce those laws.

Second, people value reputation because it is the confirmation of their own worthiness. It is clear that Smith believed people do not just want to have the public benefits of good reputation, but the confirmation that they are in fact worthy of the benefits they receive:

Man naturally desires, not only to be loved, but to be lovely; or to be that thing which is the natural and proper object of love. He naturally dreads, not only to be hated, but to be hateful; or to be that thing which is the natural and proper object of hatred. He desires, not only praise, but praise-worthiness; or to be that thing which, though it should be praised by nobody, is, however, the natural and proper object of praise. He dreads, not only blame, but blame-worthiness; or to be that thing which, though it should be blamed by nobody, is, however, the natural and proper object of blame. (TMS, III.2.1)

The problem with man's desire is the uncertainty about his own value which we discussed earlier. Smith says the man of "greatest magnanimity" wants to be virtuous for the sake of being virtuous and is capable of disdaining the opinions of the people around him, comfortable in his own assessment, but:

It seldom happens, however, that human nature arrives at this degree of firmness. Though none but the weakest and most worthless of mankind are much delighted with false glory, yet, by a strange inconsistency, false ignominy is often capable of mortifying those who appear the most resolute and determined. (TMS, VII.ii.4.10)

Given the great uncertainty most men live with about their own worth, and the ease with which Smith says falsehoods can be carried out, we could interpret Smith as preferring a legal solution to the inefficiency.

Finally, Smith thought reputation was an important asset for men engaged in various trades. A good reputation is critical to gaining the assistance and avoiding the

resistance of the people we must cooperate with in order to achieve success in our undertakings:

Our success or disappointment in our undertakings must very much depend upon the good or bad opinion which is commonly entertained of us, and upon the general disposition of those we live with, either to assist or to oppose us. (TMS, VII.ii.2.13)

This passage indicates Smith saw reputation as an asset necessary for commercial life. If we take the assumption that Smith thought reputation was something that should be protected, his thoughts on the security of capital would apply. Without secure property rights, men will hide their capital:

In a rude state of society there are no great mercantile or manufacturing capitals. The individuals who hoard whatever money they can save, and who conceal their hoard, do so from a distrust of the justice of government, from a fear that if it was known that they had a hoard, and where that hoard was to be found, they would quickly be plundered. (WN, V.iii.9)

However, when men feel their rights are reasonably secure, they will employ their capital in pursuit of profit and consequently to the benefit of society:

In all countries where there is tolerable security, every man of common understanding will endeavour to employ whatever stock he can command in procuring either present enjoyment or future profit... A man must be perfectly crazy who, where there is tolerable security, does not employ all the stock which he commands, whether it be his own or borrowed of other people, in some one or other of those three ways. (WN, II.i.30)

As with physical and monetary capital, the less secure we feel about our reputation, and the easier it is for that reputation to be unjustly taken from us, the more cautious we will be. Instead of employing whatever reputational capital we command, we instead take greater precautions than desirable.

In this section we have considered passages which would seem to show Smith supporting defamation laws. In addition to the evidence we presented earlier in favor of treating reputation as covered by commutative justice, which would carry defamation laws as an implication, we have shown evidence that Smith allowed for government action that would violate the tenets of commutative justice in favor of some limited distributive justice outcomes. He allows for these exceptions because they would allow greater prosperity for all, but Smith clearly sees these actions as exceptions to a rule of individual liberty, and to be used sparingly. Specifically we have also shown some evidence that he saw defamation as socially costly and actions by government might be justified to increase the cost of defamatory behavior.

2) The case showing Smith doubted the desirability of defamation laws.

As we noted earlier, Smith did not explicitly state support for defamation laws, nor did he explicitly indicate that he thought they were coercive and socially harmful, as he does with regard to trade restrictions, or restrictions on wages or personal movement. In this section, we infer from the textual evidence that there is reason to believe Smith was not wholly in support of allowing an exception to his principle of individual liberty with regard to defamation laws. These inferences would point toward Cell 4 of our table, the libertarian cell.

If we are considering Cell 4, then we assume the evidence of the arguments concerning the inherent uncertainty of reputation are valid, and that Smith would have disapproved of trying to manage relations around reputation in the same way he disapproved of the casuists and their efforts to clarify all possible combinations of social

situations. In this section, we will show evidence Smith thought, first, that defamation was generally ineffective, and second, that government policies that reduce reliance on a free association and free speech have socially inefficient consequences.

a) Evidence showing Smith thought defamation laws were not necessary.

We find textual evidence showing Smith thought defamation laws were unnecessary, and for three reasons. First, the main reason Smith thought that defamation was relatively harmless was that he saw reputation as built on a pattern of conduct. As we discussed earlier, he saw character, as the usual conduct of a person (TMS, VII.ii.1.13). A person can defame us relatively easily, but if we have a character for virtuous conduct, their defamatory act is unlikely to be effective:

A person may be very easily misrepresented with regard to a particular action; but it is scarce possible that he should be so with regard to the general tenor of his conduct. An innocent man may be believed to have done wrong: this, however, will rarely happen. On the contrary, the established opinion of the innocence of his manners, will often lead us to absolve him where he has really been in the fault, notwithstanding very strong presumptions. (TMS, III.5.8)

Thus, in actually being virtuous, we are most likely to develop a reputation for being so, and once we have done so, it is unlikely that people will believe accusations which indicate we have behaved otherwise. There is a sort of social momentum to reputation, and Smith says here that if we have a reputation for good character, even when we have failed, we will be excused. Likewise, the same argument applies to people of bad character. A person of bad character may get away with one bad action, but over time, he is likely to earn a reputation for being of bad character, and when we see him acting, we will assume he is up to no good:

A knave, in the same manner, may escape censure, or even meet with applause, for a particular knavery, in which his conduct is not understood. But no man was ever habitually such, without being almost universally known to be so, and without being even frequently suspected of guilt, when he was in reality perfectly innocent. (TMS, III.5.8)

So whether we are virtuous or not, we earn a reputation through repeated interactions with our fellows, and generally they are unlikely to believe defamatory accusations if we have cultivated a reputation for virtue.

The second reason Smith thought defamation was relatively harmless was that regardless of whether we are virtuous or not, he believed most people are able to sort out true statements from false statements:

Men of the most ordinary constancy, indeed, easily learn to despise those foolish tales which are so frequently circulated in society, and which, from their own absurdity and falsehood, never fail to die away in the course of a few weeks, or of a few days. (TMS, III.2.11)

As a result, Smith recommended that most defamatory conduct should be ignored:

“Smaller offences are always better neglected; nor is there any thing more despicable than that forward and captious humour which takes fire upon every slight occasion of quarrel” (TMS, I.ii.3.8). Therefore, not only are most men capable of sorting out defamatory communications from legitimate communications, but they have an incentive to do so.

Indeed, Smith says we actually enhance our reputation when we react with forbearance to a person who has attempted to harm our reputation:

Upon most occasions, the greater his patience, his mildness, his humanity, provided it does not appear that he wants spirit, or that fear was the motive of his forbearance, the higher their resentment against the person who injured him. The amiableness of the character exasperates their sense of the atrocity of the injury. (TMS, I.ii.3.2)

Finally, Smith also believes defamation is relatively ineffective because we have incentives not to participate in defamatory behavior, either directly or indirectly.

Whereas a truly virtuous character will generally lead to a virtuous reputation, prudent behavior reduces the possibility we will become the target of defamatory conduct or defame others:

The prudent man is always sincere, and feels horror at the very thought of exposing himself to the disgrace which attends upon the detection of falsehood... As he is cautious in his actions, so he is reserved in his speech; and never rashly or unnecessarily obtrudes his opinion concerning either things or persons. (TMS, VI.i.7)

On the opposite side is the man who does not practice sufficient prudence:

It is not always so with the man, who, from false information, from inadvertency, from precipitancy and rashness, has involuntarily deceived. Though it should be in a matter of little consequence, in telling a piece of common news, for example, if he is a real lover of truth, he is ashamed of his own carelessness, and never fails to embrace the first opportunity of making the fullest acknowledgments. If it is in a matter of some consequence, his contribution is still greater; and if any unlucky or fatal consequence has followed from his misinformation, he can scarce ever forgive himself. Though not guilty, he feels himself to be in the highest degree, what the ancients called, *piacular*, and is anxious and eager to make every sort of atonement in his power. (TMS, VII.iv.30)

The second passage suggests that we suffer harm ourselves when we inadvertently defame another person. We incur a moral (though not legal or commutative justice) obligation to try to set matters right.

As people belonging to the “inferior to middling stations” of life, the majority of society relies on our reputations and the reputations of others for our economic activity. We have an incentive to ensure our reputations are accurate and we also have an incentive to ensure that we have an accurate perception of other’s reputations:

The success of such people [of the inferior to middling], too, almost always depends upon the favour and good opinion of their neighbours and equals; and without a tolerably regular conduct these can very seldom be obtained. The good old proverb, therefore, That honesty is the best policy, holds, in such situations, almost always perfectly true. In such situations, therefore, we may generally expect a considerable degree of virtue; and, fortunately for the good morals of society, these are the situations of by far the greater part of mankind. (TMS, I.iii.3.5)

Because most of society relies on repeat transactions for its economic life, we extrapolate from this statement that it is not just ourselves that benefit from an accurate reputation, but the people we do business with. Ensuring that the people we do business with have accurate information is the primary reason Smith gives for the prudent man joining groups:

If he ever connects himself with any society of this kind, it is merely in self-defence, not with a view to impose upon the public, but to hinder the public from being imposed upon, to his disadvantage, by the clamours, the whispers, or the intrigues, either of that particular society, or of some other of the same kind. (TMS, VI.i.7)

The focus here is not really his benefit, but the benefit of the public, since it is the public that loses by the defamatory act by not knowing if they can trust the prudent man.

For these three reasons, we believe Smith generally did not see a need for government intervention when reputation is abused. Smith believed it was not that easy to damage someone's reputation through defamation since reputation is based on a pattern of conduct, and most people are capable of sorting out the truth by themselves without government assistance. Furthermore, not only are they capable, but they have the incentive to do so because they rely on the validity of reputations in ordinary commerce.

b) Evidence Smith thought defamation laws were socially harmful.

Having shown evidence that Smith did not see a need for government intervention for at least the majority of possible defamatory activity, we turn now to evidence that Smith thought government interventions which affect the reputation mechanism are generally harmful to social welfare.

Smith argues in WN that it is the reputation mechanism which ensures a high degree of effort and a high quality product:

If you would have your work tolerably executed, it must be done in the suburbs, where the workmen having no exclusive privilege, have nothing but their character to depend upon, and you must then smuggle it into the town as well as you can. (WN, I.x.c.31)

In the cities where monopolies have been granted by the government, workers do not have to rely on their reputation in order to gain business. Without competition and the discipline of the market for reputation, quality falls. The corporation (by which Smith meant a company with an exclusive monopoly) destroys the incentives to create quality and leaves society worse off:

The real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers. It is the fear of losing their employment which restrains his frauds and corrects his negligence. An exclusive corporation necessarily weakens the force of this discipline. (WN, I.x.c.31)

In addition to the market for manufactured goods, Smith saw government as reducing social welfare in the service sector as well. He criticizes regulations in the education sector for reducing both teachers' and universities' reliance on the reputation mechanism, and leading to a decrease in quality and innovation. Universities and

teachers who relied on student fees, and therefore relied on reputation to draw students, were quicker to adopt innovations and improvements in education:

In general, the richest and best endowed universities have been the slowest in adopting those improvements, and the most averse to permit any considerable change in the established plan of education. Those improvements were more easily introduced into some of the poorer universities, in which the teachers, depending upon their reputation for the greater part of their subsistence, were obliged to pay more attention to the current opinions of the world. (WN, V.i.f.34)

When professions such as medicine, law, and religion require a university certification, forcing students to attend particular universities in order to enter those professions, universities do not have to respond to the reputation mechanism and are able to allow quality to fall:

Whatever forces a certain number of students to any college or university, independent of the merit or reputation of the teachers, tends more or less to diminish the necessity of that merit or reputation. The privileges of graduates in arts, in law, physick and divinity, when they can be obtained only by residing a certain number of years in certain universities, necessarily force a certain number of students to such universities, independent of the merit or reputation of the teachers. (WN, V.i.f.10)⁴

Similarly, when teachers are on salary rather than paid through student fees, Smith believed the quality of the teaching fell:

In modern times, the diligence of publick teachers is more or less corrupted by the circumstances, which render them more or less independent of their success and reputation in their particular professions. (WN, V.i.f.45)

In each of these cases, Smith is clearly linking quality to the reputation mechanism, and associating a fall in quality when the reputation mechanism is weakened with through

⁴ In a 1774 letter to William Cullen (Ross E. C., 1986, pp. 241-5), Smith provides an extended critique of the university degree system, and the validity of degrees in order to practice in fields such as medicine. He makes the arguments that a requirement for a degree from a university precludes private tutoring which may be as good or superior to university teaching, and that universities are unlikely to refuse a student a degree once they have attended for a set period of time and paid the university its fees. Since we are treating the published works in this paper, we only mention it here as a footnote.

government policy. In Smith's view, it is a robust reputation mechanism that ensures that quality remains high. He even applied the same logic of incentives to salaried clergy and traveling clergy:

The parochial clergy are like those teachers whose reward depends partly upon their salary, and partly upon the fees or honoraries which they get from their pupils, and these must always depend more or less upon their industry and reputation. The mendicant orders are like those teachers whose subsistence depends altogether upon their industry. They are obliged, therefore, to use every art which can animate the devotion of the common people. (WN, V.i.g.2)

Clearly Smith believed when a minister had to rely on his reputation for his compensation, he was incentivized to provide higher quality.

Repeat interaction is central to Smith's understanding of the reputation mechanism. When we are subjected to the discipline of the market and forced to compete in reputation, we exert ourselves towards greater virtue (whether that virtue is expressed as better teaching, preaching, or any other axis of performance). Anyone who is exempted from the discipline of the market and does not have to rely on their reputation for virtue loses the incentive to strive for virtue. When the government intervenes in the form of monopoly privileges, society's welfare is reduced because businesses and workers face less competition. Given the uncertainty associated with reputation (we presume in this section that reputation is not property-like), it is difficult to ascertain the exact truth of all statements relating to a person's (or business's) reputation. Defamation laws which shift the requirement to prove truthfulness to the speaker from the object of the statement would limit the free sharing of information, limiting the communication of true but perhaps harmful information about competitors. Since we have established in this section that Smith did not think government intervention was generally required

when reputation was violated, and we have established that he thought that reductions in competition weakened incentives to act virtuously, it appears plausible that he regarded defamation laws to be undesirable.

