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Conflicting Lineages of International Law:

Cicero, Hugo Grotius and Adam Smith on Global Property Relations

Tarik Kochi*

Abstract

This essay presents an interpretation of the juridical thought of Cicero, Hugo Grotius and Adam Smith. Focussing upon questions of property, capital accumulation and violence, the essay traces a tension within their writings between a social ethic of human fellowship and compassion, and, a theory of the utility of ‘unsocial’ commercial self-interest. This tension forms a key problem for the tradition of liberal international law. For Grotius and Smith one response to this tension is to attempt to reign in capitalist markets by asserting a range of moral duties to individuals and to the nation-state. The importance of stressing such an interpretation is to reject the flattening-out of the liberal political and juridical tradition by contemporary neoliberal thought, and to reclaim a number of ways of thinking about the global economy and international law in which moral action and political intervention are understood as playing a necessary and essential role.

Keywords: Adam Smith; Cicero; Hugo Grotius; International Law; Property.

Introduction

When thinking about the broad conceptual structure of modern international law, the political and juridical tradition of ‘liberalism’ has played a key role in shaping the direction of international law across the 20th and 21st centuries. There are of course a number of disparate ancient, early modern and modern intellectual lineages which serve as the conceptual building blocks or foundations of ‘liberal international law’¹ and the global liberal political and juridical

* Senior Lecturer, School of Law, Politics and Sociology, University of Sussex. This is the final author’s version of the published work cited as: Kochi, T. “Conflicting Lineages of International Law: Cicero, Hugo Grotius and Adam Smith on Global Property Relations.” *Jurisprudence*, Published online 12 August 2016, DOI: 10.1080/20403313.2016.1214435.

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¹ See the discussion in: Schmitt, C. *The Nomos of the Earth*, (tr.) Ulmen, G.L. (New York: Telos Press 2003); Grewe, W.G. *The Epochs of International Law*, (tr.) Byers, M. (Berlin: Walter de Gruyter, 2000); Koskenniemi,

order.² In tracing an intellectual history of liberal international law the work of Hugo Grotius has often been given pride of place³ and the writings of Cicero perhaps less attention.⁴ The economic theories of Adam Smith have predominantly been seen to be important in sketching a vision of a liberal cosmopolitan economic order,⁵ and as presenting the key theoretical tools used in late 20th century and early 21st century neoliberal arguments⁶ that push for privatisation, free trade and unregulated free-market, capitalist economic development.⁷

In this article I bring together aspects of the juridical thinking of Cicero, Grotius and Smith to draw attention to an important, though often underemphasised, tension which runs through and troubles modern international law. This is a tension between, on the one hand, a social ethic of human fellowship and compassion, and on the other, a theory of the ‘unsocial sociability’, the

M. *The Gentle Civilizer of Nations*, (Cambridge: Cambridge University Press, 2004); Koskenniemi, M. *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge: Cambridge University Press, 2006); Veitch, S. *Law and Irresponsibility*, (Abingdon: Routledge-Cavendish, 2007); Douzinas, C. *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, (Abingdon: Routledge-Cavendish, 2007); Besson, S. & Tasioulas, J. (eds.) *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010).

² For an account of the liberal international order see: Jahn, B. *Liberal Internationalism: Theory, History, Practice*, (Basingstoke: Palgrave Macmillan, 2013); Fine, R. *Cosmopolitanism*, (London: Routledge, 2007); Ikenberry, G.J. *Liberal Leviathan: The Origins, Crisis and Transformation of the American World Order*, (Princeton, NJ: Princeton University Press, 2012); Sørensen, G. *A Liberal World Order in Crisis: Choosing between Imposition and Restraint*, (Ithaca: Cornell University Press, 2011); Slaughter, A. *The Idea That Is America: Keeping Faith With Our Values in a Dangerous World*, (New York: Basic Books, 2007).

³ See generally: Lauterpach, H. “The Grotian Tradition in International Law” *British Yearbook of International Law*, 23, (1946), 1-53; Bull, H. *Anarchical Society*, (New York, Columbia University Press, 1977).

⁴ See generally: B. Straumann, “Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius’ Early Works on Natural Law” *Law and History Review*, Vol. 27(1), 2009, pp. 55-85; Straumann, B. *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius’ Natural Law*, (Cambridge: Cambridge University Press, 2015).

⁵ On Smith and international law see generally: Kingsbury, B. & Straumann, B. “The State of Nature and Commercial Sociability in Early Modern International Legal Thought,” *Grotiana* 31(22) (2010) 22-43; Koskenniemi, M. “International Law and the Emergence of Mercantile Capitalism: Grotius to Smith”, in Dupuy, P. & Chetail, V. (eds), *The Roots of International Law*, (Leiden: Martinus Nijhoff 2013). On cosmopolitan approaches: Forman-Barzilai, F. *Adam Smith and the Circles of Sympathy*, (Cambridge: Cambridge University Press, 2010); Hill, L. “Adam Smith’s Cosmopolitanism: The Expanding Circles of Commercial Strangership”, *History of Political Thought*, 31(3) (2010), 449-73.

⁶ See generally: Hayek, F. *The Road to Serfdom*, (Routledge: London, 2001); Friedman, M. *Capitalism and Freedom*, (Chicago: University of Chicago Press, 1962).

⁷ See the discussion in: Harvey, D. *A Brief History of Neoliberalism*, (Oxford: Oxford University Press, 2005); Peet, R. *Unholy Trinity: The IMF, World Bank and WTO*, 2nd ed. (London: Zed Books, 2009); Rist, G. *The History of Development*, (New York: Zed Books, 2014); Holton, R. *Global Inequalities*, (London: Palgrave Macmillan, 2014); Pahuja, S. *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, (Cambridge: Cambridge University Press, 2011).

utility of private property, self-interest and commercial relations. In the Western juridical tradition this tension is primarily enunciated within Aristotle's (384–322 BCE) defence of private property. In the *Politics* Aristotle set out a theory of the social utility of private property which, when combined with a basic functional and geographic division of labour, exchange and trade, is portrayed as the best means of providing for the necessities of life. However, Aristotle argued also that the desire for property and wealth-getting for its own sake was not a virtue and leads instead to social ills and moral corruption. In this respect an excessive and egoistic focus upon wealth accumulation would be contrary to an ethical conception of the 'good life'.⁸ This tension can also be seen to be present within middle and later periods of Stoic natural law philosophy in the Hellenistic and Roman worlds,⁹ and is present also within early Christian theology in disputes over wealth and poverty.¹⁰

Paying attention to questions of property, capital accumulation and violence, I trace this tension through the writings of Cicero, Grotius and Smith with the aim of showing how their differing responses develop a number of contrasting ways of organising international juridical relations. Such an account helps to highlight the existence of a number of conflicting lineages present within the tradition of liberal international law. Hence, alongside belligerent theories of international law, theories of a global cosmopolitan legal order, and projections of a global order of unrestrained markets, commerce and free trade, resides a moral theory of Grotius which attempts to limit commercial and state antagonism through an ethic of human fellowship. In contrast to a neoliberal inheritance of Smith, sits a theory of wealth generation put in service to a republican and statist idea of 'love of country', and a historical sociology which links capital accumulation and state formation to the process of interstate rivalry and war. Drawing

⁸ Aristotle, "Politics" in *The Basic Works of Aristotle*, McKeon, R. (ed.), (New York: Modern Library, 2001), 2.5, p. 1151 (1263a); 1.9, pp. 1138-140, (1257a).

⁹ Erskine, A. *The Hellenistic Stoa*, 2nd. ed. (Bristol: Bristol Classics Press, 2011).

¹⁰ Garnsey, P. *Thinking About Property*, (Cambridge: Cambridge University Press, 2007).

out these conflicting lineages is important for demonstrating points of diversity within the intellectual history of the tradition of liberal international law. Such an effort is necessary also as a means of resisting the flattening-out of the liberal political and juridical tradition by contemporary neoliberal thought.

Property, War and Natural Rights

The ancient Roman politician and philosopher Cicero (106 – 43 BCE) can be seen as a figure who synthesised aspects of pragmatic Roman law and the more conceptual Stoic idea of natural law.¹¹ Cicero's *On Duties (De Officiis)* (44 BCE)¹² presents an ethical theory of natural law, property rights, rights of state and international law which still bears an important degree of influence within the Western juridical tradition. For Cicero, the Stoic idea of a universal natural law extends to all peoples, it includes within it the *ius gentium*, the 'law of nations.'¹³ This natural law based *ius gentium* represents something of a moral standard of justice, an international law built upon a fellowship of humanity. Cicero's idea of the *ius gentium* contains a set of moral duties which are meant to guide the actions of states. One key duty which is stipulated by natural law (governing both individuals and states) is the obligation to preserve one's self against harm (self-preservation), and the corresponding duties not to harm others or to arbitrarily take their property. Further, natural law also includes a duty of rectifying injustices and of defending those who have been unjustly harmed.¹⁴ Within this account Cicero describes the emergence of private property out the original, pre-political or 'natural' condition of common property:

¹¹ See generally: Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, (Oxford: Hart, 2000); Strauss, L. *Natural Right and History*, (Chicago: University of Chicago, 1965).

¹² Cicero, *On Duties*, (ed.) Griffin, M. and Atkins, E. (eds.), (Cambridge: Cambridge University Press, 1991).

¹³ *Ibid*, p. 108-109. See: Jolowicz, H.F. & Nichols, B. *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge: Cambridge University Press, 1972). At pp. 104-5 Jolowicz and Nichols describe how in this 'theoretical' meaning of the *ius gentium* Cicero generally follows Aristotle. Further that the 'theoretical' meaning of the *ius gentium* differed from its 'practical' use in Roman law facilitating contracts and property exchanges between Romans and foreigners.

¹⁴ Cicero, *On Duties*, pp. 9-10; 108-9.

Of justice, the first office is that no man should harm another unless he has been provoked by injustice; the next that one should treat common goods as common and private ones as one's own. Now no property is private by nature, but rather by long occupation (as when men moved into some empty property in the past), or by victory (when acquired in war), or by law, by settlement, by agreement, or by lot.... Consequently, what becomes each man's own comes from what had in nature been common, each man should hold onto whatever has fallen to him. If anyone else should seek any of it for himself, he will be violating the law of human fellowship.¹⁵

Cicero's account of natural law involves both a justification of the historical emergence of private property out of the commons (via occupation, war, and agreement), and a defence of private property, in the sense that natural law proscribes a duty not to take another person's property. Cicero condemned those in Rome who had attempted to introduce popular agrarian reform, and the abolition of debt for the sake of the public welfare, and saw such moves as creating instability and civil war which could ruin a republic.¹⁶ For Cicero the idea of land redistribution and the abolition of debt ran contra to the Roman idea of citizenship and Roman law which for a citizen involved a "free and unworried guardianship of his possessions."¹⁷ Further, such acts were conceived by Cicero as contrary to natural sociability. He argued that to take something from another, to increase one's advantage by disadvantaging another, and do so by theft or violence is to destroy the common life and fellowship of men.¹⁸ In this respect the importance of private property remained central, and even if it had historically emerged via seizure or war, once established by the civil law it was to be protected.

For Cicero the desire for wealth, like the desire for positions of command or honour and glory are not bad in themselves but these desires should not be placed above one's duty to the republic. When this occurs, such excessive, individual drives render unstable and threaten the

¹⁵ *Ibid*, p. 9.

