

Knowing before Judging: Law and Economic Analysis in Early Modern Jesuit Ethics

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Drawing on the work of early modern Jesuit scholastics, in particular Leonardus Lessius, this article argues for the importance of grounding moral judgments on expert knowledge. Without adequate specialized knowledge, moral analysis of economic matters easily slips into moralism. Jesuits such as Lessius applied the tools of juridical knowledge (law) and empirical understanding of economic events (economic analysis) to make sound moral judgments concerning social and economic issues. Contemporary moralists would do well to follow their example.

One of the main insights that Jesuits from the early modern era still have to offer us today is that moral judgments need to be based on expert knowledge. This is the central argument of this article. Sophisticated tools are needed to analyze what is happening on the ground before moral judgments about that reality can be made. For the early modern Jesuits, those tools or instruments were juridical knowledge (law) and empirical understanding of economic events (economic analysis). However necessary, good intentions are not enough.¹ They need to be completed by sound legal and economic analysis. In this respect, the Jesuits have made a seminal contribution to the methodological refinement of a basic intuition that has shaped the Catholic Church's social teachings throughout the centuries. As was observed in 1985 by then Joseph Cardinal Ratzinger during a dialogue on the Church and the economy, "a morality which believes itself able to dispense with the technical knowledge of economic laws" runs the risk of turning into "moralism."²

From Moralism to Morality

In order to understand why the methodological approach developed by Jesuits in the sixteenth and seventeenth centuries still has something important to tell us in the early twenty-first century, let me refer to two recent critiques, voiced by experts, about the way morality tends to operate in public discourse today. One example is about the way morality increasingly manifests itself within the global public sphere in general; the other illustration concerns the way the financial crisis has often been commented on in Christian circles. In both instances, morality has been exposed to the danger of moralism.

A frequently observed phenomenon in the global public sphere is that moral judgments become an excuse for creating scandal, provoking outrage and favoring “media justice.” In a critical editorial in the November 4, 2017, issue of *The Economist*, social media’s contribution to the expansion of a global culture of pettiness, scandal, and outrage was being questioned.³ In many instances, “emo-ethics,” so to speak, seems to have replaced a civilized conversation about moral values and ethical decision-making. For all kinds of allegedly moral reasons, elementary principles of moral decency are being dispensed with. Moreover, basic tenets of the rule of law that are meant to support public order and a civilized culture of respect, such as the presumption of innocence, are abandoned in favor of “attack journalism” and “trial by media”—also increasingly in Western liberal democracies.⁴ Admittedly, as recent events have shown, “emo-ethics,” fueled by both traditional and social media, can sometimes contribute to the effective prosecution of criminal behavior and help to raise moral standards. But if “emo-ethics” and “trial-by-media” become the standard way of denouncing and prosecuting sinful behavior, the risks are high. Amplified by social media, moral sentiments unfiltered by reason and knowledge easily result in vengeance, riots, and mob justice. Incidentally, early modern Jesuits were aware of that danger, highlighting the public usefulness and moral value of following strict rules of procedure (“due process”) instead.⁵

A second example of how morality runs the risk of being reduced to moralism is perhaps less inevitable, but it nevertheless reveals some of the points that could be improved in today’s moral discourse about economics within Christian communities. In a piece on the 2008 financial crisis, Paul Oslington, a Catholic economist from Sydney, regretted that much of the commentary by Christians on the financial crisis remained unhelpful because it was limited to cheap attacks on greedy bankers, reckless economists, and the vices of the capitalistic system, leaving the technicalities behind the problems and the causes of the suffering unsolved.⁶ Similarly, a call for reforming the international financial and monetary

systems in the context of global public authority has been subject to criticism. The proposal submitted has been described as “insufficiently appreciative of how modern finance actually works and inattentive to the problems associated with excessive regulation and centralization.”⁷ Clearly, good intentions abound, but specialist knowledge is lacking. As the early modern Jesuits would have been adamant to stress, a strong effort has to be made to understand the complexities of the reality on the ground before moral advice is delivered. Incidentally, one of the main reasons why the Jesuits rejected Martin Luther’s teachings was that he had tried to build a moral order exclusively centered on the gospel, rejecting the use of the scholastic tradition, which had heavily relied on legal reasoning (Roman law and canon law) and Aristotelian-Thomistic moral philosophy. The Jesuits’ reaction against the menace of Luther, like the reaction of the Dominican theologians in Salamanca, was precisely to reinforce the legal nature of their moral-theological doctrines.⁸

Lessius, Law (*Ius*), and Contracts

The objective of this article, then, is to show that the use of the languages of law and economic analysis enabled Jesuits in the early modern period to cope with the challenge of complexity in giving moral advice and prevent morality from turning into moralism. Juridical and economic expertise were deemed indispensable knowledge for a Jesuit confessor to give advice in moral matters. I will illustrate this point by concentrating on the ethical writings of one Jesuit in particular: Leonardus Lessius (1554–1623), undoubtedly one of the most famous Jesuits from the Low Countries.⁹ There are several good reasons to focus on Lessius. First, Lessius has been widely acknowledged as one of the fathers of economic analysis, along with other Jesuits such as Luis de Molina and Juan de Lugo. Bernard Dempsey, Joseph Schumpeter, Barry Gordon, Murray Rothbard, Louis Baeck, and Bertram Schefold are just some of the most famous historians of economic thought who have highlighted his seminal contribution to the birth of economic analysis.¹⁰

Second, Lessius acted as a kind of intermediary between the so-called “School of Salamanca” and Protestant natural lawyers in the seventeenth century. For example, he was an important source of inspiration for Hugo Grotius (1583–1645). The continuity between Lessius and Grotius has been highlighted especially by legal historians such as Robert Feenstra, James Gordley, and Laurent Waelkens. Third, Lessius is a good example of the profound impact that the *Collegio Romano*, the Jesuit University in Rome supported by Pope Gregory XIII, exerted on the development of Catholic moral theology in the early modern period. Lessius

studied at the Gregoriana from May 1583 until April 1584. During his time in Rome, Lessius met Francisco Suárez and Roberto Bellarmino. As professor of moral theology at the Jesuit College in Louvain from 1585 until 1600, Lessius would bring the revival of scholasticism that he had experienced at the *Collegio romano* to the Southern Netherlands.