2.4 Conclusion

Having examined the texts of Smith's two major publications, we draw the conclusion that there is sufficient evidence to at least cast doubt on the notion that Smith supported the idea that reputation was covered by commutative justice and on the notion that he believed defamation laws were desirable. The preponderance of evidence seems to indicate that Smith saw far too much vagueness in the nature of reputation for it to be governed by commutative justice. The inherent uncertainty that exists both within the self about the self's virtue as well as the uncertainty about the virtue of the self to external observers leaves a high degree of indeterminacy about what behavior is owed to an individual. Furthermore, the obligations due a person as a result of his reputation are highly situation dependent, leaving even greater indeterminacy and lack of precision.

We do believe, after considering all the passages presented from TMS and WN, that he did not believe reputation was the proper subject of commutative justice, and between the remaining cells, that he leaned toward the more libertarian position (Cell 4). This is a tentative conclusion, and to go further, it will be necessary to layer a study of the LJ, where he discusses issues of reputation and defamation more explicitly and in more detail onto these initial results. We might ask, if Smith were inclined toward a libertarian view, why did he not simply say, in polite terms, that he thought reputation was nothing more than "the thoughts of others" as Pufendorf, Carmichael, and Hutcheson had done

(the quotations appear in the Introduction of this dissertation)? In other words, why did he not make an exoteric argument for reputation not being subject to commutative justice? Why did he not condemn defamation laws as unnecessary and even harmful? We have used examples from his published works throughout this paper which were exoteric and esoteric in each cell. One could argue when Smith makes his declaration concerning the hierarchy of sacred justice that he is writing exoterically. He clearly does not include reputation. But omission is always far more deniable than commission. Readers have to notice the omission and assert it was intentional, as we suggest in this paper. It is not immediately evident that Smith would have faced physical danger or even social ostracism. Given the emphasis Smith gives to prudence as a virtue, it is perhaps no surprise that he elects to take a more esoteric approach to his writing, and express himself in the way we would expect a bargainer to do. Most likely, he saw it as a way to ensure his continued prominence in the establishment and the mainstream, while trying to make small efforts to shift mainstream belief.

3. ADAM SMITH IN THE LECTURES ON JURISPRUDENCE: IS REPUTATION PROPERTY? SHOULD THERE BE LAWS AGAINST DEFAMATION?

3.1 Introduction

In the second chapter of this dissertation I explored the issue of reputation, asking whether Smith regarded reputation first as the proper subject of commutative justice, and if he thought laws protecting reputation were just. In that paper I relied only on his published works – The Theory of Moral Sentiments (“TMS”) and An Inquiry into the Nature and Causes of the Wealth of Nations (“WN”).

In this chapter I return to the discussion of reputation, seeking further clarification of the original questions, but I focus on what was recorded of Smith’s thinking on the subject by the students in his moral philosophy class which have become the text of the Lectures on Jurisprudence (“LJ”). I explore his system of rights and I propose that reputation presents a unique challenge to his system. In particular I use reputation to examine whether natural rights are intended to be synonymous with perfect rights, or whether natural rights refer to both perfect and imperfect rights.

It would seem at first glance that there is relatively little to say about reputation because Smith announces plainly that reputation is a natural right:

That one is injured when he is defamed, and his good name hurt amongst men, needs not be proved by any great discussion. One of the chief studies of a mans life is to obtain a good name, to rise above those about and render himself some way their superiors. When therefore one is thrown back not only to a level, but

even degraded below the common sort of men, he receives one of the most affecting and atrocious injuries that possibly can be inflicted on him. (LJA, i.25)

Unlike in TMS or WN, in this early passage of the LJ Smith makes an exoteric declaration that reputation is the same kind of right as life and liberty, and by implication on a par with them.

Smith follows Pufendorf and others in calling property an acquired right as opposed to a natural right, putting it into a category separate from life, liberty, and reputation. The implication would seem to be that reputation is in a special category of rights that gives it precedence over property – if we presume that “natural rights” are higher than “acquired rights”. It seems to answer the question I originally posed in the first paper quite plainly. Regardless of the question of property, based on these passages, it would seem reputation is a natural right like life and liberty, and therefore must be subject to the rules of commutative justice, and the laws that protect property should apply.

A closer look at the text of the LJ, however, makes this conclusion less certain. The student notes never show Smith returning to the subject of the origin of natural rights to clarify what they are or how they fit into the hierarchy of the system of rights he describes. He presents several overlapping categories of rights, and their definitions and relationships are not completely clear through the course of the lectures. This lack of emphasis and clarity may or may not have been intentional. It may or may not have been the result of copying errors or a lack of the note taker’s understanding. It is also possible that the loose dismissal of further discussion is intentional on Smith’s part.

It is clear that Smith's lectures followed in the "established pedagogy of Glasgow University" (Lieberman, 2006) of his predecessors Hutcheson and Carmichael.

According to Lieberman, Smith himself would have received the lectures from Hutcheson in this format when he was Hutcheson's student, since "Hutcheson's own textbook, *A Short Introduction to Moral Philosophy . . . Containing the Elements of Ethicks and the Law of Nature*, largely conformed in structure and approach to the model of Pufendorf as mediated by Carmichael" (Lieberman, 2006, p. 220). Ross notes that "Hutcheson made it clear that he wished to continue the tradition of his former teacher, Gershom Carmichael, in making the staple of his courses the classical Stoic tradition, revived in the seventeenth century by Grotius and Pufendorf..." (Ross I. S., 1995).

Haakonssen states further that,

The specific link between the general theory of moral sentiments and jurisprudence is the concept of rights. This is hardly used at all in the *Theory of Moral Sentiments*, but it is introduced in the *Lectures on Jurisprudence*. The concept of rights was of course central to the jurisprudential tradition, and Smith does to some extent follow writers like Pufendorf and Hutcheson in his definition of it. (Haakonssen, 1981)

I develop a reading that shows even as he declares reputation one of the three natural rights he indicates in numerous passages that only the young, foolish, and weak acknowledge attacks on reputation, while the mature, wise, virtuous, and strong simply ignore such assaults.

This chapter will be in two parts. First, I try to clarify the groundwork of rights that Smith discusses in the LJ, focusing particularly on those elements that apply to reputation. I rely especially on the work of Knud Haakonssen for his outline of rights. Second, I return to the analytical structure used in the previous chapter, examining the LJ

for textual evidence that shows whether Smith thought reputation was a perfect natural right or not, and whether he believed reputation should be protected by law.

3.2 Smith's System of Rights

The LJ has an extensive discussion of rights. Unfortunately for readers, given the nature of the LJ as a transcript of lectures, the discussion is not laid out in a deliberate fashion. Knud Haakonssen does an excellent job of sorting through the many references to the various rights and organizing them in his book The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith. The following graphic is reproduced from his analysis (Haakonssen, 1981, p.105):

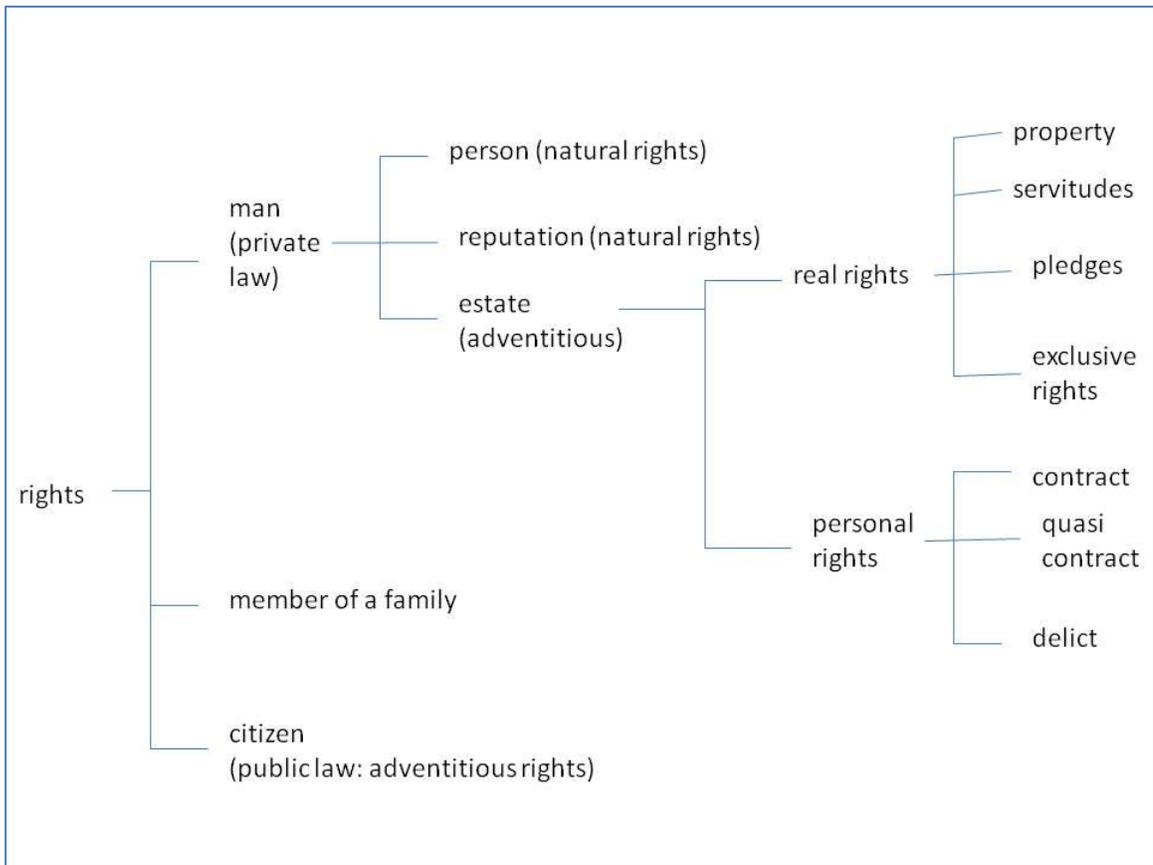


Figure 1. Haakonssen's Interpretation of Smith's System of Rights

Haakonssen's primary division of rights is based on the division of law Smith lays out in both versions of the LJ:

Let us consider then in how many ways justice may be violated, that is, in how many respects a man may be injured.—1st, he may be injured as a man; 2dly, as a member of a family; and 3dly, as a citizen or member of a state. Every injury that can be done a man may be reduced to some of these, and in all of these he may be injured without being affected when considered in any of the other views. (LJA, i.10)

Thus, the three areas of law Smith treats in the LJ are private law, domestic or family law, and public law. The three of these constitute Smith's study of jurisprudence. The concern of civil government, according to Smith, is to prevent violations of justice:

The first and chief design of all civill governments, is, as I observed, to preserve justice amongst the members of the state and prevent all incroachments on the individualls in it, from others of the same society.—That is, to maintain each individual in his perfect rights. Justice is violated whenever one is deprived of what he had a right to and could justly demand from others, or rather, when we do him any injury or hurt without a cause. (LJA, 10)

At the outset, we have a broad set of rights which can be subdivided into three general categories. The rights listed in the diagram above presumably are only the set of perfect rights, which Smith says are the subject of jurisprudence and commutative justice.

Imperfect rights, on the other hand, are not the proper subject of jurisprudence, although they are a matter for morality or distributive justice. Moving backward (to the left) on Haakonssen's graphic, we could picture an additional dichotomy where we have perfect rights and imperfect rights. Haakonssen's graphic would represent the perfect rights branch, though we will see that this division is not as clean as it may seem at first, since as we travel down the branches, we will find that some are more perfect than others.

Perhaps the most important difference between perfect and imperfect rights is the idea that perfect rights give the right holder warrant to use compulsion:

Perfect rights are those which we have a title to demand and if refused to compel an other to perform. What they call imperfect rights are those which correspond to those duties which ought to be performed to us by others but which we have no title to compel them to perform; they having it intirely in their power to perform them or not. Thus a man of bright parts or remarkable learning is deserving of praise, but we have no power to compel any one to give it him. A beggar is an object of our charity and may be said to have a right to demand it; but when we use the word right in this way it is not in a proper *but a metaphoricall sense*. The common way in which we understand the word right, is the same as what we have

called a perfect right, and is that which relates to commutative justice. Imperfect rights, again, refer to distributive justice. The former are the rights which we are to consider, the latter not belonging 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. (LJA, i.14, emphasis added)

We can compel people to perform those duties that are associated with perfect rights, but we cannot compel people to comply with those duties which are associated with imperfect rights. The imperfect right is a right only in a metaphorical sense – Smith recognized that we might use the same language, but with different meaning. Language and its meanings become particularly important as we move farther along the divisions of the tree, and arrive at Smith’s division between personal and real rights.

