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ADAM SMITH: JUSTICE AND DUE SHARES

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In a contribution to this journal Amos Witzum has challenged a common interpretation of Adam Smith's theory of justice, according to which Smith 'employed a concept of justice – in the tradition of natural laws theories – whereby rights are related to guarding what is one's own rather than to what is one's due' (Witzum, 1997, p. 242).[1] Witzum claims that not only does Smith's conception of justice include one's due, and hence, distributional considerations, but the right to one's own 'stems from the right to what is one's due' (p. 244). Furthermore, he asserts that 'as all members of society own their natural faculties, which presumably were given to them to enable them to survive, the fruits of their labour up to subsistence level belong to them by virtue of their ownership of their own faculties' (p. 259). This leads him to the conclusion that property acquisition gives rise to a duty, on the part of property holders, to 'distribute subsistence' and that when wages fall below the subsistence level, the rights of workers have been violated 'in exactly the same sense that taking an acquired asset away from its owner constitutes a violation of justice' (p. 244).

In the next section I discuss Witzum's claim that Smith's conception of the right to one's own is derived from a more fundamental right to what is one's due. I then discuss the 'presumption' that our labour was given to us for our preservation and the conclusions that Witzum claims follow from it.

[1] See, for example, Cropsey (1957, 1975); Salter (1994); Werhane (1991).

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PROMISES AND PROPERTY

In the *Lectures on Jurisprudence*, Smith says that the preservation of justice means to 'maintain each individual in his perfect rights.' Justice is violated when a person is 'deprived of what he had a right to and could justly demand of others' that is to say, when he is injured (LJ(A), i.9). A man 'merely as a man' can be injured either in his person, or in his reputation, or in his estate. Estate rights are of two kinds: they are either real rights (*iura in re*), or they are personal rights (*iura ad rem* or *iura personalia*), which are 'rights available only against a particular person, in respect of a particular thing' (LJ(A), ii.41). The most important part of real rights are property rights, and personal rights are rights 'to things which are due to us 'by loan or contract of whatever sort, sales, etc.' (LJ(A), i.16). Now the fact that Smith includes within the scope of justice, that which is due to a person on the basis of a promise, leads Witzum to develop a line of argument in support of his contention that 'due shares' and hence some notion of distributive justice, fall within the domain of justice.

He first notes that a right created by a promise is a right to one's due and is thus classified as *ius ad rem* because it is a right *to* something, as opposed to a right *in* something that one already has (*ius in re*). Because both kinds of rights are included by Smith within the scope of justice, that is, they are both perfect rights, Witzum concludes that the 'distinction between *ius in re* (the right to what one possesses) and *ius ad rem* (one's due share)' could not have been for Smith 'the means of delineating justice' (p. 250). Further, he suggests that the concept of *ius ad rem* has a wider application than to the *in personam* rights arising from explicit promises and contracts. He refers to Smith's remark that personal rights are produced by a loan or contract 'of whatever sort' and to Smith's discussion of the way in which contracts evolved over time.[2] This shows, according to Witzum, that Smith is suggesting that implicit contracts, as well as explicit ones, are binding and thus fall within the scope of justice.

Now *ius ad rem* can mean a right to something held against a particular person, as in a promise, or a right to something held against all other people, for example, a right to an equal share of something wherein all other people have a duty not to take more than their share. The fact that Smith acknowledges the existence of the former does not mean that he acknowledges the existence of the latter. Those authors whom Witzum criticizes are claiming that it is this latter sense of *ius ad rem*, that is, rights to one's due share held against all others, that is absent from Smith's theory. They do not mean that Smith did not

[2] See LJ(A), ii.41–78.

recognize promises and contracts to be matters of justice. As to Witzum's suggestion that Smith acknowledges the binding quality of implicit promises, we should note that Smith's discussion of the evolution of contracts remains within the context of his discussion of personal rights, that is, 'rights available only against a particular person, in respect of a particular thing.' It thus has no relevance to property rights, which are always available against all other people. So, while it is true that rights in the sense of *ius ad rem* fall within the scope of Smith's concept of justice, this is only true as long as we remember that *ius ad rem* here refers to rights held against a particular person as a result of a promise or contract.