As Samuel Gregg has explained, the complexities with which the Jesuits were confronted from the very foundation of the order in 1540 were formidable.¹¹ The Jesuits were living in the first globalized world, following the discovery of the Americas and the expansion of the Iberian empire into the most remote outskirts of Africa and East Asia.¹² Jesuits were appointed as astronomers at the imperial court in China, others acted as brokers for Portuguese traders in Japan, some even led political experiments in Paraguay and Ethiopia. They promoted education, sciences, and arts from Paris to Beijing and Puebla.¹³ Yet most relevant for us is that the Jesuit order was founded at a moment in history that saw international trade relations and financial markets growing on an unprecedented scale, especially across the Iberian empire. These evolutions demanded fresh reflection on how one could be both a good Christian and a good businessman, or for that matter, a successful banker and a devout believer. Questions were raised about the legitimacy of profit-seeking, new financial practices, and public policy, creating a huge demand for expert confessors who were willing to understand the new challenges merchants and leaders faced while guaranteeing the salvation of their souls.¹⁴ The Jesuits observed this rising demand for moral advice and reacted to it by training themselves to provide adequate answers.

For the Jesuits, the answer to the challenges of the new world came partly from the reinforcement of Thomistic theology—especially as promoted by the Dominican theologians at the University of Salamanca¹⁵—and partly from the increased use of the Roman canon legal tradition. Even more so than famous sixteenth-century Dominican friars such as Francisco de Vitoria, Domingo de Soto, Tomas de Mercado, and Domingo Bañez, the Jesuits turned to law (*ius*) as the instrument that could enable them to find nuanced answers to sophisticated moral cases. It is worthwhile drawing attention to the Latin word for “law,” namely, *ius*.¹⁶ This is a body of legal norms the meaning of which goes far beyond the modern notion of “law.” For example, it also includes the rights and norms derived from natural law (*ius naturale*) and divine law (*ius divinum*).¹⁷ Today, law in Western democracies is primarily associated with the activity of “lawmakers,” that is, elected politicians. The content of norms is determined by the will of those lawmakers, against the background of a legal system the characteristics of which are essentially voluntaristic. This voluntaristic notion is not the only sense, however, in which the Jesuits thought of law. On the con-

trary, *ius* was supposed also to include a kind of rational order, especially the rational order of *ius naturale*. Since law was thought of in a much broader way than today, the knowledge of law, too, was thought of as the science of a much broader legal order (“juris-prudence”), especially of the different components of it (e.g., divine law, civil law, ecclesiastical law, natural law) and the way these different components interacted among each other. Both jurists and theologians were experts in understanding the interaction between the different layers of the legal order.¹⁸ From natural law, individual citizens derived natural rights that could protect themselves against unjust laws, especially norms that were solely the product of voluntary, irrational government regulation.¹⁹ We see an excellent example of the critical potential of this broader notion of law in Alejandro Chafuen’s exposition of the work of Juan de Mariana.²⁰ Mariana criticized the laxist laws on the alteration of money precisely on the grounds that these government interventions violated the basic legal order (*ius*) and the property rights of the citizens derived from this order.²¹ Conversely, political decisions could be considered as binding in conscience if they were in line with rational principles and natural law. For example, early modern theologians fiercely debated the question whether maximum grain prices imposed by the government could also be binding as a matter of natural law, that is on pain of sin.²² To sum up, when talking about law in the context of early modern Jesuit ethics, we should be careful to understand it in the broader sense of *ius*. Special attention is needed to the pluralistic nature of *ius* and its potential for defending subjective rights against arbitrary lawmaking.

One part of “Roman canon law” (also called the *utrumque ius* because of the close relationship between the study of Roman law and canon law in late medieval and early modern legal culture) that Jesuits considered particularly useful for their purposes was the law of contract. The law of contract offered them a framework of concepts to come to grips with reality. About every single commercial transaction could in fact be analyzed in juridical terms as a bundle of rights and obligations produced by the mutual consent of the parties involved in the transaction. Moreover, contract law could be framed in Thomistic terms as being subject to the virtue of justice in exchange (*justitia commutativa*).²³ In this manner, a synthesis of moral and legal knowledge about contracts and commercial transactions was forged by Jesuits such as Molina, Lessius, and Lugo that, in turn, influenced legal scholars such as Hugo Grotius, Samuel Stryck, Giambattista de Luca, Robert Joseph Pothier, and Andres Bello, leaving its mark on legal systems in continental Europe and Latin America.²⁴

The first copies of a massive, four-volume work on contracts (*De contractibus*) written by Pedro de Oñate were published in Rome in 1646. Oñate was born in

Valladolid in Spain but eventually became the provincial of the Jesuit Province in Paraguay and a professor at the Colegio Máximo de San Pablo de Lima in Peru.²⁵ In the introduction to his four-volume treatise on contracts, Oñate used three adjectives to underline the importance of a work on contracts: It is a subject, he said, which is “extremely vast,” “extremely difficult,” but also “extremely useful.”²⁶ The myriads of contracts concluded every day, Oñate warned his readership, make up an ocean that is deep, mysterious, and capricious. Contracts are the inevitable means enabling man to navigate his way either to the salvation or to the destruction of his material goods—and of his soul. Therefore, he considered expert knowledge of the complex field of contract law to be indispensable for confessors who needed a nuanced solution to practical cases of conscience. Each contract was thought to express a moral choice for either virtue or vice, for avarice or liberality, for justice or fraud.