Because this paper is particularly concerned with reputation, I focus on the branch Haakonssen labels as “man (private law)”. Support for how Haakonssen divides private law into three further branches can easily be found in several places in the LJ:

A man merely as a man may be injured in three respects, either 1st, in his person; or 2dly, in his *reputation*; or 3dly, in his estate. (LJA, i.12; emphasis added)

I have now said all that I think necessary concerning the first branch of rights, under the 3 different classes of the right one has to his person, *to his character*, and property, and the injuries which may be done one in each of these respects. (LJA, iii.1; emphasis added)

As a man, he may be injured in his body, *reputation*, or estate. (LJB, 7; emphasis added)

At this branching point, Smith differentiates between two further categories of rights: natural rights and adventitious/acquired rights:

These rights which a man has to the preservation of his body and reputation from injury are called natural. Or as the civilians express them *iura hominum naturalia*. ... His rights to his estate are called acquired or *iura adventitia* and are of two kinds, real and personal. (LJB, 8)

From the perspective of punishment:

Crimes are of two sorts, either 1st, such as are an infringement of our natural rights, and affect either our person in killing, maiming, beating, or mutilating our body, or restraining our liberty, as by wrongous imprisonment, *or by hurting our reputation and good name*. Or 2dly, they affect our acquired rights, and are an attack upon our property, by robbery, theft, larceny, etc. (LJA, ii.94; emphasis added)

The division between natural rights and acquired rights is not new with Smith, nor is most of the structure of rights Smith refers to in the LJ. For example, Smith's mentor Francis Hutcheson wrote, "Private rights are either natural or adventitious. The former sort, nature itself has given to each one, without any human grant or institution. The adventitious depend upon some human deed or institution" (Hutcheson, 2007 (1742), p. 256). The adventitious rights come from social convention. Pufendorf makes a similar observation:

Some of these proceed from that *common Obligation* which it hath pleas'd the Creator to lay upon all Men in general; others take their Original from some certain *Human Institutions*, or some *peculiar, adventitious* or accidental *State* of Men. The first of these are always to be practis'd by *every* Man towards *all* Men; the latter obtain only among those who are in such peculiar Condition or State. (Pufendorf S. v., 2003 (1673), p. 63) (emphasis original)

Property is adventitious according to Pufendorf because it gains its special status from the state. Property, as well as "our Laws, Bodies, Limbs, Chastity, Liberty" are protected by our first mutual duty "that one do no wrong to the other". Pufendorf gives this duty the status of "first place" (p. 63). This duty is similar to Smith's commutative justice because Pufendorf explains that if we violate this duty, others may respond with violence. Thus, life, liberty, and property are perfect rights for Pufendorf, despite the fact that property is an adventitious/acquired right. Pufendorf then goes on to discuss esteem and

reputation in a chapter that immediately follows and gives the status of “second place” to the duty “that every man esteem and treat another, as naturally equal to himself, or as one who is a Man as well as he” (p. 67). Hutcheson, however, includes reputation in his list of perfect natural rights:

The private natural rights are either perfect or imperfect. Of the perfect kind these are the chief. 1. A right to life, and to retain their bodies unmaimed. 2. A right to preserve their chastity. 3. ***A right to an unblamished character for common honesty, so as not to be deemed unfit for human society.*** (Hutcheson, PM, 256, emphasis added)

Smith appears to work with this structure of natural and adventitious rights, including the fact that he includes the three perfect natural rights Hutcheson lists. Hutcheson goes on to list a total of eight in this passage, but these first three mirror Smith’s shorter list. Smith says there are “in all about a dozen” natural rights, but that “these may all be reduced to the three above mentioned” (LJA, i.13). Worth noting in this passage is the fact that Hutcheson says natural rights can be perfect or imperfect. This is interesting because Smith never discusses this point.

Imperfect natural rights for Hutcheson include two categories: first, people who are actually more virtuous have a natural right to “superior offices and services of humanity”; and second, the right of those in need to our charity, and the corresponding obligation to give charity to those in need. These rights are imperfect for different reasons. Regarding the right to superior offices, Hutcheson says “But as nature has set no obvious or acknowledged marks of superior wisdom and goodness upon any of mankind” no one has a right to assume “power over others without their own consent” (p. 131). Regarding the right to charity, Hutcheson says we have an obligation to provide it within

our means, given our judgment of the worthiness of the applicant. Worthiness is judged by “first, the moral characters of the objects, and next their kind affections towards us, and thirdly the social intercourses we have had with them, and lastly the good offices we formerly received from them” (p. 132). Pufendorf has a similar analysis of beneficence, though he does not use the phrase natural imperfect rights: “Among the Duties of one Man towards another, which must be practis’d for the sake of Common Society, we put in the third place this, That every Man ought to promote the Good of another, as far as conveniently he may” (Pufendorf S. v., 2003 (1673), p. 70). Both focus particularly on beneficence and gratitude, or what Smith referred to as distributive justice, and both conclude like Smith that neither should be forced. Pufendorf clearly has a hierarchy within his set of duties, with life, liberty, and property being in the first place and being enforceable by civil and natural law, down to beneficence in third place which is not enforceable by law.

Nonetheless, Haakonssen takes all natural rights to be perfect rights in Smith. Haakonssen represents the natural rights/acquired rights division only parenthetically on the chart, rather than creating another branch under private law. Smith does not expound on the difference between natural rights and acquired rights, although he goes into significant detail explaining the evolution of acquired rights. Despite his efforts to clarify acquired rights, Smith provides very little insight into natural rights. Whenever Smith discusses the origin of natural rights, he seems to perform a hand wave, stating that they do not really need to be explained because they are so obvious:

Now we may observe that the original of the greatest part of what are called natural rights {or those which are competent to a man merely as a man} need not be explained.

That a man has received an injury when he is wounded or hurt any way is evident to reason, without any explanation; and the same may be said of the injury done one when his liberty is any way restrain' d; any one will at first perceive that there is an injury done in this case. ***That one is injured when he is defamed, and his good name hurt amongst men***, needs not be proved by any great discussion... The only case where the origin of naturall rights is not altogether plain, is in that of property. (LJA, i.24; emphasis added)

And:

The origin of natural rights is quite evident. That a person has a right to have his body free from injury, and his liberty free from infringement unless there be a proper cause, no body doubts. But acquired rights such as property require more explanation. (LJB, 11)

Smith goes on to explain five ways that a thing becomes property, yet natural rights are so clear that they do not require further discussion. Haakonssen interprets Smith's idea of natural rights as original and universal:

some situations involving injury are so basic to human life that the spectator's verdicts will always be recognizably similar. That is why Smith is willing to adopt the traditional distinction between natural and acquired rights: some rights are so basic that they can be taken as universal or natural. (Haakonssen, 1981, p. 148)

What follows from this is that the spectator's verdicts between the ages, whether the age of hunters, shepherds, agriculture, or commerce would be the same when it comes to issues of natural rights. The impartial spectator witnessing murder in the age of hunters would also declare the same act in the age of commerce murder. In both cases the spectator would see an injury, in this case murder, and enter into resentment with the victim's family and friends equally. Theft, which is based on an understanding of property, would be different. A spectator operating with the construct of justice from the

age of commerce would see an injury if someone had his house broken in to, and his things taken. A spectator operating with the construct of justice from the age of hunters would not recognize an injury. The spectator from the age of commerce would feel resentment toward the burglar, whereas the spectator from the age of hunters might disdain the burglar, but not see an injury. The spectators across ages would generally be in agreement with each other about what constituted violations of natural rights. With acquired rights, the individual spectator's judgment would reflect the respective periods, and there will likely be variation over a wide range of actions.

Irrespective of whether the violation is a violation of natural rights or acquired rights, if the impartial spectator agrees that a person has been injured, Smith allows that the person could respond justly to reclaim what was his, or punish the transgressor. Haakonssen sees justice and injury linked together in Smith thinking, and it is injury that defines rights: "And what the impartial spectator recognizes as injury is definitive of absolute rights and justice" (Haakonssen, 1981, p. 100).

As already discussed, willful injury is an important difference between commutative justice and distributive justice. Commutative justice is violated when a person willfully disregards a second person's perfect rights and causes the second person harm. To violate commutative justice, the violator must violate a right he was under obligation to respect (a perfect right), and he must make the violation willfully. The failure to give charity to a beggar may, in a sense, lead to harm for the beggar, but Smith, following Pufendorf and Hutcheson, says society recognizes only a moral obligation in that case, and therefore even if the beggar comes to harm as a result of a person's lack of

generosity, the beggar has not been injured by the uncharitable person. Another important difference between commutative and distributive justice is the focal nature of commutative justice. Commutative justice is precise and accurate in rules, whereas distributive justice, which concerns itself with imperfect rights, is loose, vague, and indeterminate. It requires extensive knowledge of the specifics of a situation and the social context of the actors. As Haakonssen asserts for Smith:

There are areas of morality which are so basic and universal in their humanity that the impartial spectator need know little or nothing about the individuals involved in them in order to determine his sympathies, and punishment is certainly one of them. (Haakonssen, 1981, p. 116).

The rules of commutative justice are focal such that the men in any period will generally reach concurrence with relatively little quibbling, and the rules of commutative justice which apply to natural rights in particular are general in nature. Punishment is the proper subject of commutative justice, and proper punishment arises only from violations of perfect rights.

A. Is Reputation a Perfect (Natural) Right?

I will turn now to the first question of my analysis. As in the previous chapter, I first ask if reputation is covered by commutative justice. Is reputation like property? Can we extend something like property rights over it? I will consider evidence supporting each side of the question.

1) Evidence Supporting Reputation as a Perfect (Natural) Right.

In this section I will first gather the textual evidence from the LJ in support of the idea that Smith thought reputation was a perfect natural right. I will also attempt to show

how Smith's concepts of property and contract might be applied to reputation in order to support the idea that Smith regarded reputation as a perfect right.

As we have already established, Smith defines perfect rights as "those which we have a title to demand and if refused to compel an other to perform" (LJA, i.16). In this section we will examine the evidence which supports the perspective that Smith did indeed believe that reputation was a natural and perfect right.

First with regard to reputation as a natural right, Smith lists reputation as a natural right in both sections of the LJ:

Now we may observe that the original of the greatest part of what are called natural rights {or those which are competent to a man merely as a man} need not be explained.

That a man has received an injury when he is wounded or hurt any way is evident to reason, without any explanation; and the same may be said of the injury done one when his liberty is any way restrain'd; any one will at first perceive that there is an injury done in this case. That one is injured when *he is defamed, and his good name hurt amongst men*, needs not be proved by any great discussion. (LJA, i.24; emphasis added)

and

These rights which a man has to the preservation of his body and *reputation* from injury are called natural. Or as the civilians express them *iura hominum naturalia*. (LJB, 8; emphasis added)

Smith says that natural rights "need not be explained" because we presumably all agree on what they are, and he puts reputation into the "natural rights" category. Smith does not articulate in the LJ that all natural rights are also perfect rights, nor does he articulate as Hutcheson did that natural rights are divided between perfect and imperfect rights.

These passages and others make it seem that Smith thought reputation belonged in the same general category as the rights to life and liberty in the sense that they were all

“natural rights.” Does simply applying the natural rights label mean that they were also perfect? There is textual evidence that Smith did believe reputation, at least by some definition, was a perfect right.

In the preceding passages Smith lists reputation following bodily integrity and liberty, without offering any sense of hierarchy or order of importance. It is possible to read these passages, then, as Smith placing reputation on par with life and liberty. This perspective is further supported by the following passage:

The end of justice is to secure from injury. A man may be injured in several respects.

1st, as a man

2dly, as a member of a family

3dly, as a member of a state.

As a man, he may be injured in his body, *reputation*, or estate. (LJB, 7; emphasis added)

Here again we see Smith putting reputation alongside harm to the body, but now adding property, which adds support to the idea that he thought reputation was not only a natural right, but a perfect right as well. He makes a near identical statement in the LJA: “A man merely as a man may be injured in three respects, either 1st, in his person; or 2dly, in his reputation; or 3dly, in his estate” (LJA, i.12). Indeed, Smith uses very strong language to refer to injuries to reputation:

A man may be injured in his reputation, by affronts, by words, and by writings. An affront in company is a real injury; if the affront be offered in words it is a verbal injury, if in writing it is a written injury... Affronts in company are most atrocious crimes. (LJB, 193)

Smith asserts in the WN that even at the earliest age of human development (the age of hunters), when property rights are extremely limited and few things have the certainty of being regarded as property, people can suffer injury to their “persons or reputations”:

Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days labour; so there is seldom any established magistrate or any regular administration of justice. Men who have no property can injure one another only in their persons or *reputations*. (WN, IV.i.b.2; emphasis added).

When Smith associates injury with person and reputation, he implies that there is a perfect right: “Justice is violated whenever one is deprived of what he had a right to and could justly demand from others, or rather, when we do him any injury or hurt without a cause” (LJA, i.10). To know when an injury has occurred, Smith applies the test of the impartial spectator:

we may conceive an injury was done one 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 any violent attack, or used force to recover what had been thus wrongfully wrested out of his hands. (LJA, i.38)

If it is possible to be injured in person *or reputation* even in the age of hunters, then it must be that the impartial spectator, who respects the age’s sense of justice, would have to concur that these were perfect rights.

Acknowledging that it is possible to be injured in our reputation, we have to ask what it means for one to be injured in his reputation. Smith states that we can be injured in our reputation if someone causes others to regard us as below the “common standard”:

A man is injured in his reputation when one endeavours to bring his character below what is the common standard amongst men. If one calls another a fool, a knave, or a rogue he injures him in his reputation, as he does not then give him that share of good fame which is common to almost all men, to perhaps 99 of 100. (LJ, 49)

Smith is making a claim here for the possibility that we can be injured when our reputation is harmed.

Furthermore, a person can be injured by false accusation if that false accusation causes the victim to be regarded as unfit for society. A false accusation that implies the victim has violated a law can make him appear to be the proper object of resentment, and consequently certainly reduces him to a social status. The injury caused by false accusations comes from being subjected to legal action:

Verbal injuries are redressed both by ancient and modern laws. When a person is accused by words it sustains a process before a court of justice. If he be accused of forgery, theft, or any crime, as he may be subjected to great dammages he is entitled to sufficient redress. (LJA, i.13)

The outcome of being branded a thief or robber would have exposed the individual to the possibility of severe punishment, and likely left him a defective member of the state (if he was not killed – a common punishment for theft in his time, Smith notes). The actual harm here is a direct result of falsely changing a person’s status from full citizen to something less than full citizen and subject to punishment. Even if the injury does not trigger a legal action, it can cause people to be treated as if they were less than full citizens:

The injury does not consist in the hurt that is done, but in the necessity it puts one to, either of exposing his life in a duel, or being for ever after despised and contemned as a poor, mean–spirited, faint–hearted wretch by those of his own rank, from whose company he will be ever afterwards excluded. (LJA, ii.137)

This passage could be read as Smith’s endorsement that violence was justified in order to defend one’s reputation if one was insulted, implying that we have a perfect right to our reputation. We have a right to exclude others from doing harm to our reputation, and in this sense it is similar to property.

The bar for treating injuries to reputation as violations of commutative justice seems fairly high. In order to violate commutative justice, we have to drag a person's reputation down to the point where he is something well below average. He is explicit that we do not violate commutative justice or an individual's perfect rights by not giving them all the recognition that they might deserve:

But, again, if one calls another an honest good natured man, tho perhaps he deserved a much higher character, he can not complain of any injury being done him, as that is the character due to the generality of men... Thus a man of bright parts or remarkable learning is deserving of praise, but we have no power to compel any one to give it him. (LJA, i.14)

It seems Smith's standard of 99 out of 100 indicates that we violate commutative justice only when we accuse someone of behavior that is several standard deviations below the propriety – which should be the 50th percentile. It seems we can meet our requirements for respecting an individual's reputation, by simply abstaining from accusing him of vile behavior.