The next step in Witzum's argument is to point out that promises create obligations, according to Smith, because '[a] promise is a declaration of your desire that the person for whom you promise should depend on you for the performance of it'. Such obligations are derived entirely 'from the expectation and dependence that was excited by him to whom the contract was made' (LJ(B), 176). Now since breaches of promises are breaches of rights in the sense of *ius ad rem*, and since they are breaches of rights because they cause frustrated expectations, Witzum concludes that 'frustrated expectations ... inevitably relate to the idea of *ius ad rem*' (p. 250). He is thus led to the question: 'whether we can consider different forms of 'frustrated expectations' – other than broken explicit promises as causing 'real injury?' (pp. 248–9). The implication behind this question being that if we can, then they, like broken promises can be considered to be breaches of rights in the sense of *ius ad rem*. At this point Witzum turns to the discussion of property in the *Lectures* where he finds that Smith does, indeed, think that rights other than broken promises are explained in terms of the expectations of the right holder. Smith says that the right of property acquired by occupation is founded on the expectation of continued use that is created in the mind of the person who is the first to seize a thing. This explanation of property illustrates, according to Witzum that: '[t]he importance of frustrated expectations (which inevitably relate to the idea of *ius ad rem*) in Smith's general theory of justice can even be seen as part of his justification of people's right to possess (presumably, an *ius in re* type of problem)' (p. 250). And so, 'the right of possession (*ius in re*) is based on the 'impartial spectator's' approval of the resentment felt by a person whose expectations to enjoy the thing he possesses (i.e., the enjoyment which is due to him from the asset he acquired: *ius ad rem*) are frustrated' (pp. 250–51). Witzum concludes that the right to one's own is itself derived from a more general notion of the right to one's due: 'the principle of ''one's dues'' is not only part of Smith's conception of justice, it is one of its fundamentals' (p. 251).

However, frustrated expectations 'relate to the idea of *ius ad rem*' in

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the sense that one kind of *ius ad rem* – promises, are explained by Smith with reference to frustrated expectations. It does not follow that any other right that Smith explains with reference to frustrated expectations must also be classified as *ius ad rem*. Although Smith says that promises are founded on the same kind of spectator judgement as property, they are distinct from property because it is a requirement of all property rights that the thing must, at least once, be brought into the power of the proprietor.[3] For example, occupation cannot take place 'unless the subject has been brought once at least into the power of the occupant, and becomes by that means separated from the common ones' (LJ(A),ii.1–2). It is founded on the fact that *the person who acquires possession* can form a reasonable expectation of using the thing, and that an impartial spectator would concur with this expectation. People do not, therefore, have rights to things growing on the common, or to animals in their wild state before they have taken physical possession of them, even though they may have some kind of prior expectation or intention of acquiring them. Property acquired by occupation, and indeed, property acquired in any other way, is 'property in', and the rights thus created are *ius in re* because they only begin once the thing is brought into the possession of the proprietor.[4] It is not the case, therefore, that the right of property is derived from the idea of one's due, either in the sense of one's due share, or in the sense of what is due from a promise or contract.

RIGHT OF SUBSISTENCE

Witzum develops his argument by asking whether a property right extends beyond the right to use the thing itself to 'the right to other things which are produced by the asset' (p. 251). He points out that in the course of discussing the principle of accession, Smith remarks that the right acquired by the occupation of land was strictly a right to cultivate the land: 'when the land was divided by the common consent of the state, the thing they would have in view would be to give each the property of the land in order that he may raise crops on it' (LJ(A), i.66).[5] Witzum concludes: 'any "fruit" of the asset which the person had in

[3] It is not Salter's view, as Witzum suggests, that promises are defined as someone's property.

[4] Smith, in fact, says that a physical attachment is required for all forms of property acquisition, including the derivative forms such as voluntary transfer and prescription. (LJ(A), ii.1–2, and LJ(A), i.77). This was a revision of the theory of Grotius and enabled Smith to make a clear distinction between contractual rights and property rights and to thereby claim that property cannot be created by contract alone.