¹⁶ *Ibid*, p. 95.

¹⁷ *Ibid*, p. 95. On the role of radical Stoic ideas in relation to Roman agrarian reform, social conflict and the Gracchi see: Erskine, A. *The Hellenistic Stoa*, pp. 150-181.

¹⁸ Cicero, *On Duties*, p. 108.

existence of the republic. Further, Cicero argued that a life devoted to commercial activity was not a particularly virtuous one, as opposed to a life devoted to civic duty or martial virtue. His account portrayed agriculture more favourably to trade and scorned the act of trading purely for profit.¹⁹ In a broader respect there existed a tenuous relationship between the demand of self-preservation and, the communal duty to others within Cicero's thought. Cicero claimed:

It is permitted to us – nature does not oppose it – that each man should prefer to secure for himself rather than for another anything connected with the necessities of life. However, nature does not allow us to increase our means, our resources and our wealth by despoiling others.

The same thing is established not only in nature, that is in the law of nations, but also in the law of individual peoples, through which the political community of individual cities is maintained: one is not allowed to harm another for the sake of one's own advantage.²⁰

For Cicero, these prohibitive and positive duties extend to the field of war and help to delineate a legitimate from an illegitimate war under the concept of the 'just war'. He considered a just war to be generally a war of defence, and one waged with the idea of peace in mind.²¹ Cicero's natural law idea of just war thus provides a sense of moral and legal restraint upon the use of violence, it appears as a normative criteria of the *ius gentium* used to limit or restrain acts of war otherwise carried out for power, territorial and commercial interests.

However, in Cicero's idea of the *ius gentium*, two opposing values – a universal law of nature, and the communal good of the Roman republic²² – are combined in a variety of contradictory ways. Set quite starkly in contrast to the Stoic idea of a universal fellowship of humanity (together with the duties not cause injury to others, and not to take their property), the power and glory of Cicero's Rome had been built upon a history of aggressive military expansion and incorporation of subject peoples on the Italian peninsular, and upon the military and

¹⁹ *Ibid*, pp. 27-28; 58-59.

²⁰ *Ibid*.

²¹ *Ibid*, pp. 14-15.

²² *Ibid*, pp. 9-10; 21-24.

commercial domination of the Mediterranean. Rome's culture inherited the Greek celebration of the ideal of the martial virtue of the citizen-soldier whose glory lay in selfless combat and death for the republic. Further, Rome's economy had increasingly depended upon slave labour and upon an incessant outward expansion for territory, for the control of trade, and for the capture of human bodies whose forced slave-labour sustained an economy that powered the Roman political-military machine.²³

While Cicero's idea of a just war included the old Greek notion of an honourable struggle amongst rivals for glory, power and reputation, he overlaid this account with a Stoic moral universalism which portrayed the creation and protection of the Roman Empire as largely beneficent and as a series of wars fought 'justly' in self-defence, for the protection of allies, and against treacherous and threatening enemies.²⁴ In Cicero's use, the concepts of natural law and *ius gentium* were deployed then partly as an apology for empire and as a rhetorical tool used to clothe an imperial war machine in the garments of moral duty and a universal natural law. Cicero's idea of just war spoke the language of humanity and human fellowship but exclusively represented Rome's military and commercial interests. Such a notion was not itself a contradiction for Cicero's republican thought, he had argued that while one may possess a general duty of fellowship to humanity, one's immediate and over-riding duty was always to the immediate political community, to the city-state, and in his case, to Rome.²⁵ Hence, in contrast to passages where Cicero draws upon the notion of the just war to restrain violence, he praises the violent acts of those who have increased Rome's power. He argued:

(B)y whatever means they can, whether in war or at home, to increase the republic in power, in land and in revenues. Such are the deeds of men who are great; such deeds

²³ See generally: Finley, M.I. *The Ancient Economy*, (Berkeley: University of California Press, 1999); Brunt, P.A. *Social Conflicts in the Roman Republic*, (New York: Norton & Co, 1971); Anderson, P. *Passages from Antiquity to Feudalism*, (London: Verso, 1996).

²⁴ Cicero, *On Duties*, pp. 16-17; 72.

²⁵ *Ibid*, 22-23; 98-9. See more generally: Evrigenis, I. *Fear of Enemies and Collective Action*, (Cambridge: Cambridge University Press, 2009).

were achieved in our forefathers' day. Men who pursue these kinds of duties will win, along with the utmost benefit to the republic, both great gratitude, and great glory for themselves.²⁶

Grotius, Property and International Law

The Dutch scholar Hugo Grotius (1583-1645) has been treated by many 20th century legal and political theorists as a sort of 'founding father' of the modern liberal international order and theorist of the modern 'Westphalian' idea of state sovereignty.²⁷ Grotius' writings inherit a rich and varied natural law tradition stretching across ancient Aristotelian and Stoic philosophy, medieval canonist writings, Thomist philosophy, and the early modern Spanish scholastics. His work also incorporates much from European traditions of ancient and early modern humanist thought and Roman law.²⁸ Importantly, Grotius inherited and expanded upon a theory of subjective natural rights which had developed in Europe as early as the 12th century,²⁹ and at least by the 14th and 15th centuries.³⁰ In this respect Grotius' writings straddled a number of often conflicting intellectual traditions. The question of the extent to which Grotius's work represents either, a continuation of an Aristotelian-Thomist ethical framework or, initiates a break with this tradition via presenting a 'modern' account of rights and sovereignty, remains a contested issue for scholars writing the intellectual history of Western moral and political thought.³¹ What is of interest here is the way in which aspects of this tension animate a set of problems related to Grotius' theory of property relations and his account of international law.

²⁶ *Ibid*, pp. 98-99.

²⁷ See: Bull, H. *Anarchical Society*, (New York, Columbia University Press, 1977). See also: Lauterpach, H. "The Grotian Tradition in International Law" *British Yearbook of International Law*, 23, (1946), 1-53.

²⁸ See generally: Tuck, R. *Natural Rights Theories: Their Origin and Development*, (Cambridge: Cambridge University Press, 1981); Tierney, B. *The Idea of Natural Rights*, (Grand Rapids: Eerdmans Publishing, 2001); Somos, M. *Secularisation and the Leiden Circle*, (Leiden: Brill, 2011); Straumann, B. *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, (Cambridge: Cambridge University Press, 2015).

²⁹ Tierney, B. *The Idea of Natural Rights*.

³⁰ Tuck, R. *Natural Rights Theories*; Villey, Michel, 2000. "Epitome of Classical Natural Law (Part 1)" tr. G. Voilley, *Griffith Law Review*, 9(1): 74-97; Brett, A. *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press 1997).

³¹ See generally: Skinner, Q. *The Foundations of Modern Political Thought, Vol. 1: The Renaissance*, (Cambridge University Press 1978); Skinner, Q. *The Foundations of Modern Political Thought, Vol. 2: The Age of Reformation*, (Cambridge University Press 1978); Tuck, R. *Philosophy and Government 1572-1651*,

On this account one element that will be emphasised is the way in which Grotius' theory of natural law displays a tension between a Stoic ethic of human fellowship, and a theory of social utility built upon the unsocial sociability of commercial self-interest. In part, this tension relates to a conflict between self-interest and human fellowship present within the natural law theory of Cicero. The argument however is not that Grotius' theory of natural law is necessarily a replication of that given by Cicero. Rather, that a particular conceptual tension found within ancient natural law jurisprudence develops, in somewhat different ways, in the work of Grotius and then Smith. The contrasting dynamics of this tension are worth exploring and have relevance to how we understand today the intellectual history and conceptual structure of a broadly 'liberal' idea of international law.

Grotius' early work on international law, particularly, *The Free Sea* (1609)³² was written in the context of acting as an advocate for the Dutch East India Company, and of developing a theory of a universal natural law and *ius gentium* which could combat Portuguese and Spanish claims to colonial and trade monopolies over the new world.³³ His later major work, *On the Law of War and Peace* (*De jure belli ac pacis*) (1625),³⁴ developed a natural law based theory of international law which expressed a theory of individual, private property and contractual rights widespread in late 16th and early 17th century Northern European commerce and global trade.³⁵

(Cambridge: Cambridge University Press, 1993); Irwin, T. *The Development of Ethics, Vol. 1: From Socrates to the Reformation*, (Oxford: Oxford University Press, 2007); Irwin, T. *The Development of Ethics, Vol. 2: From Suarez to Rousseau*, (Oxford: Oxford University Press, 2008).

³² Grotius, H. *The Free Sea*, Armitage, D (ed.), Hakluyt, R. (tr.), (Indianapolis: Liberty Fund, 2004).

³³ See generally: Van Ittersum, M. *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615*, (Leiden: Brill, 2006); Grewe, W.G. *The Epochs of International Law*, pp. 227-275; Blom, H. (ed.) *Property, Piracy and Punishment: Hugo Grotius on War and Booty in De iure praedae*, (Leiden: Brill, 2009); Armitage, D. *The Ideological Origins of the British Empire*, (Cambridge: Cambridge University Press, 2000).

³⁴ Grotius, H. *The Rights of War and Peace*, Tuck, R. (ed.) (Indianapolis: Liberty Fund, 2005).

³⁵ See generally: Kennedy, D. "Primitive Legal Scholarship" *Harvard International Law Journal*, 27(1) (1986), 1-98; Koskenniemi, M. *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge: Cambridge University Press, 2006); Koskenniemi, M. "International Law and the Emergence of Mercantile

This is not to say that Grotius reduced all international law to a theory of private property. His cosmopolitan and ‘multicultural’ theory of international law acknowledged also the validity of a variety of alternative property relations.³⁶ However the question of private property remains central to Grotius’s idea of international law and a number of problems and issues flow from his account. Further, alongside the question of private property other tensions run through Grotius’s work. In one sense his theory of international law expressed a spirit of free conscience, a rights-based natural law of a free, Protestant commercial people who had fought and won a war of liberation against Spanish feudal domination and imperialism.³⁷ Yet his account also echoed aspects of an apology for state authoritarianism and expressed a theory of state sovereignty in which the sovereign’s ability to hold together a peaceful, internal juridical order was considered vital.³⁸

Building upon the concepts of ‘objective’ and ‘subjective’ right found within the natural law and natural rights traditions Grotius outlined a theory of modern sovereignty which focussed upon securing natural rights in the context of a wider theory of justice. Following Cicero, for Grotius, the natural right to life is considered primary and with it comes the injunction to preserve one’s life (self-preservation)³⁹ and the duty not to do harm to others.⁴⁰ Contained within the duty of self-preservation is the right of self-defence against harm.⁴¹ This position was situated within a wider theory of natural human sociability. For Grotius, humans are not naturally selfish creatures. Following the Aristotelian conception of innate and political

Capitalism: Grotius to Smith”, in Dupuy, P. & Chetail, V. (eds), *The Roots of International Law*, (Leiden: Martinus Nijhoff 2013).

³⁶ Grotius, H. *The Rights of War and Peace*, pp. 420-481.

³⁷ Tuck, R. *Philosophy and Government 1572-1651*; Bloch, E. *Natural Law and Human Dignity*, Schmidt, D.J. (tr.), (Cambridge, MA: M.I.T. Press, 1996), pp. 45-52.

³⁸ Grotius, H. *The Rights of War and Peace*, p. 338. See generally: Tuck, R. *Natural Rights Theories*, p. 3; Tierney, B. *The Idea of Natural Right*, pp. 316-348.