However, in the second set of student notes we find Smith making a qualifying remark that seems to lower the bar substantially to qualify a remark as a violation of commutative justice. Instead of treating an individual as meeting the minimum standards to be a member of society, Smith makes reference to treating an individual with the respect due an individual in light of his profession:

We do not however injure a man when we do not give him all the praise that is due to his merit. We do not injure Sir Isaac Newton or Mr. Pope, when we say that Sir Isaac was no better philosopher than Descartes or that Mr. Pope was no better poet than the ordinary ones of his own time. **By these expressions we do not bestow on them all the praise that they deserve, yet we do them no injury, for we do not throw them below the ordinary rank of men in their own professions.** These rights which a man has to the preservation of his body and reputation from injury are called natural. (LJB, 8; emphasis added)

Treating someone as meeting the ordinary rank of a man in his profession is a much higher standard for not doing injury than treating someone as barely suitable for society. This creates a wide gap between the two possible definitions of perfect right to reputation. It makes it much easier to violate someone's reputation – the higher standard of professional standing lowers the bar for what is a violation.

Smith acknowledges he borrows the idea of perfect and imperfect rights from Pufendorf and Hutcheson (LJA, i.14). Since Smith references these writers, we can go to each of their texts to see how they dealt with the question of reputation and whether they regarded it as a perfect or imperfect right in pursuit of some clarification about Smith's perspective.

Like Smith, both Pufendorf and Hutcheson propose a division of reputation into a portion which is protected as a perfect right, and a portion which is not protected and therefore an imperfect right. Pufendorf labels the portion of reputation that is a perfect right "simple esteem", and the portion that is an imperfect right he labels "intensive esteem". Pufendorf's description of simple esteem follows:

Now that is **simple esteem** inside a state, by which each **one is regarded at least as an ordinary and a complete member of the state, or as one who has not been declared a defective member of the state according to laws and statutes**. And any and all free men and respected, or those who have not been branded by disgrace in process of law, rejoice in that esteem. This esteem is lost as a result of antecedent misdeed, when some one, in accordance with the laws, because of a definite kind of misdeed (for not all misdeeds extinguish esteem in a civil sense), is branded with infamy; and this consists either in his being eliminated at the same time from natural existence; or utterly ejected from the state; or else retained, indeed, in the state, yet not as a complete member, but as a defective member, so that he rejoices, indeed, in domicile within the state, and in the common protection of the laws, but is excluded from public official duties and honourable

associations, and is disdainfully deprived even of individual intercourse with all but the base. (Pufendorf S. , 1931 (1672), p. 95)(emphasis added)

Pufendorf makes the case here that we have a perfect right to simple esteem, so long as we are not convicted of some misdeed which earns us a lesser status. The emphasis Pufendorf places on some sort of due process lends strength to the claim that simple esteem is a right which we can only lose when we have been properly prosecuted. Like liberty, it is a right which can only be taken away after cause is shown.

For Pufendorf, simple esteem is actually a status of citizenship and is determined by a “process of law”. A modern parallel to the loss of simple esteem for Pufendorf would be the loss of status a convicted felon experiences in many places in the United States. Even when a felon has paid his fines or served his prison sentence, he is frequently left a defective member of society (to use Pufendorf’s term) because of laws which forbid a felon to vote or hold certain positions and offices. Depending on the nature of the conviction, a person may be forbidden from entering certain parts of the community (in many jurisdictions convicted sex offenders must register with the state and are not allowed to live or work within a certain radius of schools for example). Persons who are reduced in their status from complete members of society clearly suffer a loss. For Pufendorf this is exclusion from “public official duties and honourable associations”, implying this exclusion is at least in part an official change in status. Pufendorf uses the example of panderers and prostitutes in The Whole Duty of Man as examples of persons who exist within society, but are below the common esteem:

As likewise that of Panders, Whores, and such like, whose Lives are accompanied with Vice, at least the Scandal of it. For tho’, whilst the Community thinks fit publickly to tolerate them, they participate of the Benefit of the Common

Protection; yet they ought however to be excluded the Society of Civil Persons. (Pufendorf S. v., 2003 (1673), p. 161)

This reduction in status and the consequent formal and informal restrictions might be a significant part of the injury Smith refers to when he says that a person's reputation is injured when someone endeavors to bring it without due process "below what is the common standard amongst men".

Hutcheson also uses the idea of "simple" esteem in his writing on reputation: "The simple estimation, or character of common honesty, is so much every man's right, that no governors can deprive one of it at pleasure, without a cause determined in judgment" (PM, 542). Hutcheson's statement that simple esteem can only be taken away after a judgment also implies a right and a public status.

Pufendorf offers a second category of esteem he calls "accumulative" or "intensive" and correlates it with reputation:

That is intensive esteem, in accordance with which persons equally honourable in civil capacity are preferred one above another, in proportion as one has a larger share than another of those things whereby the minds of others are commonly moved to show honour. Now honour, which corresponds to the intensification of esteem, is properly the signification of our judgement concerning the superiority of another; and therefore, *in truth, honour is not in the person honoured but in the person who shows honour*, although by a certain kind of metonymy, esteem also itself, or that which deserves honour, is denoted by this word, and, in a special sense, definite statuses which honour is wont to accompany, are called honours, because in due course these statuses are bestowed only upon those who surpass others in some point of superiority. That same esteem, as far as *it produces in others the opinion* of a special prudence and wisdom regarding the determination of practical affairs or of theoretical truths, is called authority. And as far as it suggests the widespread recognition of that superiority among large numbers of men, it is called *reputation*. (Pufendorf S. , 1931 (1672), p. 96) (emphasis added)

Like Pufendorf, Hutcheson says: “The higher estimation, or intensive, as some call it, is not a matter of perfect right; as no man can at the command of others form high opinions of any person, without he is persuaded of his merit” (PM, 542).

These passages may help illuminate the origins and substance of Smith’s thinking about our obligation to the reputations of those who are above the common level. Smith does not use the distinct wording Pufendorf and Hutcheson embraced, but as I have shown, he retains the idea of a division. The passages in the LJ are plain and exoteric: we have a negative, perfect right to a minimum standard of reputation, perhaps the kind of reputation Pufendorf and Hutcheson called “simple esteem”, but no perfect right to any claim of reputation above the common level. Reputation, in this sense is a natural right because it precedes the establishment of government, just as rights to life and liberty do.

Pufendorf makes the highly libertarian statement with regard to intensive esteem that “honour is not in the person honoured but in the person who shows honour” and it is only “by a certain kind of metonymy”, that we say the honor is in the honored person. Elsewhere he says, “For Honour is properly, the Signification of our Judgment concerning the Excellency of another Person” (Pufendorf *S. v.*, 2003 (1673), p. 161). Intensive esteem is not a thing which belongs to us. When lots of people are willing to honor us, Pufendorf says we have a reputation, but this reputation clearly exists in the minds of other men. In his commentary on Pufendorf, Carmichael says true reputation “is nothing but the opinion of one’s excellence on the part of other men, particularly of good and sensible men” (Carmichael, 2002 (1724), p. 68). Hutcheson is quite explicit about intensive esteem as well, saying that we cannot command a person to have a high

opinion of someone else. Both indicate that intensive esteem exists in the minds of others, and is not something inherent in the individual.

For Pufendorf, Hutcheson, and ultimately Smith, “intensive esteem” or the higher forms of reputation seem to correlate with rank or distinction. For Pufendorf, intensive esteem is about being “preferred one above another” and possessing a “larger share than another” of the things which earn us honors. Smith articulates the idea of rank or distinction by saying we do not injure Newton or Descartes by arguing one was better than the other. Alexander Pope is not injured if we say that he was no better than any other poet of his time. We do not injure them when we fail to find the right place in the hierarchy of exceptional scholars and authors, so long as “we do not throw them below the ordinary rank of men in their own professions” (LJB, 8) As with most basic evaluations of commutative justice, the right to (simple) reputation seems to be binary. Unless proved otherwise, a person has a right to be free of accusations which would cause them to be regarded as unfit for society. Beyond this binary “Yes, fit for society”/“No, unfit for society” judgment, it would seem issues of precise rank are a matter for casuistic analysis and distributive justice.

At first blush, then, Smith seems to follow the logic of Pufendorf and Hutcheson’s simple esteem/intensive esteem dichotomy fairly well. But as noted earlier, Smith goes beyond the simple esteem as described by Pufendorf and Hutcheson when he considers men not merely as members of the state, but also as members of a profession. Whereas Pufendorf’s and Hutcheson’s definition of simple esteem extends the protection of

perfect right status to a person's status as a citizen, Smith extends it to include a person's status within a profession. Again, in the LJ Smith says a man may be injured:

...in his reputation, either by falsely representing him as a proper object of resentment or punishment as by calling him a thief or robber, or by depreciating his real worth, and endeavouring to **degrade him below the level of his profession. A physician's character is injured** when we endeavour to persuade the world he kills his patients instead of curing them, for by such a report he loses his business. (LJB, 8) (emphasis added)

The "thief or robber" portion of this statement seems to correspond to Smith's "99 of 100" measure and the protection of simple esteem. The second portion of the passage, however, where Smith refers to the harm to a physician gives us a specific example of throwing a man below the common level of his profession. This example expands the range of protected reputation beyond what is defined by Pufendorf and Hutcheson. Reputation is no longer simply a question of whether the person is fit for society or not. It is not a question of whether the person has the full rights of citizenship. Instead Smith proposes a broader, more inclusive standard which requires us to respect not only the fact that a person is fit for society, but that he is fit for his profession. If we convince the world that a particular physician kills his patients instead of curing them, he will certainly lose business because we are convincing the world that he is unfit for his profession. We can regard a person's status as a physician from the binary lens of Pufendorf's simple esteem: a person who does not kill his patient might be a doctor; a person who kills people is not a doctor. These are clear, grammar-like distinctions and it seems then that this distinction could fit the commutative justice standard. If we make the accusation that a physician kills his patients, we are not making a relative comparison. A relative comparison would be saying that one physician is better than another. Relative

distinctions above the level of basic fitness are the subject of distributive justice and imperfect rights. If we are actually saying that this physician is not fit to be called a physician, we are attempting to bring him below the common reputation for his profession. We injure the physician by reducing the value of his practice, since the value of his practice is entirely contingent on his continued reputation as a healer. The physician's reputation as being fit for his profession is an intangible economic asset with real value.

A similar passage occurs later in the LJ, where Smith is explicit about the economic value of reputation:

A dealer is afraid of losing his character, and is scrupulous in observing every engagement. When a person makes perhaps 20 contracts in a day, he cannot gain so much by endeavouring to impose on his neighbours, as the very appearance of a cheat would make him lose. Where people seldom deal with one another, we find that they are somewhat disposed to cheat, because they can gain more by a smart trick than they can lose by the injury which it does their character. (LJB, 327)

Thinking of reputation as property-like, as something that is ours, in turn allows us to think of reputation as built on a sort of social capital. We can imagine earning reputation social capital by behaving in a virtuous manner. The accumulation of reputation social capital becomes our character, which has economic value. The argument ignores issues of social status and focuses instead on trustworthiness in exchange. The more frequently an individual has business dealings, the more important it is for him to maintain a reputation for honesty. Just like Smith's example with the doctor, the merchant whose reputation is injured would lose business. The merchant is scrupulous in every

engagement in order to build up reputational capital, and fears losing his accumulated capital because it has economic value.

Following the line of analysis that professional reputation is an economic asset allows us to look at it as property-like for Smith. If we take Smith's statement that professional reputation is on par with the simple esteem of Pufendorf and Hutcheson, it is clear his definition is much more expansive. With regard to reputation being a natural right, we know Smith did not regard all things we refer to as "reputation" as belonging to a protected class like property. Treating reputation as property-like does not necessarily deny reputation's status as "natural", nor as a perfect right. Smith regards property as a real right, which grants it perfect right status. Thus, even if we could conclude that Smith really did not consider reputation a natural right, we could not simply conclude that it was therefore not a perfect right or the object of commutative justice. Where the division is exactly between simple and intensive esteem is quite unclear – particularly in Smith's writing, because commutative justice requires specific rules to enforce a perfect right. The higher bar of simple esteem would seem to be closer to a grammatical definition of reputation that Smith tended to endorse as fitting commutative justice and perfect rights. The inclusion of profession significantly complicates treating reputation as a perfect right as it dramatically lowers the bar people would have to cross to claim their perfect rights had been violated, while simultaneously requiring a high degree complex reasoning. Defining what ordinary rank means within a profession introduces significant ambiguity. With this problem in mind, I now turn to examining the evidence showing perhaps Smith did not think reputation was a perfect natural right.

3.3 Reputation as an Imperfect (Natural) Right: Reputation is Not Like Property, it is Not the Object of Commutative Justice

In the previous section I established that Smith did not regard all aspects of reputation as protected. He declares that there is a portion of reputation which is not protected as a perfect right. In this section I go further. I consider textual evidence that perhaps Smith did not believe firmly, or perhaps not at all, that the remaining portion of reputation was a perfect right, and therefore not the object of commutative justice.