Oñate praised freedom of contract, namely, the principle that all agreements are binding by virtue of mutual consent between the parties. This consensual approach allowed the contracting parties to take full possession of their freedom, according to Oñate (*libertas contrahentibus restituta*).²⁷ He saw the free will of the parties as the basis of the entire doctrine of contract (*cardo et basis totius materiae contractuum*), invoking the need to protect private property.²⁸ In Oñate’s eyes, private property and freedom of contract were two sides of the same coin. Man would not be the true and perfect owner of his goods unless he could dispose of them by contractual agreement when he wanted, with whom he wanted, in whatever way he wanted. Strong property rights necessitated freedom of contract. Gregorio de Valentia, a fellow Jesuit teaching in Ingolstadt, talked about the individual’s right to love his own goods (*ius amandi proprias res*).²⁹ Juan de Mariana was highly suspicious of laws and policies that might violate the property rights of the citizens, considering monetary debasement without consent of the people as a form of disguised robbery by the government.³⁰

Property and contracts were also at the heart of Leonardus Lessius’s *On Justice and Right and the Other Cardinal Virtues* (*De iustitia et iure ceterisque virtutibus cardinalibus*), a treatise dealing with the ethics of the marketplace that was first published in Louvain in 1605.³¹ Significant additions can be found in subsequent volumes published by Plantin-Moretus in Antwerp (e.g., the appendix on the Mounts of Charity, public lending institutions, was not included in the first version, nor was his discussion on monopolies).³² He used this treatise as the theoretical framework to give advice to the archdukes Albert and Isabelle and to businessmen in the Antwerp marketplace. His contemporaries considered Lessius as the Oracle of the Low Countries. Jurists of his time considered him the best source for empirical data and legal analysis of how monetary trans-

actions and bills of exchange worked in practice. Lessius became famous for his defense of the principle of freedom of contract, explaining the creation of contractual obligation in terms of offer and acceptance. He considered contract as a matter of natural rights, thus insisting that agreements should be kept even among businessmen who did not share the same Christian faith³³—a problem frequently encountered in the Antwerp marketplace, where Anglican Merchant Adventurers traded with Catholic merchants from Spain, Lutheran businessmen from Germany, and Calvinist traders from the Northern Netherlands. He wrote on many subjects that we would now consider as being part of the morality of the marketplace, such as the justice of speculation and insider trading, dominant positions, financial markets, junk bonds, and auctions.

Judging the Morality of Commercial Capitalism³⁴

A case of special interest to illustrate the application of legal and economic knowledge before reaching a moral judgment in Lessius's work is that of the so-called "triple contract." This legal concept was used to capture a practice of commercial finance that had become widespread across early modern Europe but goes back at least to the late Middle Ages. Merchants borrowed money from investors for the sake of a business venture and promised those investors that they would return the invested money at the end of the project while also paying dividends on an annual basis. Clearly, this was an alternative way of lending money at interest to businessmen. As a result, this practice met with fierce resistance from tradition-minded jurists, theologians, and canon lawyers. Lessius, however, became one of the most famous advocates of this practice.³⁵ In a very long *dubitatio* about the partnership contract in his treatise *On Justice and Right*, Lessius demonstrated that this practice was not incompatible with the dictates of morality. He did so on the basis of a remarkable cost-benefit analysis of what actually happened in such a deal between an entrepreneur and a capital investor. On the basis of what we would now call a "law and economics" approach, Lessius approved of a popular technique for safely investing money in commercial ventures—an investment technique especially popular among widows, wards, bankers, and religious foundations.

Following traditional scholastic authority, Lessius first analyzed this practice from a legal point of view in terms of a combination of three contracts. As a result, the practice was designated by the technical term "triple contract" (*contractus triplex* or *contractus trinus*). Upon closer inspection of the practice, Lessius explained, you can actually consider it as a combination of three contracts, namely a partnership contract (because both parties confer something for

the purpose of setting up a common venture), an insurance contract (because the merchant promised the investor to make restitution of the entire capital at the end of the venture), and a sales contract (because the merchant promised to pay a fixed annual price to the investor—the dividend—in exchange for the right to reap the remainder of the profits generated by the common venture). So, we have a threefold contract, consisting of a partnership contract, an insurance contract, and a sale contract. Clearly, this triple contract can be regarded as the juridical expression of the basic form of “commercial capitalism”—an investor providing capital to be invested in a commercial enterprise.³⁶ It is a technique that is useful to both parties: It allows the capitalists (in the literal sense of the word) to invest their money with a capital guarantee and a fixed annual return. Conversely, entrepreneurs can raise more liquidity and expect to make almost unlimited profits.