³⁹ Grotius, H. *The Rights of War and Peace*, p. 180; 187.

⁴⁰ *Ibid*, p. 185.

⁴¹ *Ibid*.

sociality, and the Stoic concept of *oikeiosis*, Grotius argued that because humans are naturally social creatures who engage in moments of interaction and care, and who can judge their desires and the desires of others through the use of reason, the demand for self-preservation leads humans towards a key social good – peaceful sociability.⁴² For Grotius sovereign authority is justified not by any external religious authority, but is derived by natural reason and relations of consent in which humans group together out of mutual need and protection.⁴³ Sovereign authority gains its justification through the state’s ability to protect natural rights, and stop civil conflict and war. For Grotius, self-preservation and peaceful sociability is best maintained if individuals submit to a third party – the state – to protect their natural rights.⁴⁴

One central function of this natural rights idea of state sovereignty is the protection of private property rights. For Grotius, in an original pre-historical, natural condition of humanity, all property was held in ‘common’. However, through occupation and use, as well as through theft, seizure and through contracts and agreements where communal property is divided via mutual consent, forms of private property began to be carved out of the commons and both human laws of custom and the legislation of states turned these into enforceable legal rights.⁴⁵ For Grotius:

From hence we learn, upon what account men departed from the ancient community, first of moveable and then of immovable things: namely, because men being no longer contented with what the earth produced itself for their nourishment; being no longer willing to dwell in caves, covered only with the barks of trees, or the skins of wild beasts, wanted to live in a more commodious and more agreeable manner; to which end labour and industry was necessary, which some employed for one thing, and others for another. And there was no possibility then of using things in common; first by reason of the distance of places where each was settled; and afterwards because of the defect

⁴² *Ibid*, pp. 80-86; Cicero, *On Duties*, p. 6. See more generally: Brooke, C. *Philosophic Pride: Stoicism and Political Thought from Lipsius to Rousseau*, (Princeton: Princeton University Press, 2012); Straumann, B. “*Oikeiosis* and *appetites soietatis*: Hugo Grotius’ Argument for Natural Law and Just War”, *Grotiana*, 24-25, (2003-2004), pp. 41-66; B. Straumann, “Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius’ Early Works on Natural Law” *Law and History Review*, Vol. 27(1), 2009, pp. 55-85; Blom, H. and Winkel, L. *Grotius and the Stoa*, (Assen: Van Gorcum, 2004);

⁴³ Grotius, H. *The Rights of War and Peace*, pp. 93-4; 184.

⁴⁴ *Ibid*, pp. 240-1; 338.

⁴⁵ *Ibid*, pp. 420-7. See also: Grotius, H. *The Free Sea*, pp. 20-26.

of equity and love, whereby a just equality would not have been observed either in their labour or in the or in the consumption of their fruits and revenues.

Thus also we see what was the original of property, which was derived not from a mere internal act of the mind, since one could not possibly guess what others designed to appropriate to themselves, that he might abstain from it; and besides, several might have had mind to the same thing, at the same time; but it resulted from a certain compact or agreement; either expressly as by a division; or else tacitly, as by seizure. For as soon as living in common was no longer approved of, all men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by right of first possession, what could not have been divided.⁴⁶

Within this passage Grotius repeats a historical justification of private property developed much earlier by Cicero. Yet, there is another sense in which Grotius adds to the natural rights tradition by casting private property as a ‘natural right’.⁴⁷ He did so via expanding upon a set of earlier Aristotelian arguments, by emphasising the trans-historic role of ‘natural necessity’ and intensifying the role of social utility as it operated through the ‘division of labour’.⁴⁸ In this account the emphasis upon the drive for self-preservation, for comfort, for the betterment of the human condition through the use of tools, land, exchange and trade operates as if it were a form of ‘natural reason’. In this sense Grotius argued that private property was a ‘natural right’, even if this was not the case in the original natural condition and was a product of history.⁴⁹ This natural right to property had to be protected and it was one of the roles of the state to do so.

Grotius’ justification of the role of private property reflected a practical understanding of the progressive power of modern commerce which had propelled the small Dutch state in the late 16th and early 17th centuries into a major global commercial and military power.⁵⁰ His account

⁴⁶ *Ibid*, pp. 426-7.

⁴⁷ Tuck, R. *Natural Rights Theories*, pp. 59-62.

⁴⁸ Aristotle, “Politics”, 2.5, p. 1151 (1263a); 1.9, pp. 1138-140, (1257a).

⁴⁹ Grotius, H. *The Rights of War and Peace*, p. 154; 184-6.

⁵⁰ Braudel, F. *Civilisation and Capitalism 15th-18th Century, Vol. 3: The Perspective of the World*, (tr.) Reynolds, S. (London: Fontan Press, 1984), pp. 174-277.

articulated a theoretical link between private property, the utility of economic exchange, and the idea of social progress,⁵¹ developed a ‘stadial theory’ of history and involved an optimistic theory of historical progress.⁵² Within this however there is a degree of conflict between aspects of Grotius’ thought which his approach to property and exchange attempts to overcome. The element of self-interestedness contained within the historical development of private property conflicts somewhat with Grotius’ Stoic idea of a natural sociability based on mutual need, care, compassion and affection.⁵³

Grotius attempted to reconcile this conflict by portraying *commerce* and global *free trade* as the *means* by which mutual need is met and by which natural sociability is historically enhanced and developed. Hence, it is the drive towards self-preservation, the desire for comfort and betterment which pushes the development of private property relations and commercial exchange. Out of this the ever-growing relations of commerce and global trade operate as a form of mutual assistance which enable the satisfaction of the needs of the individual through the acts of others. In this respect, in Grotius’ natural rights theory a degree of self-interest (as Stoic-Ciceronian self-preservation⁵⁴), combined with mutual need, expresses itself via

⁵¹ Grotius, H. *The Rights of War and Peace*, pp. 443-444. On the positive role of trade via the ‘free sea’ Grotius quotes firstly Plutarch:

Human Life would have been wild and savage, there would have been no Intercourse between Men, were it not for this Element, which furnishes them with the Means of supplying one another’s Wants; and of forming Acquaintances and Friendships by the Exchanges they make.

And then Libanius:

God has not bestowed all his Gifts upon every Part of the Earth, but has distributed them among different Nations, that Men wanting the Assistance of one another, might maintain and cultivate Society. And to this End has Providence introduced Commerce, that whatsoever is the Produce of any Nation may be equally enjoyed by all.

⁵² Garnsey, P. *Thinking About Property*, p. 139.

⁵³ Grotius, H. *The Rights of War and Peace*, pp. 79-87.

⁵⁴ *Ibid*, p. 185. Grotius argues:

It is not against the Nature of Human Society, for everyone to provide for, and take Care of himself...

This follows a quote from Cicero:

commerce, which operates as the primary media (alongside the state, religion, and the family) that promotes and deepens human sociability. Such an idea of a natural law of global commerce becomes central for liberal political tradition and is a key conceptual foundation of the liberal tradition of international law.

Grotius' theory of natural rights does not however express an outright celebration of commercial selfishness as can be found later in the work of Thomas Hobbes⁵⁵ and Bernard Mandeville.⁵⁶ While for Grotius, commercial self-interest produces a degree of social utility, his account of property relations still broadly shares an Aristotelian sense of social virtue which discouraged the idea of pursuing trade solely for the sake of profit.⁵⁷ As such the selfish desires for wealth and luxury were not seen by Grotius as virtuous, but were portrayed as a common cause of war and social discord.⁵⁸ Further, Grotius emphasised also the Christian moral virtues of charity, humility, and benevolence and echoed also aspects of Thomas Aquinas' framing of private property relations.⁵⁹ Following Aquinas, Grotius argued that in cases of extreme need and emergency, such as famine, rights to private property could be temporarily suspended. In such circumstances the taking of another's property for the sake of self-preservation would not amount to theft.⁶⁰ Alongside this Grotius counselled a moral role of compassion when dealing with impoverished creditors,⁶¹ and argued for the fair and non-exploitative treatment of customers by merchants holding monopolies.⁶²

Nature allows every Man to provide the Necessaries of Life, rather for himself than for another...

⁵⁵ Hobbes, T. *Leviathan*, (1651), Tuck, R. (ed.), (Cambridge: Cambridge University Press, 1996).

⁵⁶ Mandeville, B. *The Fable of the Bees: Or, Private Vices, Publick Benefits*, (1714) (London: Penguin, 1989).

⁵⁷ Aristotle, "Politics" 1.9, pp. 1138-140, (1257a).

⁵⁸ Grotius, H. *The Rights of War and Peace*, pp. 197; 219-22.

⁵⁹ *Ibid*, pp. 178; 1478. See also: Aquinas "Summa Theologiae" in Aquinas, *Political Writings*, Dyson, R.W. (ed.) (Cambridge: Cambridge University Press, 2002), 66.2, pp. 207-8.

⁶⁰ Grotius, H. *The Rights of War and Peace* pp. 434-5; Aquinas "Summa Theologiae" 66.7, p. 216-7.

⁶¹ Grotius, H. *The Rights of War and Peace* p. 1478

⁶² *Ibid*, p. 452. Consider also Grotius' emphasis upon a republican duty to give up one's life in defence of the state, pp. 1152-1115.

This account links also with Grotius' emphasis upon a natural law and republican idea of maintaining forms of non-privatised, common property, such as oceans and seas, which are needed to maintain the public good of all peoples.⁶³ In this manner the Stoic sense of compassion, the Aristotelian republican ethic concerned with a socially-orientated good life, and the Christian idea of charity all played an important role in the way Grotius attempted to morally frame private property relations. On this account private property rights are not absolute and instead reside within an ethically-bounded political and social context in which, at times, certain forms of common ownership and political duty have precedence.

One way then of interpreting the tension in Grotius between an ethic of human fellowship and an unsocial commercial sociability, would be to read Grotius as accepting the existence of selfish and jealous passions within human social relations, and asserting against this a universal framework of natural law to guide humans towards more appropriate forms of moral behaviour. For Grotius, such a universal moral framework aimed at the respecting of rights and redress and punishment of wrongs is the basis of international law and the law of war. On this account one chief role of international law is to help render the 'natural' relation of private property rights and global commerce as peaceful as possible.

Grotius' account envisages a global set of individual human rights to life and private property sitting alongside the rights of states which are treated as if they are human individuals with rights and duties. Individual and corporate rights to life (self-preservation, sovereignty) and to property, as well as jointly held rights over the commons (oceans), are to be guaranteed by

⁶³ *Ibid*, pp. 420-53; Grotius, H. *The Free Sea*, pp. 24-5; 49-50.

international law, and when infringed are to be defended by force via ‘just war’.⁶⁴ This vision of international law justifies free trade in principle, but also allows states to close-off spheres of mutual economic interest when built upon commercial contracts and mutual consent.⁶⁵ In a very broad sense Grotius’ takes the Stoic-Ciceronian concepts of self-preservation, the duty not to harm others, the respect of contracts, treaties, private property and common property, and uses these to reimagine and project a global juridical space consistent with 17th century commercial and trade relations.