A. Reputation as Simple Esteem: An Issue of False Accusation?

If we start by assuming the basic level of reputation Smith refers to as being protected is actually well represented by Pufendorf's concept of simple esteem, one question to ask is whether this is what we think of reputation today, or even if it was reputation in the way it was thought of during Smith's time. If we limit reputation to simple esteem, we limit what can possibly be regarded as an injury to reputation as those things which can lead to formal action against an individual. Smith makes several statements that indicate he supported that level of protection – but is this protection for one's reputation? If we take a right to simple esteem as being a right to be free from legal actions generated by false accusation, are we talking about reputation? For example, Smith says that libel can lead to a formal proceeding against an individual: “Written injuries are subjected to severer punishments than verbal ones, as they are more deliberate malice. Abusive words in a libel give a process tho' the same words would not if spoken” (LJB, 194). Although Smith is quoting current practice in this case, we can see how he is differentiating between libel and slander based not on the insulting accusation, which could be exactly the same, but the fact that a libel is more likely to

result in a formal proceeding against the individual. The willful nature of an act is critical in determining if it is in fact a crime. The fact that libels were more likely to cause harm than slanders coupled with the fact that libels require more deliberate effort clearly makes the same statement in writing a much worse offense than the same statement made verbally. Further clarity is provided by the following passage:

Verball injuries are of all others least easily prevented, as there is nothing so ungovernable or which is so apt to offend on a sudden as the tongue. Those which are of little moment are not heeded by the law; tho some of them are punished very severely according to the strict laws of honour. The law however gives redress for the more important ones which might be of prejudice to the person. Thus if one is said by another to have been guilty of murder, adultery, or any other crime which would make him liable to punishment, he may have redress before the civill court. (LJA, ii.140)

Again we see that Smith focuses on the process of law that can be triggered by a false accusation. Slander is generally not heeded by the law, unless it brings about the possibility of punishment. In both of these passages, we see Smith referring to the current state of the law, without offering explicit approval or disapproval.

In some of Smith's discussions of defamation, he considers both acts of defamation against individuals as people, and acts of defamation against property rights. For example, he says in this passage that the title a person's home can be slandered in such a way that it raises questions about the validity of the title:

Verbal injuries are redressed both by ancient and modern laws. When a person is accused by words it sustains a process before a court of justice. If he be accused of forgery, theft, or any crime, as he may be subjected to great dammagages he is entitled to sufficient redress. In the same manner if a person's right or tittle be slandered he suffers an injury. If I say you have no more right to your own house than I have, it is an injury, as it may excite those who have pretended tittle. (LJB, 193)

And:

Or if one injures anothers title, e.g. affirms that I have no better title to the house he possesses than he has, as by this means he may give me trouble by setting others to raise a claim against me, he may be called to account before the court. (LJA, ii.141)

In this passage we can see that Smith treats the topic of slander generally, moving from the individual to his property. Even if reputation itself is not treated as a right, causing someone to be brought before a court to defend themselves could be regarded as an injury in itself, as that person must defend themselves in order to prevent harm being done to them by the judicial system. It would be reasonable to support defamation laws in order to reduce the likelihood of false claims. Indeed, Smith says here we are entitled to redress if we are falsely accused. The reference to slander of title indicates that he is not only concerned with the single incident of slander, but that one slander will lead to another, as pretenders to title will see an opportunity to exploit. Strong defamation laws would punish such behavior. The emphasis in this case is on outcomes.

Smith's discussion of perjury shows that he regarded false accusations levied against a person that result in legal action as a dangerous crime. The following passage follows a discussion of forgery, to which he compares perjury:

Perjury is a crime no less dangerous. For by it one may be deprived of his estate, or his life itself. The false oath of a witness may bring all that about... There are indeed some cases where one may be executed from perjury, but then that is not as a perjurer but as a murderer, having by his false oath been the occasion of a mans suffering innocently, and this extends to the subborner as well as other cases of perjury. (LJA, ii.161)

Smith is concerned about perjury not principally for the risk it poses to a person's life, liberty, and property. He points out that when people have been executed for perjury,

they are executed because of the suffering they have caused someone else, not for lying. Lying in this instance is simply the weapon used to commit murder.

Generalizing from this extreme case, I think we can start to see that perhaps Smith did not see attacks on reputation in themselves as a violation of rights. Instead it is what the slander or libel bring about that we could say we have a right to be free of. As quoted earlier, “The injury does not consist in the hurt that is done, but in the necessity it puts one to” (LJA, ii.137). Being free of bodily harm, confinement, or loss of property is already protected by our rights to life, liberty, and property. What Pufendorf and Hutcheson identified as simple esteem, and what Smith rolls into a broader definition of reputation, does not really seem to exist independently of other rights. When Smith says we injure a man by treating him as undeserving of the status enjoyed by the vast majority of all men (99 of 100), what is the nature of the injury? The two kinds of injury he makes explicit reference to in the LJ are first, falsely representing someone as a “proper object of resentment”, and second, by degrading him “below the level of his profession” (LJB, 8). My discussion so far in this section has related to the first kind of injury, which I believe correlates most strongly with the simple esteem concept. To conclude this discussion of reputation as simple esteem I would argue that Smith’s text supports the idea that actions which result in someone facing a formal process which would label them the proper object of resentment are indeed a violation of their rights. They are, however, a violation of rights that stand apart from reputation. A person who brings about a formal process through false accusation commits an assault on the individual accused. The assault is on the victims’ person, liberty, or property depending on the consequences.

Smith's thinking about perfect rights and commutative justice always brings us back to general rules that can be thought of in grammar-like terms (TMS, III.vi.11). Feelings of resentment are associated mostly with violations of commutative justice. If an individual is subjected to a false accusation that causes him to be treated as the object of resentment, then the individual's perfect rights would have been violated. In this case, to call what occurs a violation of reputation is more of a metaphor. What is really violated is the victim's perfect rights to other things.

B. Problems in Treating Professional Reputation as a Natural Perfect Right

The second way Smith says a man can be injured in his reputation is by degrading him below the level of his profession. There are two reputations that require specification for professional reputation to be treated as a perfect right and the object of commutative justice: there is the reputation of the profession, and the reputation of the individual within the profession.

Smith shows professions are constantly emerging and changing with the extent of the division of labor. If the professions are constantly emerging and changing, can professional reputation hold the constancy of a natural right? Furthermore, professions are not only constantly emerging, but professions are changing status in relation to each other. Both of these create issues of finding grammar-like rules for dealing with the reputation of a profession, and ascertaining what the level of a profession is.

Smith explains that professions come about as a result of the division of labor. In the early ages there is less division of labor and fewer professions. Like property, the professions come into existence and disappear as human civilization advances through

the ages. He famously says in the WN that division of labor is limited by the “extent of the market” (WN, I.iii.1). A precursor to the thought appears in the LJ:

We may observe on this head that as the division of labour is occasioned by immediately by the market one has for his commodities, by which he is enabled to exchange one thing for every thing, so is this division greater or less according to the market. If there was no market every one would be obliged to exercise every trade in the proportion in which he stood in need of it... Hence as commerce becomes more and more extensive the division of labour becomes more and more perfect. (LJA, vi.64)

In the age of commerce we see the most perfect division of labor as people reach their highest level of specialization:

The age of commerce naturally succeeds that of agriculture. As men could now confine themselves to one species of labour, they would naturally exchange the surplus of their own commodity for that of another of which they stood in need. (LJB, 150)

These passages show that specific professional reputations are not fixed. In fact, in the early ages, most professions do not exist. In this sense, *professional* reputation is more like an acquired right than a natural right. Professional reputation is like property since the profession of shepherd cannot exist until society has advanced into the age of shepherds, when property over animals is recognized.

Not only does Smith show that the number of possible professions evolves, but the relative status of those professions changes. Smith asserts, “In a rude society nothing is honourable but war” (LJB, 300), and he notes from literature that Ulysses preferred to be known as a pirate rather than a merchant:

We see that in the Odyssey, Ulysses, who very seldom gives a true account of himself, is often asked whether he was a merchant or a pirate. The account he generally gives of himself was that he was a pirate. We see too that this was a much more honourable character than that of a merchant, which was always looked on with great contempt by them. A pirate is a military man who acquires

his livelyhood by warlike exploits, whereas a merchant is a peaceable one who has no occasion for military skill and would not be much esteemed in a nation consisting of warriors chiefly. (LJA, iv.64)

The standard of what is honorable and worthy as a profession changes over the ages, and is not immutable. According to Smith, as society moves from the rude society of the age of hunters to the more refined age of commerce, the number of professions does not just grow, but it changes order in status. In the age of commerce, pirates were criminals (LJA, ii.154). Smith bemoans the mistreatment of merchants saying that treating them with less respect than they deserve slows economic progress: “This mean and despicable idea which they had of merchants greatly obstructed the progress of commerce” (LJB, 302). Despite their mistreatment it is clear that the profession of merchant certainly rises relative to piracy as society advances through the ages. Thus, we can see that there is evidence in Smith that the standard of professions changes both in absolute terms as new professions come into existence, and in relative terms as the status of professions change relative to each other.

The standards of reputation with respect to profession are not constant or universal as we would expect if they were a natural right. What is protected becomes much more than a formal relationship between the individual and the state. There is some significant difficulty with the question of how to define the ordinary rank of men in their own professions. An ordinary doctor might warrant significantly higher esteem than perhaps an ordinary garbage collector. If we happen to meet a man on the street and not have knowledge of his profession, how would we know what level of esteem he deserves? We could potentially unwittingly violate all manner of individuals’ rights to

reputation all day long if we lived in a large city. The bar measuring the threshold for violating commutative justice would be highly variable and subject to extensive debate. If one is thrown below the level of one's profession, it is not clear in a grammatical sense what the damage is. Are lawyers at a level below doctors? Are they above teachers? How do they compare to baseball players? It appears that the relative level of a profession's reputation is loose, vague, and indeterminate.

Given that the reputation of a profession cannot be specified in a way that would allow it to fit the grammatical nature of commutative justice, can we specify an individual's reputation within a profession? Can we arrive at a grammatical definition that provides the kind of clarity necessary for the application of commutative justice? If Smith thought we had a perfect right to our reputation within a profession, he would have been granting that reputation is like property- something we would have a right to defend with violence if necessary. The standard to consider is whether an individual has the right to protect his minimal reputation to be a member of the profession, since he makes it clear that we do not have a right to an exceptional reputation within our profession.

There are two ways defamation could potentially violate a perfect right to reputation within a profession. The first would be if the defamation were a false accusation that caused a legal proceeding, like a hearing before a licensing body, where the person could be removed from his profession as a result of the accusation. Smith does not mention this circumstance specifically with respect to professional reputation, but it would fit with his mention of defamation resulting in legal action. Smith says the "physician's character is injured when we endeavor to persuade the world he kills his

patients instead of curing them” (LJB, 8). If our accusation that a physician kills his patients is taken seriously, and the result is the physician is brought before his licensing body, then the physician would face the prospect of losing his license if the charges were believed. This circumstance is like that for simple esteem. If he loses his right to practice, he has clearly been reduced below the level of his profession. In this case the issue is not reputation, but the physician’s freedom to engage in an occupation which has been unjustly taken from him. His liberty is violated.

The second possibility is in line with his specific mention of profession – that people would believe the defamatory statements and consequently the person would lose business. It is obvious that this is immediately a looser definition of harm than the first circumstance where the physician loses his license. Like the reputation of the professions themselves, individual reputation within a profession is variable and constantly changing. The skills and services a physician needs to maintain change with the industry, and an individual physician may not be able to keep up with those changes, or might not be capable of performing the tasks the industry demands as it advances. An 18th century physician might have been an expert at the application of leaches and bleeding. From today’s standard, we would say that 18th century physicians did indeed kill their patients, at least some of the time. Less dramatic examples of evolving industry standards occur every day: physicians and other practitioners of knowledge-based fields (accountants, lawyers, etc.) who might, at the peak of their careers, have been amongst the best practitioners eventually tire of keeping up with their industries and choose to retire or leave the field when they realize that they are falling below the standard of their

professions. Even within relatively unchanging fields, such as sport, athletes rise and fall within the sport, eventually arriving at a place where they are no longer fit to be called athletes. Virtually every participant of every profession eventually reaches a point where he or she is no longer capable of practicing the profession, and his or her reputation reflects that fact, even if the profession does not change. As Hayek points out, businesses and businessmen compete to create reputations to convince customers they offer the best solution to the customer's problems:

In actual life the fact that our inadequate knowledge of the available commodities or services is made up for by our experience with the persons or firms supplying them – that competition is in large measure competition for reputation or good will – is one of the most important facts which enables us to solve our daily problems. The function of competition is here precisely to teach us who will serve us well: which grocer or travel agency, which department store or hotel, which doctor or solicitor, we can expect to provide the most satisfactory solution for whatever particular personal problem we may have to face. (Hayek, 1948, p. 97)

Thus, having one's reputation fall below the ordinary rank of men is a normal occurrence in the process of economic competition. The battle of bookstores we have seen in recent years demonstrates such competition. The Borders mega-stores showed customers that local mom-and-pop stores were inferior. The common level of the profession as a bookseller changed as Borders demonstrated a new and better way of delivering book buying services. Local book stores acquired a reputation for not being able to deliver the kind of book buying experience customers wanted. People stopped frequenting them and they lost business. Amazon has now proven that Borders was an inferior provider of book buying services, and it too has been forced out of existence. If someone had accused Borders of being an inferior book seller while it was still in business, at some

point the accusation would have been a true statement, especially as Amazon's superior business model became apparent. If a person accuses another person of being below the ordinary rank in the profession and it is true that the accused is in fact below the ordinary rank, this is hardly interesting. However, when Borders was still consolidating its hold over the bookstore industry, it would not have been true. We could say that the person making this untrue statement about Borders would have committed what Smith refers to as a breach of veracity. This condition is more interesting, since it seems to be the situation Smith has in mind when he refers to throwing someone below the ordinary rank of men in their own professions, with the consequence of them losing business. This leads to two questions: first, what does Smith mean by losing business? And second, where do breaches of veracity fit in his scheme of commutative justice?

To say one loses business is in itself a metaphor, since the thing lost is some expected future quantity and value of transactions. The very idea of expectation is built into the idea of business as it is used in this phrase. It is certain a good reputation has more value than a bad reputation, but how much more valuable would be highly variable and circumstantial. Perhaps most importantly, the value of a professional reputation is based on expectations of future business. Smith believes the strength of our right over something is diminished as our expectations of possession or control are reduced. He ranks things in our actual possession higher than those which are more tenuous, especially those things which we rely on others to deliver to us (see Smith's hierarchy of rights in TMS, II.2.2). An illustration of this principle is the following quote in which he

says the injury from a breach of contract is ranked below theft, even if the economic value lost in both cases was the same:

We are to observe here that the injury done by the breach of a contract is the slightest possible; at least the slightest one can well account to require any satisfaction. It is a common saying, that he who does not pay me what he owes me, does me as great an injury as he who takes as much from me by theft or robbery. It is very true the loss is as great, but we do not naturally look upon the injury as at all so heinous. One never has so great dependence on what is at the mercy or depends on the good faith of another as what depends only on his own skill. (LJA, ii.44)

Despite the fact that the economic loss is the same, the loss due to breach of contract is regarded as less of an injury because we do not have possession of it – it is less certain.