[5] Accession, Smith says, is a principle by which people can acquire the property in a thing as a consequence of their ownership of something else even when the former was not principally in view when the latter was acquired.

mind constitutes part of that expectation upon which his right to the property had been established in the first place' (p. 252). He then says that 'as there is no question of the right to possess one's natural assets, there should not be a question of one's right to the ''fruits'' of those assets. In particular, when the ''fruits'' of the asset do exactly what ''nature'' intended them to do: to provide subsistence' (p. 252). And further, he says that people's natural faculties, including their labour, 'presumably were given to them to enable them to survive' hence 'the fruits of their labour up to subsistence level belong to them by virtue of their ownership of their own faculties' (p. 259). And again, he says that the labourers' right to subsistence 'stems from their acknowledged ownership of their faculties and the intended use of them' (p. 253). In the age of hunters game was freely available and 'equally distributed' and satisfying one's subsistence needs depended only on the skill of the hunter. Under these conditions most people's subsistence needs would be met by hunting as long as they all confined their takings to the subsistence level. But a problem arises when property in flocks is introduced. Then '[t]hose who have not any possession in flocks and herds can find no way of maintaining themselves but by procuring it from the rich' (LJ(A), iv,7; Witzum, p. 253–4). And for Witzum, this is a problem of justice because 'if the product of labour naturally belongs to the labourer, what justification was there for the appropriation of land (or any other means of production) in the first place?' (p. 253).[6]

At this point Witzum refers to Smith's remark that 'the land was divided by the common consent of the state' (LJ(A), i.66), and comments: '[o]bviously, the common consent . . . would not have been given had the right of propertyless individuals to the fruits of their labour been violated'.[7] Property acquisition is thus 'conditioned by not depriving someone else of the intended fruits of their labour, namely their subsistence'. And Witzum remarks that Smith 'would agree with considering the failure of distributing subsistence as a violation of justice in its commutative sense' (p. 255). Thus, when workers in a commercial society fail to find employment for a subsistence wage, their rights have been violated 'in exactly the same sense that taking an acquired asset away from its owner constitutes a violation of justice' (p. 243). This

[6] Witzum points out, correctly, that the famous 'invisible hand' passage in the *Theory of Moral Sentiments*, provides no *guarantee* that the propertyless will receive subsistence. So for Witzum patterns of property distribution which emerge through occupation and the other forms of acquisition can be unjust, and they are if the trickle down does not occur.

[7] Witzum is evidently appealing to some notion of interpretive charity to argue that in principle, people could have given up their original rights unconditionally, but that it is reasonable to assume that they would not have done so. This is a view that has been attributed to Grotius, the condition being that *in extremis* the original right (of access to the common) revives in the form of a right of necessity. See Tuck (1979, p. 80).

would be true of those earning less than a subsistence wage, and also of the unemployed who 'would not be in a position wherein they could even make use of their assets'. Both of these are violations of justice because they are a 'violation of individuals' rights to own their own natural assets, in the sense that they can make use of them and enjoy their intended fruits'. The starving would thus feel resentment and the sympathy of an impartial spectator would 'demand an enforced recompense' (p. 258).

Before examining this argument further, we should note that Witzum says that what the impartial spectator demands is an 'enforced recompense'. This is presumably because the duty to distribute subsistence was the condition attached to appropriation under the contract, and it thus has the same status as the obligation to fulfil the terms of a promise.[8] But if, as he also says, the 'failure of distributing subsistence' is a violation of rights 'in exactly the same sense that taking an acquired asset away from its owner constitutes a violation of justice', then what the impartial spectator demands, according to Smith's theory, is not 'an enforced recompense', but punishment. But this raises the question of which property holders have the duty to distribute subsistence, that is, which property holders should be punished when a worker starves. Is it all property holders, on the grounds that the duty to distribute subsistence is a duty acquired by all property holders on acquiring property, or is it only those who actually refuse a request of employment from a starving person? The implausibility of either of these answers should alert us to the fact that the argument has gone seriously astray at some point.

There are two problems with Witzum's interpretation. The first is his presumption that our labour was given to us to enable us to survive. No such presumption appears in Smith's theory. The second problem is that he misinterprets Smith's discussion of the nature of the original right acquired in acquiring land ownership. He takes it to mean that ownership of an asset, whether it is labour or land, not only gives us the right