Grotius’ conception of the law of war inherits natural law accounts that went before him, such as that developed by Francisco de Vitoria,⁶⁶ in which the ‘just war’ is traditionally understood as a war of self-defence and self-preservation.⁶⁷ Such an account rejects Cicero’s argument that war could be waged for the ‘glory’ of a republic and empire, and describes as ‘unjust’ wars aimed at territorial conquest, religious conversion or launched to pre-empt the rising threat of an adversary.⁶⁸ Further, Grotius described as unjust the act of war which claimed a rightful ownership of territory because the inhabitants were wicked, lacked intelligence or had false religious beliefs.⁶⁹ For Grotius, war may only generally be waged to avenge an injury⁷⁰ and should be done in a proportionate way,⁷¹ and with a degree of prudence rather than recklessness.⁷² Built into this account also is notion which resembles the contemporary idea of

⁶⁴ *Ibid*, p. 189; 198; 393-7.

⁶⁵ *Ibid*, pp. 452-3; 465; 4714. On the question of the role of ‘monopoly’ in Grotius and his relation to the work of John Selden, see generally: Anand, R.P. *Origin and Development of the Law of the Sea*, (The Hague: Martinus Nijhoff, 1982), pp. 82-107; Armitage, D. *The Ideological Origins of the British Empire*, pp. 103-122. Somos, M. “Selden's Mare Clausum: The Secularisation of International Law and the Rise of Soft Imperialism.” *Journal of the History of International Law*, 14 (2) 2012 pp. 287-330.

⁶⁶ Vitoria, F. *Political Writings*, Padgen, A. & Lawrance, J. (eds.) (Cambridge: Cambridge University Press, 1991). See generally: Schmitt, C. *The Nomos of the Earth*, (tr.) Ulmen, G.L. (New York: Telos Press 2003); Grewe, W.G. *The Epochs of International Law*, (tr.) Byers, M. (Berlin: Walter de Gruyter, 2000).

⁶⁷ Grotius, H. *The Rights of War and Peace*, p. 180; 397-8; 416-7

⁶⁸ *Ibid*, pp. 1097-1114.

⁶⁹ *Ibid*, p. 1104.

⁷⁰ *Ibid*, p. 396-401. Including the duty to protect friends and allies, pp. 1155-8.

⁷¹ *Ibid*, p. 417.

⁷² *Ibid*, p. 1116, 113-4.

the ‘responsibility to protect’ whereby contained within the idea of ‘punishment’,⁷³ the ‘just war’ could be considered as a defence of the natural rights of others. This was the idea that states could intervene to protect vulnerable others suffering from the abuse of their natural rights.⁷⁴ Such a notion sits somewhat uncomfortably within Grotius’ theory of just war and reflects perhaps an earlier, more expansionist account of war developed in *The Free Sea*, where Grotius had argued that war could be fought “for the freedom and liberty of all mankind.”⁷⁵

One final point of note which speaks to a tension within Grotius’ theory of natural law is the historical question of the possible violent origins of private property. In *On the Law of War and Peace* Grotius placed a heavy emphasis upon the role of *consent* in the act of privatising property rights out of common property. On this account the creation of private property rights were seen to take place as a consensual, social act. Occupation and possession generate private property rights only through the inter-subjective acts of others who consent to and affirm these rights. Grotius argued that the generation of a private property right cannot merely be an “internal act of mind”, but that it comes about through “compacts and agreements” and the “division” of property through “consent.”⁷⁶

However, there is sense within Grotius’ account which alludes to a less consensual basis for the creation of private property rights, that is, to a form of ‘consent’ which is not given on precisely equal and free terms. Grotius alludes to this when he speaks of the creation of private property rights via ‘tacit consent’ and ‘seizure.’⁷⁷ In describing an initial division and

⁷³ Grotius, H. *The Rights of War and Peace*, pp. 1018-1021.

⁷⁴ *Ibid*, pp. 1021-4. See also: Tuck, R. *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant*, (Oxford: Oxford University Press, 1999), p. 103.

⁷⁵ Grotius, H. *The Free Sea*, p. 58.

⁷⁶ Grotius, H. *The Rights of War and Peace*, pp. 426-7.

⁷⁷ *Ibid*. At p. 426.

recognition of private property Grotius claimed that “(E)veryone appropriated to himself those he could seize on.”⁷⁸ Further, that:

It resulted from a certain Compact and Agreement, either expressly, as by Division; or else tacitly, as by Seizure.⁷⁹

Such a notion is slightly ambiguous, and sits in contrast to other facets of his work. One way of explaining this aspect of Grotius’ account is to see his description of the origin of private property as displaying a conflict between his dual inheritance of the scholastic natural law tradition and the humanist intellectual tradition, with the latter’s emphasis upon understanding history and social power relations. In this respect, on the one hand, Grotius asserts a normative natural law concern with the ‘proper’ consensual creation and regulation of private property relations which condemns violent conquest and theft. On the other hand, his account bears witness to the historical emergence of both property and sovereign relations which sometimes, though not all of the time, have taken place via acts of murder, seizure, violence and brute force. For Grotius both the Old Testament and ancient Roman writers of history and tragedy provided accounts of the violent origins of private property and political power. In this sense he claimed that:

The most antient Arts were those of Agriculture, and Feeding Cattle; they were exercised by the first Brothers, so that there was between them some Sort of Division of Goods. The Diversity of Inclination, immediately produced Jealousy, and afterwards Murder.⁸⁰

In the earlier *The Free Sea* (1609), Grotius’ account of the historical and ‘natural’ justification of private property is followed by a quote from Seneca’s *Thyestes*: “Between us lies the crime for him who first shall do it.”⁸¹ This can be read as something of a ‘realist’ acknowledgement

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, p. 424.

⁸¹ Grotius, H. *The Free Sea*, p. 23.

of the crimes and murders that lie at the origins of many juridical and political institutions – the violence of taking and making property, of founding cities and colonies, and of creating ruling dynasties and sovereign relations. Viewed in this light Grotius’ condemnation of the colonial conquest of territory via spurious ‘just war’ claims, (such as that undertaken by the Spanish and Portuguese empires), can be understood as the moral insistence that any past crimes of ‘seizure’ be not repeated in the present.

Such passing references to the violent origins of property point to a degree of historic unsociability sitting underneath Grotius’ moral theory of human fellowship and respect for the rights and property of others. An awareness of this tension was inherited by subsequent natural law and natural rights scholars who drew attention to the very *paradoxical* nature of private property relations. The 18th century natural law theorist Jean-Jacques Rousseau (1712-78) viewed the contradiction between a universal moral regime of natural rights, and the violent origins of property (leading to widespread inequality and conditions of economic domination), as a moral outrage. For Rousseau, in the *Discourse on the Origin and Foundations of Inequality Among Men* (1755), the violent creation of private property rights through seizure represents a historic ‘wrong’ turned into a ‘right’, something which natural law should properly condemn, and something which throws the whole law of private property and modern social relations of inequality into question.⁸²

Adam Smith and the Question of Property

One 18th century response to the possible violent origins of private property rights is given by Adam Smith (1723-90). Smith’s account responds to a discourse of levelling politics, critical

⁸² Rousseau, J. “Discourse on the Origin and Foundations of Inequality Among Men” (1755) in *The Basic Political Writings of Jean-Jacques Rousseau*, Gay, P. (ed.), Cress, D. (tr.) (Indianapolis: Hackett, 1987), pp. 60-71.

of the idea of private property and wealth inequality, such as exemplified by the account developed in Rousseau's *Discourse on Inequality*. Smith's account adopted and developed many of Rousseau's critiques of modern commercial society. Yet, contra Rousseau, Smith's account also presented a powerful defence of private property, inequality and the socially beneficial and progressive role of modern commerce.⁸³ In this respect Smith's account attempts to reconcile a number of tensions related to property, inequality, and commercial (un)sociability present in Grotius' theory of natural law and in Rousseau's critical reframing of the natural law tradition.

Smith's approach is key in that it outlines a form of economic, political and juridical thinking which becomes fundamental to subsequent attempts by many scholars and political actors in the late 19th and 20th centuries to project and bring into being a global, liberal order. Oddly, for contemporary theorists of international law, Smith is often portrayed as a minor figure, whose contribution is dwarfed by the cosmopolitanism and moral theory developed by Immanuel Kant (1724-1804).⁸⁴ Kant's theory of cosmopolitan rights, moral critique of aggressive just war, juridical framework of 'perpetual peace', and commercial idea of 'unsocial sociability' (*ungesellige Geselligkeit*) inherit much of a conceptual structure developed by Grotius and has been drawn upon heavily by modern liberals in attempting to craft a distinctively 'liberal' idea of international law.⁸⁵

⁸³ On the relationship between Rousseau and Smith see: Rasmussen, D. "Adam Smith and Rousseau: Enlightenment and Counter-Enlightenment" Berry, C. *et. al.*, (eds.) *The Oxford Handbook of Adam Smith* (Oxford: Oxford University Press, 2013).

⁸⁴ Kant, I. "Perpetual Peace: A Philosophical Sketch" (1795) in *Political Writings*, (ed.) Reiss, H.I. (Cambridge: Cambridge University Press, 1991); Kant, I. "Idea for a Universal History with a Cosmopolitan Purpose" (1784) in Kant, I. *Political Writings*, Reiss, H.I. (ed.) (Cambridge: Cambridge University Press, 1991).

⁸⁵ See generally: Bull, H. *Anarchical Society*, (New York, Columbia University Press, 1977); Carr, E.H. *The Twenty Year's Crisis: 1919-1939*, (Basingstoke: Palgrave MacMillan, 2001); Bohman, J. and Lutz-Bachman, M. (eds.) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, (Cambridge Mass., MIT Press, 1997); Rawls, J. *The Law of Peoples*, (Cambridge, MA: Harvard University Press, 1993).

One reason however for focussing upon and emphasising the work of Smith, rather than Kant, is that Kant's analysis rarely pursues the problems of 'unsocial sociability' as they relate to questions of property, capital accumulation and social and interstate conflict.⁸⁶ In contrast, Smith's attempt to reconcile an ethic of human sociability with unsocial commercial relations relies upon developing a historical sociology of violence, dispossession and war, and then tempering this with an economic theory designed, not as a naïve idea of commercial progress, but as a prudential art of governance. There is a degree of *pragmatism* contained in Smith's approach, the original violence laying at the foundation of property relations is acknowledged historically. However this original violence is deemed unimportant and fades in comparison when viewed in contrast to the productive and wealth generating power of modern commercial societies which are understood as providing better lives for all individuals.

Smith's economic and jurisprudential arguments have proved to be highly influential in shaping the liberal tradition and are often assumed, though rarely cited, by modern international lawyers. What follows involves a focus upon the tensions contained within Smith's account, and examines how Smith inherits and develops much from Grotius' theory of natural rights, as well as how Smith breaks away from a number of Grotius' key positions. Such an approach is important for not merely understanding Smith as a scholar of international law, but for forming a clearer understanding of the conflicts and limitations contained within the idea of liberal international law more generally.

⁸⁶ For critiques of Kant's position see: Kochi, T. *The Other's War: Recognition and the Violence of Ethics*, (Abingdon: Birkbeck Law Press, 2009); Veitch, S. *Law and Irresponsibility: On the Legitimation of Human Suffering*, (Abingdon: Routledge-Cavendish, 2007).

Smith's thought has sometimes been criticised for offering a somewhat naïve or confused account of the origin of wealth and capital accumulation.⁸⁷ Attention is generally paid to Smith's comments in the *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)⁸⁸ where Smith refers to 'previous' accumulation. In this the accumulation of stock takes place primarily through thrift and saving.⁸⁹ However, looking at Smith's *Lectures on Jurisprudence* (1762-3; 1763-4),⁹⁰ which are a copy of Smith's University of Glasgow lecture notes, (a version of which was first posthumously published in 1896), it is clear that Smith held a very realistic view of the historical violence that underpinned private property and capital accumulation.