Indeed in the LJ, Smith asserts that non-performance of a contract is not a crime at all. It is enforceable, but violation of the contract is not a crime, unless the contract was made with the intent of defrauding:

A crime is always the violation of some right, natural or acquired, real or personal. The non performance of a contract indeed is not a crime, unless it be thro' some fraudulent intention. (LJB, 182)

The difference here between crime and not-crime is an element of willful deception; it amounts to theft by contractual instrument. Like simple esteem, what makes a breach fraudulent is the intent to steal. None of this is to say that Smith approved of people not fulfilling their promises. Quite to the contrary, he thought we had moral obligations to fulfill promises and other implied obligations. Furthermore, we can be compelled to fulfill obligations that have raised a sufficiently high level of expectation – as formal contracts do. The point I want to highlight is that Smith did not think that the failure to fulfill a promise was a crime, even if that promise is a formal contract. He believed we could be compelled to fulfill a contract, but we cannot be punished for failing to do so.

This is brought into focus when he says that the injury done by breach of explicit contract is the slightest possible. Thus, in a sense, if we fail to treat a person with the respect he deserves, we violate an expectation, but the violation of such an expectation fails to rise to the level of criminal act.

The future value of the cash flows from the physician's practice are never known with certainty. It seems contradictory for us to argue that Smith thought there is an actual, punishable injury if a physician's reputation is defamed when the future value is so uncertain. Furthermore, the harm done when a reputation is defamed is difficult to measure, unlike a contract. A contract or promise is an explicit obligation with explicit expectations raised in the individual. If Smith regards the failure to honor one's contractual and promise obligations as resulting in the slightest injury possible, regardless of the economic loss, perhaps the injury associated with defamation in terms of lost professional reputation is more metaphorical than real.

Also of interest is the fact that Smith ranks breach of contract or promise above our duty for veracity:

If one tells what he really thinks to be true with regard to the past and the present state of things, this is all that the man of the greatest veracity can require of him; with regard to what is future veracity can have no effect, as knowledge does not extend to it.—Besides, it can never happen that a less crime should be of a greater. Now it is evident that the breach of a contract or promise is a much greater crime than that of the breach of veracity. (LJB, ii.60)

Here we have a direct comparison between contract and truth-telling, and Smith ranks breach of contract above breach of veracity. Furthermore, his point about ignorance of the future fits with his overall preference for those things which are certain. What these passages show is a hierarchy in Smith's thinking, placing possession at the top of the

hierarchy, promises (including contracts) below possession, and finally an obligation to veracity below promises. If, as he says, “it can never happen that a less crime should be of a greater”, then we have by transitivity the fact that Smith believes breaches of veracity in and of themselves are not crimes. Supporting this interpretation, Smith goes on to say that a man who “makes a common custom of telling lies and making up wonderful and amazing adventures” is a “low and despicable character, but we do not consider as being guilty of a very great crime” (LJA, ii.60). Unlike the unintentional breach of veracity Smith mentioned above, the man who makes up lies commits a willful breach of veracity. Even when the act is willful, the liar is not a criminal. He does not raise resentment which would justify punishment. Thus, neither accidental nor intentional breaches of veracity appear to be crimes.

The considerations I have discussed with regard to defaming a person’s professional reputation suggest that perhaps Smith was speaking metaphorically or half-heartedly when he said we do a person injury when “we throw them below the ordinary rank of men in their own professions” (LJB, 8). If we make a false accusation concerning someone’s ability to perform a profession that leads to them being barred from the profession, we have gone beyond an attack on reputation and have moved to falsely restrict our victim’s freedoms. In this case, the harm to reputation is incidental to the harm to the individual’s freedom to pursue whatever occupation he desires. Smith’s attacks on monopoly privileges throughout his works show he believed in an individual’s freedom to pursue work and compete in almost any field, and monopoly privileges that interfered with that privilege were almost always harmful to society. Regarding attacks

on an individual's reputation within a profession that results in harm to his reputation, I have shown that Smith ranked the obligation to veracity below the obligation to honoring contracts, which he ranked as doing the slightest possible injury, and not punishable as a crime unless it was done with the intent to defraud. Unlike breach of contract, lying is always done with intent to deceive, and yet Smith says that liars are to be regarded as having low and despicable characters, but they do not appear to generate any resentment. Finally, as with the reputations of professions, reputations of individuals within professions are constantly changing. It is the normal course of virtually every career that an individual will eventually reach a point where he is not fit to practice. Even though Smith makes the statement that someone can be injured in their reputation by bringing them below the common standard of their profession, it is hard to see how he would have held that the right to professional reputation was anything but a metaphorical right given how he treats other rights.

C. Doubts About Reputation as a Real Right

If reputation is like property, it should share with property the characteristics of real rights. Although reputation is not captured on the "real right" branch of Haakonssen's diagram, Smith's description of real rights is robustly developed in the LJ, whereas natural rights are not. I will pursue here some counter points from the text that show perhaps reputation would not meet the definition of a real right. Smith divides the acquired rights into real rights and personal rights. Real rights are all perfect rights. If we have a real right, we have a right to claim it against anyone and everyone. Real rights give us the authority to exclude anyone from making use of the thing we claim a right to

in anyway. Personal rights, on the other hand, are relationship specific obligations between individuals. Contracts are an example of personal rights. The rights of a contract are limited to the parties to the contract, and do not extend beyond the parties to the contract. Defining reputation as a set of personal relationships would weaken claims to it well below the level of property, therefore I focus the rest of the discussion on real rights only.

Setting aside the fact that reputation is intangible, it is clear that reputation fails to meet the standard of being disposable. Smith describes the real right of holding property as dominium or “the full right of property”, which means that we have the right to do anything we want with that thing:

By this a man has the sole claim to a subject, exclusive of all others, but can use it himself as he thinks fit, and if he pleases abuse or destroy it. By this right if any subject be lost or abstracted from the right owner he can claim it from any possessor, and tho perhaps that possessor came justly by it, yet he can not claim any restitution but must restore it to the owner. He may indeed if he can find the means obtain restitution from him who by wrong means first possessed it. Property is to be considered as an exclusive right by which we can hinder any other person from using in any shape what we possess in this manner. A man for instance who possesses a farm of land can hinder any other not only from intermeddling with any of the products but from walking across his field.(LJA, i.17)

It is certainly possible to abuse one’s own reputation, but only indirectly by doing things which are unbecoming or spreading word that we have done such things. The fact that in order to damage one’s own reputation requires being perceived by others as less worthy reinforces the argument that reputation is the opinion of someone else. He says elsewhere that if a man holds something as property, not only may he abuse it, but he may dispose of it: “A man during his own life may very well be conceived to have the

power of disposing of his goods; the very notion of property implies that he may abuse, give away, or do what he pleases with them” (LJA, i.149). Ultimately, reputation is not alienable, so it fails to be meaningfully property-like in that critical way. If we have a good reputation, we can grant some benefit to others by affiliation, but we cannot simply transfer reputation to another individual. In the sense that property implies it may be abused and alienated, reputation does not appear to be property-like.

Intellectual property such as copyright and patent laws are intangible, but Smith says they are real rights⁵. On the surface, these seem to be good corollaries to reputation. Although they are intangible, Smith seemed to think intellectual property rights were fairly well defined:

Thus the property one has in a book he has written or a machine he has invented, which continues by patent in this country for 14 years, is actually a real right. During that time he can claim restitution, or shew for damages from any one who prints his book or copies his machine, so that he may be considered as having a real right to it. (LJA, i.20)

Smith defines a real right as that whose object is a real thing and which can be claimed a quocumque possessore. Such are all possessions, houses, furniture” (LJB, 8). Smith uses the Latin phrase, “quocumque possessore”, which the editors translate as meaning “Can be claimed from any possessor whatsoever” (LJB, 8) to mean the property rights are transferable and not tied to a personal relationship. However, defining the right to reputation is much more difficult. Extreme cases go back to the previous discussion of

⁵ Smith’s approval of intellectual property seems to be grudging at best. To the degree that he approves of intellectual property as a real right, it is as if he is choosing to endorse the lesser of two evils. The legitimacy of intellectual property as property is weak at best in Smith’s perspective. I discuss intellectual property in more detail in the next section on defamation.

simple esteem. The less extreme case for economic damages has historically been challenging for defamation, and these relate to the professional reputation already discussed.

Although modern intellectual property law is becoming more complex, Smith seems to have regarded it as fairly straight forward: if I sell copies of your book or your machine, I violate intellectual property laws. Thus, intellectual property lends itself to a claim of *quocumque possessore* and the owner of an intellectual property right has the right to exclude others from his property. Even Smith's attempt to qualify reputation as what would be afforded a common man or at the level of a man's profession, these qualifiers are quite a bit greyer. Like physical property, intellectual property comparisons to reputation show the difference in alienability. A copyright or patent holder can sell his rights. Reputation, once again, cannot be transferred. Furthermore, the boundaries of reputation are less well defined than the boundaries of intellectual property. This makes it difficult to assert that we would be able to apply the kind of grammatical consistency to reputation that Smith requires for commutative justice.

The twin elements of being able to claim a thing from anyone and everyone, and simultaneously exclude anyone from it are the key elements of real rights for Smith. The right to exclude eliminates obligations associated with distributive justice. One of the critical problems for arguments concerning reputation as being property-like, or as something resembling a real right, is simply locating it so that one can claim it and exclude others from it. Where does it reside? Smith does not offer an answer. Pufendorf implied it resided in other men's minds (Elements, 96), and Carmichael states it quite

plainly: it is nothing but the opinion of good men (Carmichael, 2002 (1724)). Even if we allow that reputation exists in other people's minds, the reputation comes to exist there in some way. One way to attempt to wrestle with reputation if we agree that it is held by others is to think of it as a form of capital – reputation capital as I referred to it in the previous section. Smith did not discuss the idea of reputation as a form of social capital, however I do not think he would have been opposed to thinking about it in those terms. Smith does recognize that we labor to establish our reputation, and that it is a goal of most people to rise in relative rank in the world. If we were to look at this desire from a capital formation perspective, we would go about day to day trying to increase our reputation capital just as we would any other capital. Offenses to our reputation, such as someone saying a doctor kills rather than heals his patients, would possibly result in the destruction of this capital.

Even if we think of reputation as a form of capital, it does not mean that it accrues to the individual who happens to be the subject of the capital. We could imagine reputation as a product of our efforts that accrues to us in the same way the offspring of an animal accrues to the owner of the parent animal. Smith uses the term “accession” to refer to how the offspring becomes property of the owner of the parent animal, and he defines it as the process “by which the property of any part that adheres to a subject and seems to be of small consequences as compared to it, or to be a part of it, goes to the proprietor of the principall, as the milk or young of beasts” (LJA, i.26). If we think of reputation as a form of capital that we create over time through honorable actions, we might say that it just happens to be that the capital accumulates in the minds of other

men, but it does not necessarily mean that it is not ours. Accessions are generally straightforward, Smith says, except when they involve conflicts between the ownership of the “principal” and the “subject”: “Thus when one builds a house on another mans ground, it is a question whether the house should be considered as an accession to the ground or the ground to the house” (LJA, i.70). The problem of property conflicts like this is solved by one party paying the other for his share and resolving the conflict. Treating reputation as capital is a metaphor, of course, unlike houses and land. Metaphorically speaking, we could imagine that there is a stock of reputation each person carries about in their head for the people they know. If I know you, I might hold ten units of reputation capital in my head in a notional account with your name on it. When I observe your actions, the stock adjusts accordingly. If you do something estimable, your reputation stock increases. If I witness you doing something reprehensible, your stock in the account in my mind falls. Any accounting for such a capital stock would certainly be loose, vague, and indeterminate. Furthermore, the conflict over ownership can never really be resolved in the way physical property can be because it is inalienable. You cannot buy the stock from me, the way you could buy my land if you had built a house on it. Since it is inalienable from me, it seems Smith would likely default ownership of the capital to me.

As an illustration, let me introduce Bill and Dr. Jim. If Bill has a cough and goes to see Dr. Jim for help, and Dr. Jim treats Bill and Bill gets better, Bill develops an opinion about Jim. In this case, Bill holds in his head a positive association with Dr. Jim because of the outcome of the treatment. Over time, Bill gathers many more experiences

of Dr. Jim's positive service as a doctor. We might use the notation O_B^J to indicate the opinion Bill holds in his mind about Dr. Jim. Initially the value for O_B^J might be small, but then Bill continues to go to Dr. Jim when he is ill, and Bill finds that generally when he goes to Dr. Jim, Bill gets better. The magnitude of O_B^J continues to increase.

Furthermore, Bill hears from other friends who go to Dr. Jim that they also get good care from Dr. Jim. More positive information is added to the stock that already exists in Bill's memory, and O_B^J increases further. When Frank moves to town and asks Bill who a good doctor is, Bill might check the stocks of knowledge he has about doctors, and recommends Dr. Jim because Bill has the largest stock of positive opinion in his mind about Dr. Jim. Bill expresses to Frank the value of his reputation capital concerning Dr. Jim, $E_B^F O_B^J$. This stock of positive memories and information clearly exists only in Bill's mind, and though it is valuable to Dr. Jim because it results in more business for Dr. Jim, Dr. Jim has no right to claim it as his property. In fact, it would be much more plausible to view Bill as the owner of the reputation capital that exists in his mind – if it is anyone's property, it must be Bill's by accession - and he has a real right to it. If Bill has a real right to the reputation capital, he may do with it as he pleases, since he would have dominium over it. The problem with this analysis becomes more complicated with expression to a third party. Even if Bill has the right to destroy the reputation capital, does he have the right to express it to Frank? If the value of O_B^J was negative – that is, Bill thought Dr. Jim was a terrible doctor who killed his patients rather than healing them – would it be socially beneficial for him to express this opinion freely? Would it be

socially beneficial for Bill to be allowed to express a negative opinion when he in fact holds a positive one? That is, Bill knows Dr. Jim is a good doctor, but tells Frank Dr. Jim is a bad doctor explicitly to cause Frank to go to a different doctor. I will return to this in the following sections on whether defamation should be legal.