Even if analyzed through the concept of a “triple contract,” traditional moral and juridical authority had remained very skeptical, since, in reality, the practice resembled a simple loan at interest.³⁷ A key step in removing that skepticism was the breakthrough of freedom of contract. Traditional arguments against analyzing this practice as a triple contract rather than as a loan at interest maintained that it was not possible for those three contracts to be concluded between the capital investor and the entrepreneur. Surely, when taken apart, the partnership, the insurance, and the sale could be considered just—but not when taken together. This objection no longer convinced Lessius because he thought that it did not matter from the point of view of commutative justice with whom the contract was concluded.³⁸ Also, he thought that one could enter into any contract with whomever one wanted on the basis of the mutual will of the parties. Once the will of the parties and freedom are taken as the starting points of contract law, it does not make sense any longer to argue that the investor can conclude an insurance contract with a third party, but not with the entrepreneur with whom he happens to conclude also a partnership contract. Moreover, freedom of contract frustrated the traditional analysis of partnership contracts as contracts the essential feature of which was to expose both partners to both profit and loss. This is a traditional argument that we still find in Islamic finance, where it is known as the “profit and loss sharing-principle.”³⁹ For Jesuits like Lessius, this static view of partnership contracts no longer made sense at the turn of the seventeenth century. They argued that the essential feature of a partnership was that two or more parties agreed to each confer something for the sake of a common enterprise. The distribution of risk could be the subject of an agreement, according to Lessius. This argument was actually not new. The first theologian to have submitted this view was John Eck, the archenemy of Martin Luther.⁴⁰ In 1515, he had already put forward

the notion of a triple contract to justify the investment activities of the Fugger banking family. But few theologians had followed him.

A century later, Lessius would repeat the defense of the triple contract in an unprecedented way. If we want to assess the morality of the practice observed in the market, Lessius argued that we have to consider whether the practice is just and equitable. To make this a bit more concrete, he explained that there could be three sources of injustice or inequity: (1) a lack of equality between the contributions of the partners (leading to a violation of the equilibrium that is central to the notion of commutative justice), (2) a violation of the nature of the partnership contract because the obligations incurred by the merchant are much more burdensome than those of the capital investor, and (3) the fixed annual profit should be considered as interest because the conclusion of the insurance contract on top of the partnership contract transformed the providing of funds into a simple money-lending transaction. Lessius considered each of these potential sources of inequity in great detail. His conclusion would be that the triple contract is legitimate and that the practice behind it cannot be considered inequitable on any of those potential grounds of inequity.

Justice and Comparative Cost-Benefit Analysis

As far as the first potential source of inequity in triple contracts is concerned—the lack of equality (*aequalitas*)—Lessius developed an interesting comparative cost-benefit analysis.⁴¹ He weighed the costs and benefits of each of the partners only to conclude that there was no uneven relationship. In other words, the triple contract did not violate the virtue of commutative justice.

In a nutshell, here is a list of costs or burdens suffered by the investor, according to Lessius:

- First, he exposes his capital to risk. This might not seem to be a cost for the investor, since capital guarantee is one of the essential features of a *contractus trinus*. Lessius points out, however, that the insurance promised by the merchant is very unreliable (*securitas valde infida*), frequently resulting in the investor's bankruptcy. Investors are very happy to pay a higher premium for effective insurance that is further strengthened by a real security such as a pawn or a mortgage.
- The second burden incurred by the investor is that he deprives himself of the advantages and ease (*commoditas*) offered by liquid money. This was a typical feature of Lessius' analysis of money and interest-taking.⁴² It drew on traditional scholastic economic arguments that

were developed already by medieval Franciscan theologians such as Peter John Olivi.⁴³ Present money offers advantages to react to opportunities that suddenly present themselves in the market. The price of “lack of money” or “liquidity preference” is to be seen as a cost which the investor suffers by parting with his money.

- Third, the estimation of the future profits that can be made with present money can be considered a partial cost for the investor. According to Lessius, daily experience in the market and declarations by merchants (*quotidiana experientia et mercatorum confessio*) show that the profits that an industrious merchant can make with liquid money easily attain ten to twelve per cent. This is, literally, an “opportunity cost” incurred by the investor. To Lessius, this type of argument taken from experience—from observation of economic reality—mattered a lot.⁴⁴

From the perspective of the merchant, concluding a triple contract also entails three costs or burdens, in Lessius’s view:

- First, the merchant puts his work and industry in the service of the partnership. He labors to spend the money of the capital investors in a fruitful way. According to Lessius, this cost should not be overestimated, since the merchant would invest his labor anyway to bring his private money to fruition. Rather, Lessius astutely noted, the merchant benefits from the fact that investors have deposited their capital with him. This is a clever observation that can also be found in Molina. To the merchant, managing more money and displaying more riches mean that he enjoys more trust and improves his reputation (*auget illorum fidem et facit illustriores*). Also, he can buy at more advantageous prices, since he is able to buy larger quantities and make cash payments. In conclusion, Lessius was almost inclined to maintain that the labor cost is actually more of a benefit than a cost.
- Lessius also minimized the impact of a second cost the merchant can be said to incur, namely the cost of insuring the capital. Insurance is merely a personal security, not a real security, so it entirely depends on the trustworthiness of the merchant (*nitens sola fide mercatoris*). Moreover, if the merchant goes bankrupt, then the insurance is of no avail to the investor. Conversely, if the merchant does not go bankrupt, then he will be happy to fulfill his promise of guaranteeing the principal, for fear of losing his trustworthiness among other market

participants (*ne amittat fidem*). In other words, Lessius suggested that performing his obligations was in the merchant's own interest. This could hardly be considered as a cost.

- The merchant's third and last obligation, namely to pay a fixed annual dividend, for example, 6.25 percent, was also downplayed by Lessius. He considered alternative ways for the merchant to obtain funding for his projects, particularly *census* or rent-contracts, concluding that the rents that need to be paid in exchange for money in those contracts exceed the annual dividend to be paid in triple contracts. Therefore, the merchant should not complain, as the triple contract offers a cheaper alternative.