The traditions of natural law and natural rights play an important role in Smith's thought and his account of the emergence of private property rights forms part of this intellectual tradition.⁹¹ Smith's account of property, drawing on Roman law and Grotius, places an emphasis on the role of occupation and is critical of the mythical nature of John Locke's labour theory of property ownership.⁹² Smith develops a 'stadial history' of social-property relations which outlined a shift from relatively egalitarian modes of communal property relations towards

⁸⁷ Marx, K. *Capital, Vol. 1*, (tr.) Fowkes, B. (London: Penguin, 1990), pp. 873-4. See also: Perelman, M. *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation*, (Durham: Duke University Press, 2000), pp. 25-7.

⁸⁸ Smith, A. *The Wealth of Nations, Vol. 1*, Skinner, A. (ed.) (London: Penguin, 1999); Smith, A. *The Wealth of Nations, Vol. 2*, Skinner, A. (ed.) (London: Penguin, 1999).

⁸⁹ Smith, A. *Wealth of Nations, Vol. 1*, pp. 371-2; 437; 446.

⁹⁰ Smith, A. *Lectures On Jurisprudence*, Meek, R., Raphael, D., & Stein, P. (eds.), (Indianapolis: Liberty Fund, 1982), [1762-3 LJ(A); 1763-4/1766 LJ(B)].

⁹¹ See generally: Hont, I. *Jealousy of Trade*, (Cambridge, Mass: Harvard University Press, 2005); Haakonssen, K. *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*, (Cambridge: Cambridge University Press, 1981); Haakonssen, K. *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*, (Cambridge: Cambridge University Press, 1996); Winch, D. *Adam Smith's Politics: An Essay in Historiographic Revision*, (Cambridge: Cambridge University Press, 1978); Kingsbury, B. & Straumann B. "The State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes and Pufendorf" in Besson, S. & Tasioulas, J. (eds.) *The Philosophy of International Law*, (Oxford: Oxford University Press, 2010); Koskenniemi, M. "International Law and the Emergence of Mercantile Capitalism: Grotius to Smith", in Dupuy, P. & Chetail, V. (eds), *The Roots of International Law*, (Leiden: Martinus Nijhoff 2013).

⁹² Smith, A. *Lectures On Jurisprudence*, LJ (B) p. 459; LJ(A), p. 13; Locke, J. *Two Treatises of Government*, (1689) Laslett, P. (ed.), (Cambridge: Cambridge University Press, 1988), pp. 287-90.

modes of private property ownership marked by higher levels of inequality. Smith's stadial history, which is characterised generally by upward social progress and 'development' and traces a movement from conditions of scarcity to opulence, contains four stages: hunter-gathering; shepherding; agriculture; and commerce. Within this account the methods by which property is acquired, and the content of a property right, is dependent upon the historical, material, socio-economic conditions of each period of historical development.⁹³ Given property's historical contingency, Smith could claim that "The only case where the origin of natural rights is not altogether plain, is in that of property."⁹⁴

In a manner which echoes and intensifies Grotius' earlier historical account of the development of property relations, the concepts of 'nature' ('natural progress'), 'necessity' and 'utility' play, for Smith, an important role in historically driving modes of subsistence and accumulation, the division of labour and the production and exchange of surplus.⁹⁵ For Smith, property ownership

⁹³ *Ibid*, LJ(A), p. 14-6. See also: Meek, R. "Smith, Turgot and the 'Four Stages' Theory" *History of Political Economy*, 3(1) (1971), pp. 9-27; Alvey, J. "Adam Smith's View of History: Consistent or Paradoxical?" *History of the Human Sciences*, 16(2) (2003), pp. 1-25; Pitts, J. *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*, (Princeton: Princeton University Press, 2005).

⁹⁴ Smith, A. *Lectures On Jurisprudence*, LJ(A), p. 13.

⁹⁵ *Ibid*, pp. 14-15, Smith referring to the transition from hunting to shepherding:

In the process of time, as their numbers multiplied, they would find the chase too precarious for their support. They would be necessitated to contrive some other method whereby to support themselves... The most naturally contrivance they would think of, would be to tame some of those wild animals they caught...

At p, 15, Smith referring to the transition from shepherding to agriculture:

But when society becomes too numerous they would find difficulty supporting themselves by herds and flocks. Then they would naturally turn themselves to the cultivation of land and the raising of such plants and trees as produced nourishment for them.

At pp. 15-16, Smith referring to the transition from agriculture to commerce:

As society was further improved, the several arts, which at first would be exercised by each individual as far as was necessary for his welfare, would be separated; some persons would cultivate one and others others, as they severally inclined. They would exchange with one another what they produced more than was necessary for their support, and get in exchange for them the commodities they stood in need of and did not produce themselves. This exchange of commodities extends in time not only betwixt the individuals of the same society but betwixt those of different nations... Thus at last the age of commerce arises.

arises out of acts of possession situated within historical-material relations, such that in one sense, modes of the division of property are derived from the differing forms of subsistence, accumulation, production and exchange occurring at different stages of history. For example, hunters have only small personal possessions, wandering shepherds possess property in animals, and an increase in private property emerges with the development of agriculture and settlement in towns and cities.⁹⁶ However within Smith's thought the legal *form* of property relations is not completely derivative and plays an important role in shaping moral sentiment, conceptions of prudence and justice, which can be reasserted to direct and organise the social order.⁹⁷ Social relations and the juridical form (law, right) may be thought then to co-determine each other in Smith's jurisprudence.

On Smith's account the formation of government and laws are closely bound to the process of socio-economic development. Law develops not from some imagined consent or agreement but arises in relation to "the natural progress which men make in society."⁹⁸ Significantly, law follows from and potentially holds in place economic inequality. Under the conditions of inequality the establishment of law is less some imagined social contract or consent and resembles more a succession of historical acts of domination and the reassertion of claims of equality against this.⁹⁹ For Smith, inequality is a consequence of a historical, socio-economic shift from the more precarious nature of hunter-gathering in the commons to the private ownership of animals within herding. This change involves the emergence of distinctions between the rich who own the herds and the poor who depend upon the rich for their subsistence

⁹⁶ *Ibid*, pp. 19-23.

⁹⁷ Smith, A. *The Theory of Moral Sentiments*, Haakonssen, K. (ed.), (Cambridge: Cambridge University Press, 2007).

⁹⁸ Smith, A. *Lectures On Jurisprudence*, LJ(A), p. 207.

⁹⁹ Smith echoes and expands upon an earlier account given by David Hume. See: Hume, D. "On the First Principles of Government" (1741) in *Political Essays*, Haakonssen, K. (ed.), (Cambridge: Cambridge University Press, 1994), pp. 16-18; "Of Interest" (1752), p. 128.

and provide labour for them.¹⁰⁰ On Smith's account, government becomes necessary to protect the changed nature of property rights and to hold a society stable against the tensions caused by economic inequality. Smith argues:

Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence. The government and laws hinder the poor from ever acquiring the wealth by violence which they would otherwise exert on the rich; they tell them they must either continue poor or acquire wealth in the same manner as they have done.¹⁰¹

For Smith the different forms of inequality historically emerge within herding, under agriculture, within slave owning societies, and then via the operation of wage labour within commercial societies. All of these cases stand in sharp contrast to the relative degree of equality portrayed in hunter-gather societies at a point where private property was non-existent or minimal, and in contrast also to the degree of equality projected onto the idea of citizenship within ancient republics (both cases animating Rousseau's moral objections to inequality).¹⁰² In a sense, Smith's historical reconstruction of property relations frames law, government and private property as both a 'wrong' and as 'right'. Property and government emerge historically through force, violence and seizure, but then are reconceived in each historical moment by the holders of property as the legitimate form of juridical and political relations.

By historically reconstructing the development of juridical and social-property relations as involving violence and seizure, and the domination of the poor by a 'class' of property owners, Smith's account strikes up against a tension between the unsocial aspect of private property

¹⁰⁰ Smith, A. *Lectures On Jurisprudence*, LJ(A), p. 202.

¹⁰¹ *Ibid.*, p. 208. See also: Smith, A. *The Wealth of Nations*, Vol. 2, p. 302.

¹⁰² Rousseau, J. "Discourse on the Origin and Foundations of Inequality Among Men"; Rousseau, J. "On The Social Contract" (1762) in *The Basic Political Writings of Jean-Jacques Rousseau*, Gay, P. (ed.), Cress, D. (tr.) (Indianapolis: Hackett, 1987).

relations and a natural law theory aimed at the respect of individuals encompassing a Stoic ethic of care. When Smith's historical account of property in the *Lectures on Jurisprudence* is set alongside *The Theory of Moral Sentiments* (1759)¹⁰³ his approach echoes a tension that runs through the natural rights thinking of Grotius and Rousseau. On the one hand, private property is viewed as necessary in modern commercial societies for self-preservation and individual autonomy.¹⁰⁴ On the other hand, an ethic of 'sympathy' and compassion, the concern for the welfare and happiness of others, and the worry over impoverishment and suffering¹⁰⁵ sits uncomfortably with acts of violence which cause harm to others and robs them of their possessions and their livelihood.¹⁰⁶

Smith's response to the paradox of property and problem of inequality is too intensify arguments found in Grotius, Samuel Pufendorf¹⁰⁷ and Locke¹⁰⁸ by emphasising the social *utility* of self-interest, private property and the productive power of modern commercial society which is understood as the best means of providing for the happiness of the whole of society. Smith's approach echoes David Hume's rejection of any return to the idealised egalitarianism of ancient republics,¹⁰⁹ and sees self-interest within modern commerce as being a more efficient means

¹⁰³ Smith, A. *The Theory of Moral Sentiments*. At p. 309.

¹⁰⁴ Smith, A. *Lectures On Jurisprudence*, LJ(A), p. 5; LJ(B), p. 401. LJ(A) at p. 5:

The first and chief design of every system of government is to maintain justice; to prevent the members of society from inroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property.

¹⁰⁵ Smith, A. *The Theory of Moral Sentiments*, pp. 11-16; 53-60; 96-107. See also Smith's concern for the physical and mental 'corruption' of the labouring poor whose minds and bodies are ruined by performing endless, repetitive, simple tasks. Smith, A. *The Wealth of Nations*, Vol. 2, pp. 368-70.

¹⁰⁶ Smith, A. *The Theory of Moral Sentiments*, pp. 96-103. This echoes a number of Stoic tensions running through Cicero and Grotius taken up and engaged with by Smith. On the aspects (and tensions) of Stoic and Epicurean philosophy within Smith's thought see generally: Brown, V. *Adam Smith's Discourse: Canonicity, Commerce, Conscience*, (London: Routledge, 1994); Vivenza, G. *Adam Smith and the Classics: The Classical Heritage in Adam Smith's Thought*, (Oxford: Oxford University Press, 2001); Force, P. *Self-Interest Before Adam Smith: A Genealogy of Economic Science*, (Cambridge: Cambridge University Press, 2003).

¹⁰⁷ Pufendorf, S. *The Whole Duty of Man According to the Law of Nature*, (1673) Hunter, I. & Saunders, D. (eds.), (Indianapolis: Liberty Fund, 2003), pp. 52-6; 132.