C. Conclusion

In this section I have considered the counterarguments to the idea that Smith thought reputation was a right. I have reconsidered the idea of basic reputation, which seems similar in concept to Pufendorf's simple esteem, as well as analyzed Smith's assertion that professional reputation is protected as a perfect right. In this analysis, it appears an argument can be made that reputation is really more metaphorical than real. When we separate basic reputation it appears that it is more about basic rights of citizenship, rather than a right to something separable. In this sense it is a metaphor for the collected rights of citizenship and does not have meaning alone. The primary rights which undergird the basic aspects of reputation appear to be the natural rights of life and liberty. In this sense reputation could be perceived as a perfect natural right, but again, reputation would be a metaphor for protecting us from false accusation and undue punishment. As for professional reputation, it appears to be only metaphorically protected primarily because of the deep uncertainty that surrounds its value. It does not have zero economic value, but saying what value it does have is difficult – its value appears loose, vague, and indeterminate. Professional reputation is sufficiently malleable that it appears to fail a claim to the natural right status in the sense of something which is unchanging and preexisting acquired rights.

3.4 Defamation Should Be Illegal, Defamation Laws are not Coercive

In this section I now turn to defamation, and look in LJ for support that Smith thought it should be illegal. The primary focus of this section is on the idea that we do not have a perfect right to our reputation, but there should be laws to protect it despite this fact.

A. Acceptable Intervention

If we do not have a perfect right to our reputation, if it is not covered by commutative justice, would Smith have supported protecting reputation by making defamation illegal? Would he support protecting something with the force of law that was not a perfect right? As in TMS and WN, in the LJ Smith makes the point in several places that in some limited instances it is socially acceptable for the government to limit the actions of citizens. For Smith, acceptable intervention is usually a matter of social utility and practicality, and very limited. A first example is the right given to judges to imprison suspected criminals. Smith sees this as a necessary evil:

No one ought in equity to be confined but a criminall; there would however be an end of all exercise of judgement if the judge were not allowed to confine one before there was full proof made of his guilt. (LJA, ii.128)

Even though pretrial confinement violates an individual's natural right of freedom of movement, Smith gives limited approval of its usage. He approves of pretrial confinement because it provides for a necessary degree of security to society, and he compares safeguards against false and extended pretrial confinement in England and Scotland, weighing their relative effectiveness.

Smith also supported the creation of rights by the civil law when they were not supported by what he referred to as natural reason. Examples of this include the conversion of some personal rights to real rights, and the acceptance of intellectual property as a real right. These laws are created to encourage positive behavior. With regard to the conversion of the personal rights to real rights he says:

I have now considered the severall real rights, not only property but also servitudes and pledges, and shown that these were originally merely personall rights, tho by the determination of the legislature, to prevent the confusion this was found to produce, they were afterwards changed into real rights. (LJA, ii.38)

And:

Pledges and mortgages are certain securities for the payment of debts. At first they could not be claimed as real rights, tho' afterwards the law considered them as such ... All pledges are naturally personal rights, and are only made real by the civil law. (LJB, 174)

Thus, Smith appears to approve of the civil government changing the nature of a right for efficiency purposes. Whereas he says servitudes and pledges are by nature personal, Smith seems to approve of laws that change their status from personal to real. By making them real, they are raised in their legal status, making them more generally enforceable, and decreasing the transaction costs of enforcement. As previously discussed, Smith values certainty over uncertainty; making pledges and servitudes real and more certain makes them more valuable, and would encourage people to engage in more of them.

Smith says that intellectual property, and copyright in particular, is not an exclusive privilege by "natural reason." He never raises intellectual property to the same status as physical property, but instead equates it to a legal privilege like monopoly. He says that intellectual property, as well as other privileges like exclusive licenses to

practice a profession, or monopoly privileges, are “creatures of the civil constitutions” of countries. He perceives most of these privileges as “greatly prejudicial to society”, but gives legitimacy to intellectual property as “harmless enough” (LJA, ii.31). Although “harmless enough” is hardly a resounding endorsement of the practice, Smith implies granting intellectual property privileges is the best available practice – far better than if the government tried to establish the value of an innovation and compensate the innovator for it:

Thus the inventor of a new machine or any other invention has the exclusive privilege of making and vending that invention for the space of 14 years by the law of this country, as a reward for his ingenuity, and it is probable that this is as equal an one as could be fallen upon. For if the legislature should appoint pecuniary rewards for the inventors of new machines, etc., they would hardly ever be so precisely proportioned to the merit of the invention as this is. For here, if the invention be good and such as is profitable to mankind, he will probably make a fortune by it; but if it be of no value he also will reap no benefit. (LJA, ii.31)

While Smith is explicitly against monopolies and most other forms of exclusive privilege because they tend to promote poverty, he tentatively supports intellectual property because it is the most efficient way of rewarding creative activity. Nonetheless, he makes it clear that copyright is not supported by natural reason, the way that exclusive privileges such as inheritance are:

Now suppose that a man had wrote a book and had lent it to another who took a copy of it, and that he afterwards sold this copy to a third; would there be here any reason to think the writer was injured. I can see none, and the same must hold equally with regard to printing. The only benefit one would have by writing a book, from the natural laws of reason, would be that he would have the first of the market and may be thereby a considerable gainer. (LJA, ii.32)

Smith implies in this passage that intellectual property is an imposition on the natural right of freedom. There is no harm to the maker of intellectual property if someone else

copies it. All that he loses is the stream of rents that intellectual property laws allow him to capture, but Smith clearly does not think he has a right to these. At most, intellectual property laws are an entirely utilitarian calculus made by men and their governments in the hope that the costs imposed on individual freedoms are outweighed by the benefits derived from innovation. It is not that Smith thinks we have a right to intellectual property, but that it might provide an incentive to creative work.

The preceding discussion establishes that Smith was not opposed to establishing laws that restricted the freedom of some individuals in favor of directing behavior in a way that is socially beneficial. While he clearly did not support all such laws, he did see the logic in some, and found some of them at least socially useful. Thus, even though we may not have a perfect right to a thing, it would not necessarily contradict Smith's thinking to say that a perfect right in the underlying thing is not required to have a just law that protects that thing, or to prohibit a certain behavior.

To the degree we can establish that Smith thought defamation laws were socially beneficial, we could presume that he would have supported these laws, even if they infringe natural liberty. Continuing with the metaphor of reputation as a form of capital, even if it is capital which exists only in other men's minds, it could be reasonable to extend the idea of defamation laws as protecting the self-serving destruction of reputation capital. We could argue that there is a social benefit to Bill expressing to Frank his true measure of the reputation of Dr. Jim, $E_B^F R_B^J$, rather than a false expression. The cost to Bill of transmitting his true information about reputation to Frank is the same as transmitting false information. Frank can then make better decisions about which doctor

he wants to use. Smith does not develop an extensive discussion of capital and capital accumulation in the LJ as compared to the WN, but there are references throughout the LJ that support the importance of capital accumulation, and the importance of protecting that capital in order to encourage continued investment in it (for example: LJ, 446, 489). If Bill is more likely to express true opinions about Dr. Jim, Dr. Jim has more of an incentive to worry about creating as much positive reputation with Bill as possible. If, on the other hand, Bill might express false information about his opinion of Dr. Jim, Jim might reduce his efforts at generating a positive reputation capital. In this vein, it would be arguable to say that Smith would support defamation laws in order to encourage investment in reputation capital. If we assume reputation capital is built up by good acts and appropriate behavior over time as Carmichael states (*Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael, 2002 (1724)*, p. 68), it would be generally beneficial to society that people be encouraged to do things worthy of a good reputation. By preventing unwarranted attacks on reputation capital defamation laws would encourage the ongoing effort to accumulate good reputation. Defamation laws theoretically raise the cost of defamation, reducing the likelihood that people will engage in false accusation for their own benefit, rather than through honest work.

B. Dueling

Dueling represented a social problem in Smith's time. He tells us that prevalence of dueling in his time is a result of the failure of the government to adequately punish affronts to reputation:

The law has been apt to consider these rather in the sense they were taken by the old law than in that which is suitable to the customs of modern times. That is, rather as assault or batterie than as an affront; and accordingly has given but a very small satisfaction for them. And to this in a great measure may be ascribed the great frequency of duelling. . . . And indeed these injuries, considered as assault and batterie, are but very inconsiderable and are sufficiently recompensed by the penalty incurred by law. But this fine is by no means an adequate satisfaction when they are considered in the manner they are in those countries where the laws of honour are received, for there they are considered as the greatest affront imaginable, and indeed are in this case very great ones.
(LJA, ii.136)

One example of the kind of affront Smith was describing was “pulling ones nose” (LJA, ii.136), which in terms of a physical assault is fairly modest. It hardly seems worth risking one’s life to punish someone for pulling one’s nose. However, the pulling of someone’s nose was apparently symbolic, and a grave insult to the victim’s honor, and therefore grounds for dueling. The fact that people felt compelled to respond with violence or risk being “despised and contemned as a poor, mean-spirited, faint-hearted wretch by those of his own rank” (LJA, ii.136) makes this a situation where government intervention could be perceived as useful, even if it would mean imposing on another individual’s rights. Smith says that the law fails to adequately recognize the full cost of the affront to the victim, particularly where the laws of honor dictate a violent response, and thus we are impelled to take matters into our own hands:

The triffling fine of five or ten pounds is by no means an adequate compensation for them. Where the law denies justice we are naturally led to take it ourselves. This introduced dueling in Europe, which brings along with it an additional injury. I must not only receive a box on the ear, but I am obliged to expose my life or become altogether odious. (LJB, 192)

The failure of the government to align its punishments sufficiently close to the punishments demanded by the laws of honor thus leaves us in a position where perhaps

society is made worse off. Not only does a person have to suffer an affront, but he then has to expose himself to physical danger in order to neutralize the affront. Both of these acts are costly to the individual, and the net result is likely a loss. In addition to this, Smith makes the point that dueling itself is illegal, and if two people appear to make arrangements to have a duel under the guise of “not fighting of set purpose” (LJA, ii.109), the winner can be charged with murder. Thus, in order to avoid the cost of being thought a lesser person, the insulted individual must face being killed or being charged with murder.

Smith appears to endorse the approach proposed in France, which would have treated the affront at its full social import, and perhaps thus avoid the large social losses of death and murder charges:

The punishment which was contrived by the court of honour in France, though it did not take effect, was much better calculated to the injury received by such an affront. Viz, as the injury done was with a design to expose the person and make him ridiculous, so the proper punishment would be to make the person who injured the other as ridiculous as he had made him, by exposing to shame in the pillory, and by imprisonment or fine, arbitrarily adapted to the circumstances of the affront. (LJA, ii.140)

What this endorsement suggests is that perhaps Smith would have supported an adjustment to the legal system that recognized the symbolic nature of certain assaults and provided a proportionate response to the offender in order to relieve the victim of the responsibility of responding himself. It seems that Smith believed dueling was a disproportionate response to an affront, but individual citizens only had that response available to them. The government might have had the ability to counteract the menace of dueling.

C. Conclusion

If we assume reputation is a perfect right, then I believe Smith would have supported clear laws that provided punishment for violations of that right. With respect to dueling, I have shown some support for explicit punishment, particularly the passage concerning his support for the French proposal for a court of honor. However, I have also shown that Smith showed some support for laws that protected rights which were not by their nature perfect rights, such as intellectual property laws, because of their beneficial effect on social outcomes. Thus from this analysis, we have some evidence that could be construed as Smith's support for defamation laws, whether reputation itself is a perfect right or not.

3.5 Defamation Should Not Be Illegal, Defamation Laws are Coercive

In this final section I mount evidence for the claim that perhaps Smith thought defamation laws were coercive, and that they should not exist. Dueling is an extreme example of a private response to defamation, and therefore it brings the question of defamation into close scrutiny. The issue of dueling helps us understand how Smith really regarded defamation, and answer the question of whether Smith thought defamation should be illegal, or whether he thought such laws were coercive. In order to read the text as saying defamation laws are coercive, one must take an esoteric reading. To start this process, I believe we need to consider Smith in his context giving the lectures that form the LJ, and also to see dueling in the historical context Smith gives it.

Since the text of the LJ is the specific focus of this paper, it is helpful to note that we know Smith was lecturing to young men (matriculating age between 14 and 19) of the

middle and upper classes of Scotland. They would have been culturally familiar with the expectations of the laws of honor, including some understanding of what would occasion a duel. In the previous section I showed that he framed the necessity of dueling as a government or judicial failure – that is, dueling was a private response to a failure of the government to adequately satisfy individuals’ sense of being wronged. Smith does not appear to support dueling itself as an institution. He never says that dueling is a good idea, or endorses it as appropriate and manly. At best he seems to say it is a grim outcome. Even then, however, he seems to reluctantly go along with the necessity of a violent response in some parts of the LJ, but in other parts he makes statements that undermine this response.

In the LJ, Smith is speaking to a group of young men who were under the sway of a culture that allowed for, and to some degree, informally endorsed dueling as a mark of manhood. If Smith were in fact against defamation being punishable, except in circumstances of false accusation or perjury, he might still take the position of a bargainer, and his approach might reflect what he wrote about policy makers in TMS:

Though he should consider some of them as in some measure abusive, he will content himself with moderating, what he often cannot annihilate without great violence. When he cannot conquer the rooted prejudices of the people by reason and persuasion, he will not attempt to subdue them by force... (TMS, VI.ii.2.16)

If he actually disapproved of dueling and disapproved of defamation laws, but recognized that they were both part of the culture his audience was embedded in, I think he would look for ways to moderate the thinking of his audience rather than confronting it head on. Given that he is lecturing young men, they might have been resistant to a direct argument against dueling, and against a violent response to defamation. A more successful strategy

for speaking to young men would have been to come at the issue tangentially, suggesting other ways of demonstrating one's honor and manhood without resorting to violence.