In sum, Lessius's comparative cost-benefit analysis led to the conclusion that there was no inequality in the triple contract. He minimized the gravity of the merchant's obligations, while maximizing the burdens on the capitalist investor. It would go beyond the scope of this paper to enter into the details of Lessius's refutation of the two remaining potential sources of inequity.⁴⁵ Yet it deserves mentioning that his defense of freedom of contract considerably contributed to the argument. For example, Lessius said that everybody is free to choose not to enter into a partnership contract if the prospective partner is not willing to enter into an insurance contract at the same time. The capital guarantee is a matter of free individuals concluding an additional insurance contract by their mutual consent. As long as the fund provider pays the merchant a just price for that insurance service, commutative justice is not violated. Once more, we see Lessius minimizing the obligation for the merchant insuring the capital of the investor. He said that in practice merchants preferred to promise a capital guarantee, because they were actually convinced that they knew best how to spend money safely in business. Even in the worst-case scenario, the insurance is not a problem for them. If a merchant goes bankrupt, the capitalist will not be able to recover his capital either, since he merely has a personal claim against the merchant, the insurance contract not being backed up by a real security such as a pawn or a mortgage. Lessius noted that this happened frequently in practice. In the same way, he observed that merchants were so blinded by their hope of making much more profit than the annual return promised to the investor, that they did not care about purchasing future profits at a fixed annual price. Last but not least, he cited another reason why merchants were happy to guarantee the investor's capital: It dispensed them from ordinary bookkeeping duties; it freed them from the burden to disclose their accounts.

Macroeconomic Analysis and Public Interest

Lessius's knowledge about financial practice, his understanding of economic logic, his ability to reason as a jurist—all these characteristics clearly appear from his assessment of the morality of the triple contract. It is small wonder that John T. Noonan called him a “master of economic analysis,” considering his positions on the morality of the money-lending and interest as “unprecedented.”⁴⁶ Lessius was not the kind of person to judge the morality of the market without sufficient knowledge of how things really worked. Lessius was also not afraid to go against the opinion of some of his contemporaries. He was nuanced but fearless. Throughout his exposition, he showed that he was well aware of the moral resistance that commercial capitalism met with. Yet he warned his opponents that their value judgment was unhelpful, since it was not only out of touch with reality but also harmful to the public interest (*commodum reipublicae*). Therefore, in a kind of peroration to his defense of the practice of commercial capitalism, Lessius proposed to further explain why he thought that this practice was expedient to the people in his country. This final part of his defense of commercial capitalism is quite interesting, indeed, as it provides further evidence of the important methodological value of legal and economic analysis in early modern Jesuit ethics. It also demonstrates that the use of legal expertise and economic analysis was thought to be entirely compatible with the use of traditional concepts of moral evaluation, such as the common good and the salvation of souls (*salus animarum*).

Lessius distinguished between three forms of expediency or usefulness in allowing investors to provide funds at a fixed annual profit and with the certainty of recovering their capital.⁴⁷ First, Lessius considered this practice as conducive to the salvation of souls. Second, he thought that the practice was advantageous to the common good, especially to the prince and the republic—he developed a sophisticated macroeconomic analysis to make that point as will be explained below. Third, Lessius considered the triple contract as advantageous to the interests of widows and wards, a category of persons that have traditionally been granted special protection by canon law and moral theology. Needless to say, *viduae et pupillae*, in canon law, is a legal category that, by analogy, can also include pious causes and foundations of religious institutions.

Far from being a danger to the soul, Lessius argued that the triple contract could actually prevent Christians from damaging their souls. He invited skeptics to ponder what would happen to people living off their interests, if the possibility of safely investing private wealth in commercial credit contracts would disappear. The alternative was to buy rents (*census*), but what if this market

became saturated, for instance through lack of alternative investment tools? People who did not possess rents or could no longer buy them would then lose their means of living in financial security (*ratio vivendi salva sorte*). Yet, in the end, everybody would still want to find a means of safely investing his private wealth. According to Lessius, the end-effect would be that these people would then commit themselves to truly inequitable practices, such as dry exchange or *mohatra* contracts,⁴⁸ secretly charge usurious interest rates, commit fraud in buying and selling, create monopolies, steal, or use other immoral means. He also referred to the danger that people would simply consume their wealth without saving it for the satisfaction of long-term needs. Consequently, they would not be able to let their daughters be employed in honorable jobs; they would not be able to send their sons to school; and so forth. So Lessius insisted that some sort of safe investment vehicle needed to be on offer for people with surplus funds to prevent them from squandering their private wealth or resorting to truly inequitable means of making profits.

This is also the reason why he thought triple contracts were the appropriate means for “widows and wards” to safely invest their funds at a reasonable profit rate. He acknowledged that even triple contracts were not insulated from risk, but he thought that the widows and wards who would lose their means of existence because the merchant with whom they deposited their money went bankrupt, were a relative minority. Moreover, merchants mostly went bankrupt only after a couple of years of activity, so that in the meantime widows and wards would at least have reaped the annual profits.