¹⁰⁸ Locke, J. *Two Treatises of Government*, pp. 296-9.

¹⁰⁹ Hume, D. "Of Commerce" (1752) in *Political Essays*, Haakonssen, K. (ed.), (Cambridge: Cambridge University Press, 1994), pp. 97-102.

of providing for the needs of society than any levelling or redistributive, egalitarian politics built on love and compassion such as that propounded by Rousseau. For Smith, self-interested, commercial action operates as an “invisible hand” which has the unintended consequence of advancing the interests of society.¹¹⁰

Istvan Hont argues that Smith’s metaphor of the ‘invisible hand’ is used to show how the self-interested condition of private property relations operates to unlock the productive powers of human labour in a way that could not be matched by egalitarian arrangements which otherwise struggled to feed populations under conditions of high population growth.¹¹¹ Hont argues:

It was the productivity of workers and the goods available for consumption *per capita*, he argued, that were the true indicators of economic success. Such indicators were high in most well-managed modern economies based on private property, Smith wrote, and miserably low in egalitarian alternatives. Therefore the egalitarian and levelling politics of envy deserved no serious attention from those who constructed a new science of the legislator. What really mattered was not inequality but the decent living standard of all, including the poorest stratum of society.

This argument constituted the “paradox of commercial society.” The economic efficacy of inequality was a paradox because it drove a wedge between the traditional egalitarian intuitions of Western moral thought and the guiding assumptions of modern political economy. The success of commercial society was counterintuitive to those who expected that political and economic equality must somehow proceed hand in hand. The new idiom suggested, instead, that legal and political equality could coexist with economic inequality without causing endemic instability in modern Western states. “Liberalism,” as this new political form came to be called in the next century, could even be defined by the coexistence of political and legal equality and significant economic inequality in the very same polity and society. This was the truly modern feature of the “modern republics” that have emerged in the modern era, for traditional political wisdom assumed that republics had to be egalitarian, and democracies even more so. Smith accepted the spectacular inequalities of modern society both morally and politically because they were not only compatible with, but indeed the prerequisite of, a society’s capacity to provide welfare even for its poorest working members. The poorest workers in a modern commercial state enjoyed a better standard of living than even the richest members of undeveloped societies or of any past society.¹¹²

¹¹⁰ Smith, A. *The Theory of Moral Sentiments*, p. 215-6.

¹¹¹ Hont, I. *Jealousy of Trade*, pp. 91-92.

¹¹² *Ibid*, pp. 92-93.

In one sense Smith's approach to the question of the original violence and series of wrongs that underlie the historical emergence of private property and social inequality is a pragmatic one. This relates to Smith's belief that modern commercial societies are simply better at providing for the welfare and needs of the population than egalitarian modes of political and economic organisation. For Smith, like Bernard Mandeville, in commercial societies built around private property and free markets, self-interest, inequality and the desires of selfishness and grandeur¹¹³ create the unintended consequence of providing for the needs of others. In this sense Smith, in *The Wealth of Nations*, argued that "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."¹¹⁴

For Smith, the most practical way of exercising the social ethic of care, compassion and sympathy for the needs of others is not to redistribute or redress historic wrongs, but instead to organise the governance of economy and society in a way that mobilises the 'natural' operation of the market and economic self-interest and unlocks the productive power of the social and economic division of labour.¹¹⁵ Linked to self-interest, Smith's image of the functional division of labour contained in the 'pin factory'¹¹⁶ is portrayed as the engine room of a modern, wealth-generating society. In such a society, economic inequality is not merely accepted, it is viewed as an important and *productive* part of an economic system of self-interest. The desire for wealth, capital investment and market rationality generate both private wealth and social utility by raising the living standards of all members of society through the efficient production and

¹¹³ Smith, A. *The Theory of Moral Sentiments*, p. 216-8. Smith refers to the desire for creating a beautiful and magnificent system of government, the 'spirit of system', which has the unintended consequence of creating a greater degree of public happiness.

¹¹⁴ Smith, A. *The Wealth of Nations*, Vol. 1, p. 119.

¹¹⁵ *Ibid*, pp.117-21.

¹¹⁶ *Ibid*, pp. 109-10.

exchange (via the geographical division of labour between town and country) of cheap foodstuffs and consumer goods.¹¹⁷

Smith's outline of a theory of market-based, capitalist political economy turns a set of historic wrongs into a global and universal idea of natural law and natural right which can bring progress, economic growth, wealth and opulence when the 'natural' operation of the market¹¹⁸ and the right of individual economic choice and autonomy¹¹⁹ are encouraged to operate across societies without monopolistic or protectionist interference by government.¹²⁰ When viewed purely through the economic frame of progress, development and growth via the market, the 'wrongs' of historic violent seizure and economic inequality fade to insignificance. One example of this is Smith's somewhat contradictory portrayal of European colonialism and empire. In one sense Smith openly condemned the violent practice of European colonialism since the 16th century, treating as a 'wrong' the theft of land and the destruction of the civilisations and lives of indigenous peoples.¹²¹ Yet, in another sense, Smith acknowledged the degree of economic and social 'progress' that had been brought about through the history of colonisation.¹²²

One way of making sense of this contradiction is to interpret Smith's account as one which worries little over past wrongs because he was focussed upon outlining a future-orientated,

¹¹⁷ Smith, A. *Lectures On Jurisprudence*, LJ(A) pp. 340-9; Smith, A. *The Wealth of Nations*, Vol. 1, pp. 479-84.

¹¹⁸ With regard to the idea of the 'natural' operation of the market, alongside Grotius and Locke, Smith's position also echoes ideas expressed by Hume, François Quesnay (1694–1774) and Anne Robert Jacques Turgot (1727–1781). See: Meek, R. *The Economics of Physiocracy* (London: George Allen & Unwin, 1962).

¹¹⁹ Smith, A. *The Wealth of Nations*, Vol. 2, p. 163.

¹²⁰ *Ibid.*, pp. 33-5; 105-6; 118-9; 273-5.

¹²¹ *Ibid.*, pp. 25; 142.

¹²² *Ibid.*, pp. 145; 148; 153; 209. At pp. 145-7: Smith reasserted a Lockean theory of colonisation advocating agricultural "improvement" and justifying the possession of "waste country" or land "so thinly inhabited that the natives easily give place to the new settlers." See more generally: Winch, D. *Classical Political Economy and Colonies*, (London: London School of Economics, 1965); Williams, D. "Adam Smith and Colonialism", *Journal of International Political Theory*, 10(3), (2014), pp. 283-301.

pragmatic theory of political and economic governance. In proposing a ‘science of the legislator’,¹²³ Smith’s concern is to demonstrate how a government can protect the population from famine, scarcity and external threat, and generate happiness via fostering economic growth. The form of statecraft invoked is based on the art of mobilising, as a transformative power, self-interest, private property, the functional and geographical division of labour, and the free market. As such, Smith’s approach to the tension between an ethic of human fellowship, moral sentiment, and commercial unsociability, is to put forward an art of governance which attempts to realise ‘collective welfare’ via mobilising and enabling individualistic economic desire. For Smith, however, the art of governance also aimed to balance this via restraining private and class interests when the desire for monopoly, profit and economic power threatened to undermine collective welfare and the national interests of the state.¹²⁴

The Pin Factory and the War Factory

Smith’s arguments in favour of the global respect for individual rights, the respect for private property and for individual autonomy and choice within the economic realm, express a version of liberal cosmopolitanism.¹²⁵ In his argument against mercantilism and in favour of global free trade Smith offered a critique of how the adoption of policies of mercantilism had turned economic competition into interstate war. Smith argued that commerce, which ought to be a “bond of union and friendship” between individuals and nations, has become the “most fertile source of discord and animosity”.¹²⁶

¹²³ Smith, A. *The Wealth of Nations*, Vol. 2, p. 5.

¹²⁴ *Ibid*, pp. 48-9; 409. Such as Smith’s criticism of a class of British merchants whose influence on government policy put their own narrow economic interests (profit) above the national interest and above the interest of consumers in Britain and in the British colonies. See also: Arrighi, G. *Adam Smith in Beijing*, (New York: Verso, 2007).

¹²⁵ See generally: Forman-Barzilai, F. *Adam Smith and the Circles of Sympathy*, (Cambridge: Cambridge University Press, 2010); Hill, L. “Adam Smith’s Cosmopolitanism: The Expanding Circles of Commercial Strangership”, *History of Political Thought*, 31(3) (2010), 449-73.

¹²⁶ Smith, A. *The Wealth of Nations*, Vol. 2, p. 72.

Smith followed and developed Hume's critique of the 'jealousy of trade', the idea that states loose-out when they act as rivals carrying out protectionist, mercantilist policies. Hume argued that states should recognise the mutual advantages of trade and the shared flourishing and progress that takes place through free and open exchange of commerce.¹²⁷ Hume and Smith's position involved a shift in outlook, or world view, in part found in Grotius, but also departing from Grotius' Aristotelian account, which encouraged sovereigns and merchants of differing states to think of each other less as jealous rivals and more as trading partners within a global society.¹²⁸ The outlook involved thinking of competing states, not in terms of enmity and threat, but as economic competitors within the broader field of a global geographical or spatial division of labour, whose unsocial material self-interest (desire for opulence, the accumulation of wealth), when carried out peacefully, would produce a positive social result. This position, later more firmly bound into a perspective of international law by Kant,¹²⁹ but earlier expressed by Montesquieu, presents the argument that, "The natural effect of commerce is to lead to peace."¹³⁰ In this vein Smith argued that the shift to policies of free trade and generally open markets could prove something of an antidote to interstate war. Such an idea, revived in the 20th century, has been central to liberal belief in shaping the global liberal world order and liberal international law.¹³¹

¹²⁷ Hume, D. "Of the Jealousy of Trade" (1758) in *Political Essays*, pp. 150-1.

¹²⁸ Hume, D. "Of the Rise and Progress of the Arts and Sciences" (1742) in *Political Essays*, p. 64-5.

¹²⁹ Kant, I. "Perpetual Peace: A Philosophical Sketch" (1795) in *Political Writings*; Kant, I. "Idea for a Universal History with a Cosmopolitan Purpose" (1784) in Kant, I. *Political Writings*.

¹³⁰ Montesquieu, C. *The Spirit of the Laws*, (1748), Cohler, A. et al. (eds.) (Cambridge: Cambridge University Press, 1989), p. 338.

¹³¹ See generally: Block, F. *The Origins of International Economic Disorder*, (Berkeley: University of California Press, 1977); Ikenberry, G.J. *Liberal Leviathan: The Origins, Crisis and Transformation of the American World Order*, (Princeton, NJ: Princeton University Press, 2012); Sørensen, G. *A Liberal World Order in Crisis: Choosing between Imposition and Restraint*, (Ithaca: Cornell University Press, 2011).