[8] We should bear in mind that in saying that private property in land began with a division, Smith does not mean that the rights acquired as a result of the division had the same status as rights acquired as a result of a promise or contract. They, like all property rights, are founded on the expectation of use, and hence, they only begin once the proprietor takes possession. It is only in the intervening period between the expression of the will to transfer the right, by either the majority or by the leaders of the community, and the time when possession is taken, that the recipient can be said to have the power to claim his due (against those who made the promise) rather than a real right in the thing itself (against all others). This is the point of Smith's revision of Grotius's theory of contract. Smith also makes it clear, when discussing theories of original contracts, that such contracts are not binding on subsequent generations. So any stipulations or conditions that may have been attached to the original division of the land have no effect on future generations of property holders.

to use it, but also the right 'to other things which are produced by the asset' (p. 251). What Smith in fact says is that in acquiring the ownership of land, the occupant acquires the *right to cultivate the land*. It was a right 'of plowing, sowing, reaping the fruits, or of pasturing upon it' (LJ(A), i.66). He does not mean that the occupant has acquired the right to crops. A right to use the land may be only a necessary but not a sufficient condition for successfully producing crops. In the same way, self-ownership is only a necessary and not a sufficient condition of owning the fruits of one's own labour.[9] Although hunting is an example of unassisted labour, in the sense that no other 'capital goods' are required, all labouring requires the use of, or access to, some other resources.

The problem that Witzum identifies, therefore, is that after appropriation there is an insufficiency of freely available resources for people to survive without working for others. Hunters still own their labour and have the right to use it (in the negative sense that others cannot prevent them), but in order to survive, that is, in order successfully to make use of their labour, they need access to other resources (animals or land) which are now owned by others. Appropriation thus deprives hunters of the access they originally had to unowned things and Witzum says '[i]t is as if someone has taken his assets away from him by rendering them so totally useless' (p. 258). But although the consequences for the hunter – not being able to hunt – are the same, nobody has, in fact, taken away any of his assets. The hunter did not originally have a *right to* animals in their wild state. He merely had a right to hunt and to keep the animals he captured. This is the crucial distinction between *ius ad rem*, in the sense of rights to things we do not yet possess and which apply against all others, and rights in things we possess (*ius in re*). If people originally had a right to survive by applying their labour to the fruits of the common, then they also had a duty not to take more than they needed for survival if doing so meant that others would starve. But it is precisely the absence of such rights and duties in Smith's theory that enables him to give an account of the origins of private appropriation without posing the question of how the excluded could survive as one of justice. Unconditional appropriation is not a violation of the rights of the excluded. Consequently, shepherds, landlord and capitalists are not under an obligation to distribute subsistence to the propertyless.

CONCLUSION

Nowhere in Smith's writing or teaching does he make reference to a presumption that nature gave us our labour with the intention that we

[9] A slave owner, in addition to owning the slave, owns what the slave produces. But if the slave owner owned nothing but slaves, there would be no produce for the slave owner to own.

may survive. Moreover, such a presumption is not enough to produce Witzum's conclusions. There must, in addition to a right to our labour, be a right of access to a sufficient quantity of resources to enable our labour to bear fruit. If nature intended our survival, then nature must have granted us both rights. And even Witzum is not claiming that Smith thought that the latter right exists: 'If by distributive justice, or ''due share'', we mean an a priori claim individuals might have on, say, the produce of a nation, then Smith does not have a theory of distributive justice at all' (p. 248).

REFERENCES

Cropsey, J. 1957. *Polity and Economy: An Interpretation of the Principles of Adam Smith*. Martinus Nijhoff

Cropsey, J. 1975. 'Adam Smith and political philosophy'. In *Essays on Adam Smith*. A. S. Skinner and T. Wilson (eds.). Clarendon Press

Salter, J. 1994. 'Adam Smith on justice and distribution in commercial societies'. *Scottish Journal of Political Economy*, 41:299–313

Smith, A. 1978. *Lectures on Jurisprudence [A] (1762–3)*. R. L. Meek, D. D. Raphael and P. G. Stein (eds.). Clarendon Press

Smith, A. 1978. *Lectures on Jurisprudence [B] (1766)*. R. L. Meek, D. D. Raphael and P. G. Stein (eds.). Clarendon Press

Tuck, R. 1979. *Natural Rights Theories: Their Origin and Early Development*. Cambridge University Press

Werhane, P. H. 1991. *Adam Smith and His Legacy for Modern Capitalism*. Oxford University Press

Witzum, A. 1997. 'Distributive considerations in Smith's conception of economic justice'. *Economics and Philosophy*, 13:242–59