Last but not least, Lessius reasoned that the absence of the triple contract would negatively affect society as a whole. In developing this argument, he gives us an ultimate example of how sophisticated his economic knowledge was. By looking at the economic system as a whole, he fully anticipated the economic consequences of not allowing the triple contract. Lessius warned that the cost of borrowing for merchants had an impact on the cost of borrowing of the public authorities. In a society without a fully developed tax system, merchants were indeed often called upon to lend money to the prince for the purpose of financing public projects.⁴⁹ Therefore, the costs that merchants incurred in raising funds indirectly determined the interest rates at which the political authorities could borrow money from the merchants. If merchants were going to lose the option of raising money at relatively advantageous conditions through triple contracts, then the burden of finding more expensive credit would ultimately be shifted to the community. In other words, Lessius combined his knowledge of different markets and different types of money-lending devices. From a macro-perspective, he looked at the correlation between different species of markets where money

could be invested or borrowed. Lessius warned that if safe commercial credits in the form of triple contracts were prohibited, the merchants would be obliged to raise funds by alternative means. Bills of exchange (*cambium*) are an example of such an alternative. However, the cost of borrowing money through bills of exchange could rise as high as 18 percent or more on an annual basis. Therefore, merchants obliged to borrow funds through bills of exchange would, ultimately, charge higher interest rates on loans granted to the prince. Consequently, forbidding constructions such as the triple contract would prove to be harmful to society as a whole. Conversely, allowing triple contracts would be beneficial to the public good. The reason being that it allowed the prince to borrow at relatively low interest rates, since the merchants, his main creditors, could raise money at 6.25 percent thanks to the *contractus trinus*.

In conclusion, Lessius argued that the prohibition on the triple contract would cause serious harm to the entire credit system of the Belgian society. It would also endanger the salvation of souls rather than promote it. However, even if rational argument pleaded in favor of the triple contract, there remained a serious legal obstacle to its recognition. In 1586, Pope Sixtus V had condemned the practice of guaranteed commercial credits in his bull *Detestabilis avaritia*, in which he considered the *contractus trinus* as an artificial legal device to evade the usury prohibition in money-lending. Lessius nevertheless easily dispensed with this argument from authority. In his eyes, the bull was in blatant contradiction with commercial practice in Italy and Belgium. He inferred from this that the bull had never truly been received in these regions. Particularly in Belgium, the bull was never promulgated or recognized in practice—and practice prevailed on doubtful legislation. By the same token, he argued, the bulls published by Pius V, which severely limited the sale of rents (*census*), had not been received in practice. Lessius's reasoning might seem antiauthoritarian, disloyal, and even provocative. The truth is though that the argument of nonreception of papal legislation was widespread among theologians and canonists of his time, certainly with regard to the bull *Detestabilis avaritia*.⁵⁰

Jesuits for Freedom

The objective of this article is to show that Jesuits of the past can still be a source of inspiration today to the extent that they proposed a refined model of ethical counselling. It can remedy some of the shortcomings of moral discourse that we are often confronted with at the outset of the twenty-first century: the “emo-ethics” frequently fueled by modern media and the unhelpfulness that sometimes characterizes Christian commentaries on the current state of economic life.

The backbone of the sophisticated Jesuit model of ethical counseling was a combination of knowledge in Thomistic theology with Roman canon law and empirical observation of markets. Combining these various fields of knowledge, the Jesuits were able to render sophisticated moral judgments that were credible in the eyes of merchants, bankers, and policymakers of their time. Sometimes, the Jesuits were even ahead of their time. For example, conservative jurists in the Low Countries opposed Lessius's endorsement of the triple contract, arguing that commercial freedom (*libertas mercatoria*) should be reined in for the sake of the common good.⁵¹ But then Lessius tried to show that promoting commercial freedom was beneficial to the society as a whole.

Moreover, freedom (*libertas*) was taken as the focal point of the entire moral and legal universe which the early modern Jesuits constructed for the sake of their "mission in the sacrament of penance."⁵² Eager to avoid the twin dangers of perplexity and depression resulting from moral scrupulosity and overburdened consciences, they tried to offer consolation to Christians who were anxious about the salvation of their souls. Lessius warned against the danger of contrary views, especially as promoted by Protestants. According to his observation, many Lutheran and Calvinist converts had committed suicide out of despair deriving from the teaching about predestination and Protestants' pessimistic account of human free will. As a reaction, Jesuits like Lessius tried to promote an optimistic view of man's natural abilities to contribute to his salvation, emphasizing the central role of human free will. The fight against scrupulosity in the early modern period matters to understand why the Jesuits emphasized so strongly the need to promote freedom, or for that matter, why they became such fierce proponents of the doctrine of moral probabilism.⁵³

The frontispiece of a treatise on the laws by the Spanish Jesuit Juan de Salas (1553–1612), who taught at the *Collegio Romano*, is a good illustration of the central role played by freedom in Jesuit ethics.⁵⁴ It shows a man carrying a plate that displays the inscription *libertatem meam mecum porto*—"I carry my freedom with me."⁵⁵ As a matter of fact, the man pictured by Salas is probably Samson, holding the two posts of the city gate of Gaza, which he had torn loose to escape his assassins. In the early modern period, this episode from Judges 16:3 was taken as a metaphor for man's free will (*liberum arbitrium*).⁵⁶ Man could escape dead and mortal sin by relying on his insight, courage, and free will. Many Jesuits, then, stressed human freedom.⁵⁷

Antonio Perez (1599–1649), another Spanish Jesuit who taught moral theology at the *Collegio Romano*, claimed that freedom was the starting point of all Jesuit moral theology. He explained that in a more technical way by saying that the following principle was the cornerstone of Jesuit moral theology: "in case

of doubt the position of the possessor is the stronger.” Here again, one can see the strong influence of legal reasoning on Jesuit ethics. The legal principle that “in case of doubt the position of the possessor is the stronger” is derived from Roman property law. It was also used by canon lawyers, for instance, to argue that everybody should be considered innocent until proven guilty. In early modern Jesuit ethics, it became the starting point for arguing that everybody’s natural position is one of freedom of action. Laws can limit that freedom of action, but only provided that they are legitimate, formulated clearly and promulgated, since a doubtful law cannot trump the individual’s possession of his freedom (*lex dubia non obligat*). We have seen an example of how that works in practice: Lessius was not ready to accept that Pope Sixtus V would limit the liberty of merchants in Flanders, because he thought it was a *lex dubia*.