Smith's approach however only involved, at most, a 'weak' cosmopolitanism which accepted that citizens and subjects will generally favour their own state in its interaction with others. For Smith, the bonds of sympathy within the 'love of country' were stronger than the 'love of humanity'.¹³² Further, the national political unit was viewed as the best mechanism of securing modern liberty.¹³³ In this respect Smith's account of global commercial relations, of individual rights to private property, economic autonomy and choice, of free markets and economic cooperation, was limited by a republican ethic of patriotism that had run alongside the natural law tradition since Aristotle and Cicero. This ethic of patriotism had the effect of causing inter-state rivalry and conflict when the national ethic consistently trumped the humanitarian ethic. As such, Smith's account of international economic competition, as a vision of humanitarian, cosmopolitan, market-based utility, sat alongside and in contradiction with, a republican ethic of patriotism which set states against each other and blinded them to any higher cosmopolitan interest.¹³⁴ This 'love of country' often drove states towards war. For Smith:

Independent and neighbouring nations, having no common superior to decide their disputes, all live in continual dread and suspicion of one another. Each sovereign, expecting little justice from his neighbours, is disposed to treat them with as little as he expects from them. The regard for the laws of nations, or for those rules which independent states profess or pretend to think themselves bound to observe in their dealings with one another, is often very little more than mere pretence and profession. From the smallest interest, upon the slightest provocation, we see those rules every day, either evaded or directly violated without shame or remorse. Each nation foresees, or imagines it foresees, its own subjugation in the increasing power and aggrandisement of any of its neighbours; and the mean principle of national prejudice is often founded upon the noble one of the love of our own country.¹³⁵

In this context Smith's celebration of the economic and social utility of self-interest can be understood as containing both 'light' and 'dark' sides which his theory of political economy, and advocacy of the best economic policy for Britain in the late 18th century, constantly flipped

¹³² Smith, A. *The Theory of Moral Sentiments*, pp. 267-76.

¹³³ *Ibid*, pp. 272-3; Hont, I. *Jealousy of Trade*, pp 121-5.

¹³⁴ Smith, A. *The Theory of Moral Sentiments*, pp. 269-71.

¹³⁵ *Ibid*, p. 269.

between. On the optimistic view, economic competition could sometimes be guided away from jealousy and envy towards the more noble sentiment of ‘emulation’ so as to foster economic cooperation and friendship amongst nations.¹³⁶ However, this optimism struck against the logic of Smith’s economic theory, whereby the core driving sentiment of most economic activity was a self-interested and sometimes selfish one.¹³⁷ Further, this optimism struck also against Smith’s republican, ethical theory of national patriotism which was linked to the governance goal of stimulating and maintaining economic growth. In this vein Smith argued that:

(T)he great object of the political economy of every country is to increase the riches and power of that country.¹³⁸

The combination of self-interested, unsocial and often antagonistic economic competition, together with an ethic of patriotism in which government policy *should* be directed towards promoting the best means of generating national economic growth and wealth, meant pessimistically, that the economic and political relation between states could never completely escape the sentiments of envy, suspicion, threat and open aggression. In this respect, while Smith morally condemned acts of aggressive war and violent colonialism, his moral and economic theory can be understood as being tailored not necessarily towards the benefit of the whole of humanity, but instead towards the promotion of the British ‘national interest’ and the future British ability to hold its own in the field of war. On Smith’s account while the common interest of humanity was to be promoted, under the imperfect conditions of war, threat and unsociability between states, the national interest would sometimes conflict with the common interest of humanity. For reasons of ‘love of country’ the nation would have to be put first.

¹³⁶ *Ibid*, p. 270.

¹³⁷ Smith, A. *The Wealth of Nations*, Vol. 1, p. 119;

¹³⁸ *Ibid*, p. 472.

An important example of this is Smith's willingness to *suspend* arguments about global rights to free trade and free markets, and to advocate mercantilist and protectionist policies justified by the notion of external threat and national self-defence. For Smith protectionist policies, such as the Navigation Acts (1651-1849),¹³⁹ were seen as a justified measure in the interest of protecting England and then Britain against foreign competition and military threat – particularly against the threat to national security posed by Holland. Smith argued that although Holland and England were not yet at war when the Navigation Acts were instituted, the measures were a necessary and legitimate means of undermining Dutch naval power.¹⁴⁰ He claimed:

The act of navigation is not favourable to foreign commerce, or to the growth of that opulence which can arise from it.... As defence, however, is of much more importance than opulence, the act of navigation is, perhaps, the wisest of all the commercial relations of England.¹⁴¹

Smith's argument in favour of the *prudence* of suspending the free market¹⁴² and engaging in protectionism as an economic weapon of war should be viewed also in the context of an important historical link Smith makes between wealth and warfare. For Smith the link between the generation of wealth and warfare is located in his account of the historical development of the rising costs of war and the revolution in warfare in Europe.¹⁴³ He argued that the cost of

¹³⁹ For an account of the importance of the Navigation Acts for the emergence of English and then British commercial power see: Wallerstein, I. *The Modern World System, Vol. 2: Mercantilism and the Consolidation of the European World-Economy, 1600-1750*, (Berkeley: University of California Press, 2011), pp. 76-81; 236-241. See also: Armitage, D. *The Ideological Origins of the British Empire*, (Cambridge: Cambridge University Press, 2000).

¹⁴⁰ Smith, A. *The Wealth of Nations, Vol. 2*, pp. 40-1. See also: See also: Wyatt-Walter, A. "Adam Smith and the Liberal Tradition in International Relations", *Review of International Studies*, 22(1), (1996), pp. 5-28; Sally, R. *Classical Liberalism and International Economic Order*, (London: Routledge, 1998.).

¹⁴¹ Smith, A. *The Wealth of Nations, Vol. 2*, p. 41.

¹⁴² Smith argued also that while a free-market in agricultural produce would be optimal, in conditions of scarcity and famine, and when some states were already engaging in protectionist practices, it would be prudent for a 'small state' to temporarily suspend the market and restrict the exportation of grain. In such a case necessity and the protection of the population trumped the rights of private property. See: Smith, A. *The Wealth of Nations, Vol. 2*, pp. 118-9.

¹⁴³ *Ibid*, p. 411:

War and the preparation of war are the two circumstances which in modern times occasion the greater part of the necessary expenses of all great states.

the burden of technological warfare (the rise of standing armies, the increased importance of navies, firearms, cannon, etc.¹⁴⁴) historically placed demands on states to generate massive revenues to ensure their continued survival. The cost of financing endless European wars meant the creation of new, large bureaucratic organisations necessary for the collection and administration of taxation.¹⁴⁵ In time, the cost of buying and producing armaments, the payment of military personnel and the funding of wars led to the creation of the public debt.¹⁴⁶ On Smith's account the concern for wealth generation as a legitimate concern of the art of government was a historical result of the revolution in the technology and strategy of warfare. Military technology required wealth, and success in war required both. Smith argued:

In ancient times the opulent and civilised found it difficult to defend themselves against the poor and barbarous nations. In modern times the poor and barbarous nations find it difficult to defend themselves against the opulent and civilised.¹⁴⁷

Understood in this context the distinction Smith makes at the very opening of the *Wealth of Nations* between rich (“civilised and thriving”) and poor (“savage”) countries¹⁴⁸ is a question deeply related to the concern for self-defence and the changing technological cost of warfare outlined at the end of the work. The economic question Smith pursues about how to generate a wealthy society is inseparable from a concern with the issue of defending the state from external enemies – a concern which leads Smith to worry about the poor health and corruption of the bodies of the working poor when repetitive and mindless modern labour renders them inadequate for fighting.¹⁴⁹ In general terms, for Smith, the military survival of the commercial

¹⁴⁴ *Ibid*, p. 279-297.

¹⁴⁵ *Ibid*, pp. 304-5.

¹⁴⁶ *Ibid*, pp. 508. See also, Hume, D. “On Public Credit” (1752), in *Political Writings*, pp. 166-7.

¹⁴⁷ *Ibid*, p. 297.

¹⁴⁸ Smith, A. *The Wealth of Nations, Vol. 1*, pp. 104-5.

¹⁴⁹ Smith, A. *The Wealth of Nations, Vol. 2*, pp. 368-369. See more generally: Winch, D. *Adam Smith's Politics*, pp. 78-84; 104-117. Smith's position should also be contrasted to Adam Ferguson's less optimistic position and his worries about the negative consequences of commercial societies. See: Ferguson, A. *An Essay on the History of Civil Society*, (1767) (Edinburgh: Edinburgh University Press, 1966). See also: Sher, R. “Adam Ferguson, Adam Smith and the Problem of National Defence” *Journal of Modern History*, (61), (1989), pp. 240-68.

state is dependent upon being able to pay for the rising cost of warfare and to service the public debt. The preservation of the commercial state is dependent upon it being and remaining wealthy, on socially mobilising the ‘pin factory’ to pay for the ‘war factory.’ Under such conditions to be poor is to be trapped on the wrong side of historical and material progress and possibly, to be conquered.

Underlying Smith’s theory of global natural rights to private property and autonomous economic choice, and theory of a natural law and natural logic of the market, resides a humanist, historically minded account focussed upon tracing the emergence of both military and economic power. In a sense, Smith’s approach offers a theory of governance aimed at channelling economic and military power, the purpose of which is to find a way to maintain the fortune of a particular state against the shifting ground of global economic, political and military relations. For Smith, the historian, both the rights of individuals, and the rights of states, were only ever ‘natural’ in a moral, normative sense. Historically and factually, for Smith, ‘right’, and equal rights, were an expression of economic and military power and often had to be won by violence and force. As such, Smith could speak of a time in the future when, with the decline in power of European nations, the formally colonised peoples of the world might:

(A)rrive at that equality of courage and force which, by inspiring mutual fear, can alone overawe the injustice of independent nations into some sort of respect of the rights of one another.¹⁵⁰

¹⁵⁰ Smith, A. *The Wealth of Nations*, Vol. 2, p. 210.

In such an approach Smith's focus seems much closer to the language and analysis of Niccolò Machiavelli¹⁵¹ and G.W.F. Hegel,¹⁵² and a world away from the liberal, cosmopolitan approaches of Kant and Jeremy Bentham¹⁵³ and their 20th century liberal inheritors. Within Smith's account states rely on a combination of military and economic power to maintain their independence against the rise and fall in fortunes (*fortuna*) of other powers, and the independence of the state comes about through a constant tension and struggle of recognition (*Anerkennung*) between peoples and nations.

Alternate Lineages of Liberal International Law

The conceptual framework of 20th and then 21st century international law contains a number of distinct and interwoven lines of intellectual inheritance. When thinking about the influence the moral and political tradition of 'liberalism' has had in shaping the core elements of modern international law in the 19th and 20th centuries, the intellectual debt owed to figures like Cicero and Adam Smith have often been under-appreciated and underemphasised. Yet within the way in which Cicero, Grotius and Smith frame questions of property and violence, there can be discerned a number of distinct theoretical standpoints which find their way into the conceptual structure of modern liberal international law. By holding onto these points of differentiation and continuity we can see more clearly a number of competing lineages of liberal international law.

¹⁵¹ Machiavelli, N. *Discourses on Livy*, Mansfield, H. & Tarcov, N. (tr.) (Chicago: University of Chicago Press, 1996). See more generally: Pocock, J. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton: Princeton University Press, 2003).

¹⁵² Hegel, G.W.F. *Elements of the Philosophy of Right*, (1821) Wood, A. (ed.), Nisbet, H.B. (tr.), (Cambridge: Cambridge University Press, 1991). See more generally: Kochi, T. *The Other's War: Recognition and the Violence of Ethics*.

¹⁵³ Bentham, J. "Principles of International Law" (1786-89) in *The Works of Jeremy Bentham, Vol. 2*, Bowring, J. (ed.), (Edinburgh: William Tait, 1843).