Smith has told us nothing is so ungovernable as the tongue (LJA, ii.140), and to this end, a lack of deliberateness should mitigate our responses to what is said. He goes on to say libels are worse because of their deliberateness, but even in the case of libel, he says defamation in most circumstances should simply be ignored:

But however as the libeller generally hurts his own character more than that of him whom he libells, it is most prudent to despise and not to raise prosecutions on such libell, unless the accusation be particularly marked with circumstances as to make it probable, and be of such a nature as to hurt considerably the reputation of the person. For in other cases the taking notice of a libell makes the person appear more probably to be guilty than if he had despised them. (LJA, ii.144)

This statement contradicts support for dueling. The majority of the times we should simply ignore libels, and only when the libel leads to legal action should we respond to it. Smith makes this same point again in the LJ: "In general people of circumstances take no notice of such lybels, unless it be absolutely necessary to clear themselves of some crime" (LJB, 194). The fact that this passage reappears in both versions of the lectures indicates that it was important to Smith to get this message across to his audience⁶. It

⁶ It also echoes a similar comment from Pufendorf:

You have been maliciously slandered, you have been insulted. Will your first move be to seek satisfaction through the magistrate, satisfaction which often you may not need? **If your reputation is sound, if you have nothing with which to reproach yourself, the offender's barbs will fall back on him alone.** The best means of revenge, if revenge were permitted, is scorn. It will at least spare you anxiety and disturbance of mind on account of a harm that in fact is imaginary, when it entails no real damage. (Pufendorf S. v., 2003 (1673), p. 225)

Also Carmichael made similar comments:

And likewise so-called injuries, in the proper meaning of that word (*injuriae*), i.e., **the insults which normally involve fellow citizens in duels with each other (for duels which are entered upon to settle a doubtful question, or claim an object which is not due by perfect right, are**

sneers at dueling, because it implies there is no necessity to resort to dueling. It implies that defamation itself is harmless to the intended victim, except when it becomes false accusation in a court of law. This fits the perspective that Smith does not think there is a perfect natural right to reputation. In an ironic way, we could almost say that Smith would prefer to make it easier for people to engage in defamatory behavior because it acts to show their true type and separate them from the pool of otherwise decent folk.

It would be wrong to argue that Smith would prefer a world with more defamation, but he does make a number of comparisons of defamation laws across times and cultures. His statements about defamation focus primarily on the relationship between the individual and the state, but if we add these statements add weight to the statements already considered above. Furthermore, he never says that his comments on libel apply only to the relationship between the individual and the state

($E_{Bill}^{Frank} O_{Bill}^{Jim}$ vs. $E_{Bill}^{Frank} O_{Bill}^{State}$). He argues some societies made it much easier to commit defamatory acts, particularly against the state, while others punished them quite severely. Smith consistently approves of societies that allow individuals to commit acts of defamation without government punishment, and is critical of those which treat it punitively. Smith certainly does not approve of defamatory activities, but he sees the degree to which people are free to behave in this manner as a measure of a society's liberty:

manifestly unjust); insults, I say, do not afford a just cause for extreme violence even in natural liberty. For it is utterly abhorrent to equity, to humanity, and to justice itself to attempt to repel or vindicate them in that manner. That is, the restoration of an injured reputation, which they usually say is the point of this ferocious avenging of injuries, is a pure and unadulterated fantasy in the minds of men of outrageous vanity. (Carmichael, 2002 (1724), p. 68)

In general the freedom in this respect is a great test of the liberty of the people. In all absolute governments and arbitrary ones they are altogether suppressed, but where the people enjoy more freedom they are not much regarded. Libells of the most scandalous sort indeed, but which are of no great detriment by their frequency, are every day published without being taken the least notice of. Aristocracies are of all others most jealous of them, and all monarchies endeavour to suppress them, unless it be the British. (LJA, ii.145)

Smith asserts that the British government in particular was tolerant of libel, comparing the tolerance of Britain to the intolerance of France: “libells and abusive papers are handed about here every day which would send the writers to the Bastile in France or be punished with death” (LJA, v.8). He refers to changes in the way libel was treated by the government of Rome, depending on its stage of development. In the early stages of legal development, libels were punished with death, according to the primitive laws of the Twelve Tables. As the government matured into a democracy:

this punishment, which was a very unreasonable one, was taken away, and great freedom in this respect indulged to the people. But when the monarchicall form of government was again restored, the old punishment returned; Augustus renewed the law of the 12 Tables, and many were executed on that law in his time, and still more under Tiberius. (LJA, ii.144)

Smith notes that primitive states often punished excessively, and gradually moderated.

To return to the primitive application of punishment was an imposition on liberty. In a parallel passage in the LJ, Smith makes a similar reference:

Lybels and satyres are punished according to the nature of the government. In aristocratical governments they are punished severely. Little petty princes may be quite destroyed by abusive lybels, whereas kings and ministers of state in a free country, being far out of their reach, cannot be hurt by them. In governments and in Rome for a long time they were not punished. Augustus at last revived the law, subjecting the authors to a capital punishment. (LJA, 194).

Here again Smith makes reference to the changing practices of Rome, and links how harsh the punishment of libel is to the liberty provided by the government. These

passages focus on the relationship between citizens and the government, and they make it clear that Smith thought free political speech, even when it was defamatory toward the government or rulers, should not have been punishable. In the TMS, Smith differentiates between the relationships of a citizen with another citizen, and of a citizen and his superior (superior generalized as a magistrate or other government authority), and grants the superior greater privileges in directing the activities of a citizen (TMS, II.ii.1.8). The relationship between equal citizens and between the citizen and the state is clearly different for Smith. Can we generalize from these statements that appear to be focused on defamation committed by the citizen against the state? These passages link well with and reinforce the previous passages about people of circumstances despising libels. Thus we see Smith saying that not only good individuals should ignore libels unless they are likely to bring about legal action, but states should as well because good states are immune to libel. Only weak, and presumably unjust, states need worry about libels according to Smith, and presumably with good reason. Likewise we saw that Smith thought confident individuals should despise defamatory behavior, unless that behavior rose to the level of a false accusation in a legal setting.

A. Historical Context of Dueling

On an individual level, Smith does note that in ancient Greece defamation was generally ignored, and that the laws of honor which supposedly necessitate dueling were a relatively recent invention in Europe.

The small pecuniary punishment is no sufficient recompense for such an affront. The same is the case with regard to many verbal injuries, such as giving one the lye, or other reproachfull words, which as they are looked on at this time as sufficient cause for a duel must be very heinous injuries. {They are in themselves

very unmannerly, but without the consideration of their consequence would not be the most unpardonable. } **It is intirely from this new notion of honour that the injury of such affronts has arose.** This owed its first origins to the judicial combat which was established by law, but has several other concomitant causes which have kept it up till this day, after the judicial combat has been 300 or 400 years in dissuse. **Before that time these injuries were considered merely by the hurt they did the person, and the punishment is accordingly very small,** and so inadequate to the injury that no one will think it worth his while to sue for it.– We see that formerly those actions and words which we think the greatest affront were little thought of. **Plato in his dialogues commonly introduces Socrates giving the lye to those whom he converses with, which is taken as no more than ordinary conversation.**(LJA, ii.138)

This passage shows us the historical context Smith sought to engage to explain dueling. First, he makes the point that there was a period during which defamation was generally ignored. The example of Socrates calls forth the learning and wisdom associated with ancient Greece. Socrates' Athens is not a primitive society; the men Socrates conversed with were wealthy citizens and political leaders, and they ignored his behavior. Through the example of Socrates, Smith is showing that it is reasonable in a developed society to have a social standard that guides individuals to ignore and disdain defamation, rather than respond with violence, and that such a society did indeed exist. Then something in society changes, and he notes a “new notion of honour” becomes the social standard. Smith uses the example of Socrates to show us that Western civilization had indeed advanced to that point, and had fallen back, much like Rome fell back under Augustus. Before the rise of judicial combat, verbal injuries were ignored. After the institution of judicial combat came about, verbal injuries became regarded as grounds for dueling. The historical accuracy of Smith's assertion that the Greeks ignored defamatory conduct is irrelevant, as is the accuracy of the origin of dueling in judicial combat – what matters

here is that Smith sought to explain these behaviors using these assumptions as historical context.

The origin of dueling, according to Smith, was the private prevention of false accusation in a weak judicial system through the use of judicial combat. Smith's references to judicial combat, and the fact that it is hundreds of years out of use, along with references to a time pre-dating the adoption of the laws of honor, further indicates that he does not approve of dueling as a private response to defamation. Judicial combat was relevant in a period when a weak judiciary could not protect individuals from false accusation. The underlying theme with regard to dueling and defamation in these passages is that dueling is a social error that needs to be corrected. Like entails, I believe Smith thought of dueling as institution left over from a period when government was weak and unable to maintain liberty-preserving laws. I believe it is a reasonable reading of these passages to generalize that Smith did not think the power of the government, nor individual violence, should be used to defend against defamation. I believe Smith certainly thought acts of defamation that bring about a process of law should be defended against, and if the defamation rose to the status of false accusation, that it should be punishable, but otherwise not. I think this evidence further supports the position that he thought there was no natural perfect right to one's reputation.

B. Conclusion: Defamation Laws are Coercive

Taken in context, Smith's discussion of dueling could be understood as an argument against both treating reputation as a perfect natural right, and against defamation laws. When Smith gave his lectures, he was speaking to boys becoming men

in a society that at least partially accepted dueling as a proper means of dealing with affronts to reputation. My discussion in this section has shown that not only does Smith make exoteric statements contrary to the idea that one should respond to defamation, but he tells the history of dueling as connected to a past practice from a period in history when the government was unformed and defective. If reputation were a perfect natural right, we would indeed have a right to defend it with violence if necessary. However, Smith appears to argue against defending reputation at all, unless an attack actually rises to the level of perjury, in which case it is really no longer simply an attack on reputation.

3.6 Conclusion

While Smith's structure of rights fits well into his system of jurisprudence generally, reputation appears to have received inadequate treatment, perhaps intentionally. Using the questions of whether reputation is a perfect natural right and whether defamation should be illegal, I have explored the question of reputation as Smith lectured about it to his students. At first glance the conclusion seems foregone, as he makes some strong statements about reputation's status as a natural right. In his lectures, however, he leaves significant room for discussion about what this actually means, and even appears to contradict his assertion that reputation is a perfect natural right. Using the text, I have attempted to present a balanced argument.

The question of reputation is important in Smith's work because esteem is a central motive for humans in Smith's mind. It is vanity that drives us to pursue wealth and other outward forms of greatness because it is through these outward forms of greatness that we achieve a greater reputation. It is through this selfish pursuit in support

of our own vanity that we continuously improve the lives of those around us, even though ultimately our own measure of success is how great a reputation we achieve. Whether reputation is a right and whether defamation is legal are important questions to ask because these questions shape the way we go about pursuing our ultimate end.

4. CONCLUSION

The three essays that make up this dissertation explore Smith's view of reputation in light of his writings about justice. The first essay introduces the critical distinction Smith makes between commutative and distributive justice, which then informs the core of human interaction. I discuss how Smith believed justice is an evolving project, with society approaching an idea of natural jurisprudence within which the principles of natural liberty function as a guide. In the second essay I examine the textual evidence presented in Smith's published works to explore whether Smith regarded reputation as properly the subject of commutative justice and whether defamation laws are desirable. In the third essay, I conduct a similar analysis using the student notes collected in the Lectures on Jurisprudence. The LJ offers an opportunity for insights into Smith's thinking about policy and law, thinking which in some cases goes beyond what appears in the TMS and WN. Using the LJ comes with some risk because the lecture notes were not Smith's final thoughts on the subjects and were oriented to the particular context of very young men for practical careers. The evidence presented in these essays focuses on the rules of justice and their particular application to reputation. What I have attempted to show throughout these essays is that Smith favored a simple system of liberty with clear rules that would guide us in our conduct with each other.

In the first essay, I present the idea that natural liberty represents an approach to jurisprudence that simplifies the role of government by limiting its scope to primarily the enforcement of commutative justice. Smith clearly saw a role for government, but it was a limited role. In Smith's view, there is a system of natural jurisprudence that enshrines natural liberty, and it is this system that Smith espoused for in his writings. A system of natural jurisprudence is the ideal set of rules of justice by which society should be governed. Smith holds up the system of natural jurisprudence as an ideal that human legislators should strive for.

In the second essay I explore how the rules of justice appear to apply to reputation in Smith's published works. The excess complexity of rules that would be required to determine when reputation was damaged leads me to conclude that Smith would not have held that it was properly the subject of commutative justice. I further go on to show textual support for a free market in reputation. There is much textual evidence suggesting that Smith thought that defamation laws are unnecessary, or even that these laws may even be harmful.

In the third essay I consider how Smith treats reputation when he speaks to his classes about the law as captured in the LJ. In the LJ Smith makes some of his strongest assertions about how to respond to attacks on reputation, but a closer look shows that in most cases it is quite difficult to sort out where reputation as an asset begins and ends, leading to the conclusion that reputation cannot be governed by the rules of commutative justice. Ultimately the only violations of reputation that Smith seems to think mature adults should respond to are false accusations which may result in specific government

action, such as prosecution. When a person commits a false accusation that results in the victim being prosecuted by the government, the accuser is simply using the government as a tool to violate his victim's other perfect rights. It is ultimately to the abuse of government prosecution that Smith says we should respond to. Generally the best response to all other violations of reputation is to ignore them. The reputation mechanism is imperfect, and in the short run can be interfered with defamatory statements. However, in the long run, a person's reputation tends to match his true character, and defamation tends to rebound to the defamer.

Reputation is a fascinating subject to consider because of its complexity. The very complexity of reputation and its loose, vague and indeterminate nature is what ultimately leads to my conclusion that Smith did not think reputation was properly the subject of commutative justice. Nonetheless, Smith believed reputation plays a critical role in human society. We are willing to pay dearly for a good reputation, and we are willing to go to great lengths to avoid losing the reputation we have earned. Smith lived in a time when insults regularly still led to violence, and yet many of his predecessors explicitly rejected the idea that we could claim our reputation was the subject of commutative justice. I believe Smith was more aligned with Pufendorf and Carmichael, as well as modern libertarian thinkers such as Rothbard and Block, than it might appear from some of the passages. Though he refrained from confronting reputation head on, we can find enough material in his writing to piece together an understanding that he would have had to reject the idea of a perfect right to reputation in order to be consistent with his other positions on justice. Perhaps if he had written his planned book on

jurisprudence he would have made it clear what his position was. Without that final book, we are left to try to piece together how he really thought about reputation. We will unfortunately never know for certain, but these essays have made an attempt to apply Smith's writings about justice to questions about reputation and defamation. I believe this exploration shows that Smith leaned toward a hopeful libertarian view of reputation, as he leaned toward a hopeful libertarian view of morality and justice generally.

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CURRICULUM VITAE

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