Man’s right to possess his freedom of action is always the starting point for Jesuits like Lessius. Laws threatening to limit freedom have to prove that they have a right to do so. They must bring good and convincing arguments. The relationship between man’s basic freedom, on the one hand, and laws trying to impose obligation, on the other, was conceived of in antagonistic terms. Perez explained that the position favoring the imposition of an obligation was like a plaintiff, while the other side acted as a defendant fighting for his freedom. It was up to the plaintiff to prove his claim and convince the defendant that he owed something to him. Perez defended the view that the individual doubting the existence of a certain law remained the possessor of his freedom (*possessor suae libertatis*). Interestingly, he argued that this principle promoted freedom of action (*favet libertati operandi*) and relieved men of innumerable obligations.⁵⁸

For the Jesuits, though, property and freedom were not ultimate ends. They served the purpose of leading a virtuous life. Lessius clearly emphasized that man had to focus on the glory of God as the ultimate goal of his action. Indeed, it should not be forgotten that the watchword of the Jesuit order is “for the greater glory of God.” In his works on divine grace and free will (e.g., *De gratia efficaci*, Antwerp 1610), Lessius explained that man had to work hard to amplify God’s glory. As a matter of fact, in the introduction to his work on the problem of predestination, he warned people against the Protestants because they destroyed the whole logic of the economy of salvation. They took away incentives for people to contribute in an active way to saving their souls. If people could no longer contribute to their own salvation by doing good works, by being industrious and zealous in their faith, they would start to despair and stop working for the greater glory of God altogether. He complained about the fact that this was happening already in the Low Countries in his time. Interestingly, even in his dogmatic theological works—in which he mainly borrows from Molina to explain the relationship

between grace and free will—Lessius uses the language of law. Both free will and grace are necessary for salvation, he explained, using the image of a contract. Both offer and acceptance are necessary to bring about contractual obligation. Similarly, God's grace is not enough: the divine offer starts off everything, but to make it work, man has to accept it, in an active way.

Liberty, then, was a core concept in early modern Jesuit spirituality and ethics. But it was not the same kind of liberty that is often proclaimed today. Modern freedom, for many people, resembles a kind of libertinism. Lessius would not have agreed with such a worldview. In a little work on the choice of life (*De statu vitae deligendo*, Antwerp 1613), Lessius deplored the fact that most of our efforts were constantly directed toward increasing our honor, wealth, and bodily lusts.⁵⁹ To avoid temptations, his ultimate moral advice was to keep the last judgment permanently before our eyes. In this regard, one may recall the profoundly ascetic nature of Lessius's life and theology. Suffering from chronic illness, Lessius even wrote a little treatise on how to live a healthy life (*Hygiasticon*, also published in Antwerp in 1613), mainly explaining how we can grow old without losing our mental capacities. It was full of useful but sobering recommendations.

Lessius was a master of economic analysis and an advocate of freedom of contract. Because he understood the complexities of business and economics, he rejected simplistic answers to the moral dilemmas that its actors faced. As a result, he was a much-appreciated counselor to merchants and princes. But he was not a laxist confessor. Lessius reminded his flock of their duty to live a virtuous life, avoid temptations, and keep the spirit of Christ alive. His mystical, ascetic writings call upon all Christians to strive for moral perfection and to invest energy, time, and resources in good works such as prayer, fasting, and charity. He wanted Christians to work freely but diligently both for their material prosperity and for their spiritual salvation.

Notes

- * This is a written version of the Calihan Lecture delivered on November 29, 2017, at the Gregorian University in Rome. The first part of the title of this lecture echoes one of the subtitles used in Samuel Gregg, *For God and Profit: How Banking and Finance Can Serve the Common Good* (Spring Valley, NY: The Crossroad Publishing Company, 2016), 2.
1. For a brief and easily accessible exploration of this problem, see Dylan Pahman, “Sharpening the Weapon of Love: From Moralism to Morality,” Acton Institute Powerblog, February 18, 2013, <http://blog.acton.org/archives/50101-sharpening-the-weapon-of-love-from-moralism-to-morality.html>.
 2. Joseph Cardinal Ratzinger, “Market Economy and Ethics,” in *Church and Economy in Dialogue*, ed. Lothar Roos, trans. Stephen Wentworth Arndt (Rome: Ordo Socialis, 1987), 13, available at <http://ordosocialis.de/pdf/lroos/K%20u%20W%20in%20Dialog/dialoenga4neu.pdf>; also cited in Kishore Jayabalan, “When Economic Moralism Clashes with Reality,” Acton Institute Powerblog, November 27, 2013, <http://blog.acton.org/archives/63151-economic-moralism-clases-reality.html>.
 3. *The Economist*, November 4, 2017, “Scandal, Outrage and Politics: Do Social Media Threaten Democracy?” <https://www.economist.com/news/leaders/21730871-facebook-google-and-twitter-were-supposed-save-politics-good-information-drove-out>.
 4. Chris Geer and Eugene McLaughlin, “Media Justice: Madeleine McCann, Intermediatization and ‘Trial by Media’ in the British Press,” *Theoretical Criminology* 16, no. 4 (2012): 395–416, esp. 397–98.
 5. Wim Decock, “The Judge’s Conscience and the Protection of the Criminal Defendant: Moral Safeguards against Judicial Arbitrariness,” in *From the Judge’s Arbitrium to the Legality Principle*, ed. Georges Martyn, Anthony Musson, and Heikki Pihlajamäki (Berlin: Duncker & Humblot, 2013), 69–94.
 6. Paul Oslington, “A Christian Perspective on the Financial Crisis,” *The American Economist* 53, no. 1 (2009): 28–30.
 7. Gregg, *For God and Profit*, 11.
 8. This argument has been developed in Wim Decock, “From Law to Paradise: Confessional Catholicism and Legal Scholarship,” *Rechtsgeschichte—Legal History* 18 (2011): 12–34.
 9. Toon Van Houdt, *Leonardus Lessius over lening, interest en woeker: De iustitia et iure, lib. 2, cap. 20: editie, vertaling en studie* (Brussels: Paleis der Academiën, 1998). For a shorter biographical introduction in English, see Lessius, *On Sale, Securities, and Insurance*, trans. Wim Decock and Nicholas De Sutter, Sources in Early Modern Economics, Ethics, and Law (Grand Rapids: CLP Academic, 2016).