Cicero's combination of the pragmatic aspects of the Roman law of property with a universal moral theory of Stoic natural law helps to frame juridical relations around the duty of self-preservation, the respect of property, and duty not to harm others. Such an account has exerted a very long influence over Western juridical thinking. Linked however to a republican theory of martial virtue and celebration of the glory of conquest, Cicero's theory of international law presents a bellicose, muscular theory of universal natural law which acts as an apology for empire. In such an account the idea of the 'just war' is used as a moral veil which offers legitimacy to aggressive, imperial acts which would otherwise contradict the general principles of natural law. In the 20th and 21st centuries, critics have condemned this Ciceronian strategy of using the ideas of natural law and 'just war' to justify countless acts of aggression in the name of international law.¹⁵⁴

Such a bellicose natural law theory of international law was rejected by Grotius and Smith. While Grotius' idea of a just war based upon 'punishment' opens onto the slippery slope of states potentially manipulating a language of human rights to justify acts of aggression, broadly, Grotius' theory of just war counselled restraint, prudence and often emphasised the benefits of non-intervention. In a similar vein Smith counselled against aggressive colonial adventures and expressed also a degree of scepticism of the moral language utilised by states to justify their often belligerent actions. Further, both Grotius and Smith expressed aspects of a modern, liberal, commercial ethic of statecraft and international relations which, in part, moved away from ancient and feudal modes of wealth accumulation via territorial conquest, and saw modern capital accumulation taking place primarily through open and consensual

¹⁵⁴ See generally: Douzinas, C. *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, (Abingdon: Routledge-Cavendish, 2007); Koskenniemi, M. *The Politics of International Law*, (Oxford: Hart, 2011); Bowring, B. *The Degradation of International Legal Order?: The Rehabilitation of Law and the Possibility of Politics*, (Abingdon: Glasshouse, 2008); Hardt, M. and Negri, A. *Empire*, (Cambridge MA: Harvard University Press, 2001); Neocleous, M. *War Power, Police Power*, (Edinburgh: Edinburgh University Press, 2014); Zolo, D. *Victor's Justice*, (London: Verso, 2009).

relations of interstate trade. While Smith saw certain advantages to policies of colonisation, he saw also in the emergence of 18th century capitalism an idea in which the accumulation of wealth (via commerce and free trade) could potentially be disconnected from the politics of war. Such free trade cosmopolitanism, contained within the writings of Grotius and Smith, expresses a key utopian idea of modern liberal international law.

Yet, Smith's theory presents at the most, a 'weak' cosmopolitanism. Central to his moral theory is a republican ethic of 'love of country' which reflects a Ciceronian argument that the ethical bonds to family and the state are stronger than to those humans who are strangers. Smith's emphasis upon this republican ethic leads him to frame the goal of wealth generation as an aspect of national policy, and one in which the national interest is often put above the common interest of humanity. Further, via developing a historical sociology of war, Smith presents a 'war makes states, and states make war' thesis, a theory which is later conceptualised developed in differing ways in the 20th century by Max Weber¹⁵⁵ and then by Charles Tilly and Michael Mann.¹⁵⁶

Smith's historical sociology offers a way of thinking about the state as a capital accumulating war machine, one which is driven to grow and grows through war. In this the military, security, capital accumulation, and bureaucratic functions of the state historically develop by way of a process of mutual reinforcement. In this vein, Smith then portrays modern commercial states, those that would be the building blocks of any future liberal international order, as emerging historically as very violent, land and then capital-hungry war machines. Such an account is a

¹⁵⁵ Weber, M. *Economy and Society*, Vol. 2, Roth, G. & Wittich, C. (eds.) (Berkeley: University of California Press, 1978), pp. 901-21.

¹⁵⁶ Tilly, C. *Coercion, Capital and European States: AD 990-1992*, (London: Wiley-Blackwell, 1992); Mann, M. *The Sources of Social Power, Vol.1: A History of Power from the Beginning to A.D. 1760*, (Cambridge: Cambridge University Press, 1986); Mann, M. *The Sources of Social Power, Vol. 2: The Rise of Classes and Nation-States, 1760-1914*, (Cambridge: Cambridge University Press, 1993).

less optimistic, less utopian idea of a global, liberal-cosmopolitan order. It represents a more pragmatic theory of the liberal state and of global liberal order, one which sees the use of economic protectionism and violence as a sometimes ethically valid means of state policy. In a related sense, Smith's historical sociology anticipates aspects of John Hobson's and Lenin's critiques of imperialist war.¹⁵⁷ In Smith's account unsocial and competitive global commercial relations, when combined with a jealousy of trade and jealousy of capital accumulation between states, operate as a cause of inter-state aggression and imperialist expansion. Within Smith's account the positive benefits of commercial egoism and competition are portrayed as being sometimes incredibly socially destructive and impossibly hard to restrain at the interstate level.

Running through the three accounts of Cicero, Grotius and Smith is a tension between a social ethic of care and human fellowship, and, a stress upon the unsocial role of self-interest linked to wealth accumulation. In Cicero this tension reflects an affirmation of the importance of private property within the Roman social relations in 1st century BCE.¹⁵⁸ As such Cicero's Stoic theory of natural law discards the radicalism of early Hellenistic Stoic thought which had rejected private property in the name an ethic of human fellowship and republican, democratic equality.¹⁵⁹

¹⁵⁷ Hobson, J.A. *Imperialism: A Study*, (New York: James Pott & Company, 1902); Lenin, V.I. "Imperialism, the Highest Stage of Capitalism", (1917) in *Essential Works of Lenin*, Christman, H.M. (ed.), (New York: Dover Publications, 1987). See also: Rosenberg, J. *The Empire of Civil Society: A Critique of the Realist Theory of International Relations*, (London: Verso, 1994).

¹⁵⁸ Cicero, *On Duties*, p. 11:

Riches are sought both for the things that are necessary to life, and in order to enjoy pleasures... Magnificent accoutrements and an elegant and plentiful style of life give men further delight. The result of such things is that desire for money has become unlimited. Such expansion of one's personal wealth as harms no one is not, of course, to be disparaged; but committing injustice must always be avoided.

¹⁵⁹ Bloch, E. *Natural Law and Human Dignity*, pp. 18-20. See also: Erskine, A. *The Hellenistic Stoa*, pp. 181-210.

The tension is more pronounced within Grotius' theory of natural law, reflecting an emergence of expanding pockets of capitalist economic relations in Northern Europe in the 14th and 15th centuries, and the immense expansion of global trade and colonialism in the 16th century. The intensification of early capitalist economic relations in Northern Europe, and rapid expansion of wealth generated through global trade, meant a magnification of the productive role of the social utility of economic self-interest within a number of early modern societies.¹⁶⁰ On the back of this emergence Grotius emphasised the Aristotelian theory that self-interest and private property, when combined with exchange and trade, creates a degree of social utility. Grotius' theory of natural law expresses a tension between a growing understanding of the productive power of commercial unsocial sociability, and, an insistence upon a universal moral theory which aimed at restraining society from lurching headlong into egoism and rabid possessive individualism. Alongside a theory of natural rights to private property and a derivation of sovereignty based on natural rights, Grotius emphasised a broadly Aristotelian conception of the good life, a Stoic ethic of human fellowship, care, and compassion, and counselled Christian acts of charity and love in relation to economic and military dealings. In this respect, Grotius' theory of international law may be thought of as straddling a number of differing worlds. Grotius' thought represents a moral universe of ancient and scholastic natural law and virtue ethics being torn apart by the powerful historical emergence egoistic, capitalist social-property relations. In another sense, Grotius's thought represents a lineage of liberal international law which attempts to harness the productive power of commerce and the market

¹⁶⁰ See generally: Braudel, F. *Civilisation and Capitalism 15th-18th Century, Vol. 3: The Perspective of the World*, (tr.) Reynolds, S. (London: Fontan Press, 1984); Wallerstein, I. *The Modern World System Vol. 2: Mercantilism and the Consolidation of the European World-Economy, 1600-1750*, (Berkeley: University of California Press, 2011).

while holding onto the idea that economic relations can and should be restrained by morality and politics.

Smith's jurisprudence inherits Grotius' account of natural rights, the social utility of commerce, the theory of historic and social progress, and the emphasis upon the natural right to free exchange and trade. He inherited also an understanding of an active tension between a Stoic ethic of human fellowship and compassion, and, the unsocial sociability of commercial relations. Yet, following in the steps of Pufendorf, Locke, Mandeville and Quesnay, Smith largely moves away from the Aristotelian, scholastic and Grotian condemnation of commercial egoism and radically emphasises the socially productive power of self-interest and selfishness in commercial relations. Economic egoism, when combined with the functional and geographic division of labour, is seen by Smith as a recipe for generating opulence within the state and across societies. One aspect of this theory, that a 'natural' and 'disembedded' economic logic of self-interest and the market is autonomous, universal, and should not be politically steered or interfered with, becomes a key principle of classical and then neoclassical economics in the 19th and 20th centuries.¹⁶¹ In particular the idea of a natural, autonomous market logic comes into prominence from the 1980's onwards through the emergence of a powerful and influential neoliberal international law and global development discourse.¹⁶²

Importantly however, Smith's jurisprudence is markedly different from his 20th century neoliberal inheritors. His portrayal of egoism is less a celebration of selfishness than it is a theory of harnessing the unintended social utility of egoistic economic activity. Further, guided by a republican ethic of 'love of country' and Stoic theory of moral sentiment, Smith counselled

¹⁶¹ Polanyi, K. *The Great Transformation*, (Boston: Beacon Press, 2001); Gilpin, R. *Global Political Economy: Understanding the International Economic Order*, (Princeton: Princeton University Press, 2001).

¹⁶² See generally: Peet, R. *Unholy Trinity: The IMF, World Bank and WTO*, 2nd ed. (London: Zed Books, 2009); Rist, G. *The History of Development*, (New York: Zed Books, 2014).

the prudence of suspending markets and reigning-in the activities of merchants and financiers when their interests collided with the national interest. His concept of moral sentiment looked also to a strong role of the state which was to intervene in social life to redress many of the harmful and ‘corrupting’ consequences of modern commercial relations.¹⁶³

In this respect a number of subsequent interpretations of Smith’s jurisprudence and economic theory, emphasising often radically different positions within his thought, have helped to influence a number of different lineages within the traditions of liberalism and liberal international law ranging from classical liberalism, welfare liberalism, and neoliberalism. Against contemporary neoliberal economic and political theory the moral and political breadth of Smith’s jurisprudence should be held onto as it helps to highlight the limits of any supposedly ‘autonomous’ and disembodied market logic. Alongside, Grotius’ Stoic and republican arguments for a degree of moral restraint in market relations, Smith’s historical sociology highlights the often violent and intrusive role of the state within the domestic and international economy. The historical connection between the war factory and the pin factory shows the ever-present role of the state in creating, guiding, defending and interfering within domestic and global market relations. In this respect Smith’s account offers an important historical reminder and rebuttal to neoliberal theories of transnational law which seek to diminish the role of the state in the face of a global, capitalist markets. His account stresses the very active role of the state in both creating, defending and destroying markets, and, in safeguarding the welfare of the national population. Such an account is relevant to understanding crucial aspects of the historical development of capitalism, and, is relevant also to thinking about the future relationship between capitalism and international law.

¹⁶³ See: Sen, A. *On Ethics and Economics*, (Malden, MA: Blackwell, 1987); Sen, A. “Introduction” in Smith, A. *The Theory of Moral Sentiments*, Sen, A. and Hanley, R. (eds.), (New York: Penguin, 2009).