10. Bertram Schefold, ed., *Leonardus Lessius: Vademecum zu einem Klassiker der spätscholastischen Wirtschaftsanalyse* (Düsseldorf: Verlag Wirtschaft und Finanzen, 1999), contains references to further literature about the importance of Lessius as a proto-economist.
11. Samuel Gregg, “Commerce, Economic Modernity, and the Society of Jesus” (Lecture delivered at the conference “Globalization, Justice and the Economy: The Jesuit Contribution,” Pontifical Gregorian University, Rome, 29 November 2017).
12. For a short and highly readable introduction, see John W. O’Malley, *The Jesuits: A History from Ignatius to the Present* (Lanham: Rowman & Littlefield), 2014.
13. John W. O’Malley et al., ed., *The Jesuits: Cultures, Sciences and the Arts, 1540–1773* (Toronto: University of Toronto Press, 2006).
14. On Jesuits’ role as confessors to princes, see Harro Höpfl, *Jesuit Political Thought: The Society of Jesus and the State, c. 1540–1640* (Cambridge: Cambridge University Press, 2004); Nicole Reinhardt, *Voices of Conscience: Royal Confessors and Political Counsel in Seventeenth-Century Spain and France* (Oxford: Oxford University Press, 2016).
15. On the Dominican theologians at Salamanca and their importance for the development of economic thought, see M. Grice-Hutchinson, *The School of Salamanca: Readings in Spanish Monetary Theory* (Oxford: Oxford University Press, 1952).
16. Compare the considerations on *ius* in Kenneth Pennington, “*Lex naturalis* and *ius naturale*,” *The Jurist* 68 (2008): 569–91.
17. Decock, *Theologians and Contract Law: The Moral Transformation of the Ius commune (ca. 1500–1650)*, Studies in the History of Private Law (Leiden/ Boston: Brill/ Nijhoff, 2013), 82–86.
18. James Gordley, *The Jurists: A Critical History* (Oxford: Oxford University Press, 2013), particularly chapter 2 on the *ius commune* and chapter 3 on the late scholastics.
19. See, for example, Matthias Kaufmann, “Subjektive Rechte als Grenzen der Rechtssetzung bei Luis de Molina,” in *Kontroversen um das Recht. Beiträge zur Rechtsbegründung von Vitoria bis Suárez*, ed. Kirstin Bunge et al. (Stuttgart-Bad Cannstatt: Frommann-holzboog, 2013), 291–310.
20. Alejandro Chafuen, “Juan de Mariana on Government, Commerce, and Economic Policy” (Lecture delivered at the conference “Globalization, Justice and the Economy: The Jesuit Contribution,” Pontifical Gregorian University, Rome, 29 November 2017).
21. Wim Decock, “Quantitative Easing Four Centuries Ago: Juan de Mariana’s *De monetae mutatione* (1609),” in *Texts and Contexts in Legal History: Essays in Honor*

- of Charles Donahue, ed. John Witte, Jr., Sara McDougall, and Anna di Robilant (Berkeley: Robbins Collection, 2016), 367–79.
22. Wim Decock, “Collaborative Legal Pluralism: Confessors as Law Enforcers in Mercado’s Advice on Economic Governance (1571),” *Rechtsgeschichte—Legal History* 25 (2017): 103–14.
 23. On the overarching relevance of this cardinal virtue in the Jesuit analysis of legal and economic affairs, see D. Alonso Lasheras, *Luis de Molina’s De iustitia et iure: Justice as Virtue in an Economic Context* (Leiden/Boston: Brill, 2011).
 24. This is the argument made in James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Oxford University Press, 1991).
 25. Oreste Popescu, “Latin American Scholastics,” in *Ancient and Medieval Economic Ideas and Concepts of Social Justice*, ed. S. Todd Lowry and Barry Lewis John Gordon (Leiden/Boston: Brill, 1998), 567.
 26. Wim Decock, prologue to *Theologians and Contract Law*.
 27. Decock, *Theologians and Contract Law*, 2.
 28. Decock, *Theologians and Contract Law*, 169.
 29. Decock, *Theologians and Contract Law*, 595.
 30. Decock, “Quantitative Easing,” 365.
 31. For a general overview of the content of the parts in Lessius’s treatise that are relevant for private law, see Wim Decock, “Law of Property and Obligations: Neoscholastic Thinking and Beyond,” in *The Oxford Handbook of European Legal History*, ed. Heikki Pihlajamäki, Markus Dubber, and Mark Godfrey (Oxford: Oxford University Press, 2018), 611–31.
 32. Different editions of the same scholastic works can differ considerably, indeed. See Wim Decock and Christiane Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit, 1500–1750*, Methodica: Einführungen in die rechtshistorische Forschung 1 (Berlin/Boston: De Gruyter, 2016), 57–58.
 33. Wim Decock, “Trust Beyond Faith: Re-Thinking Contracts with Heretics and Excommunicates in Times of Religious War,” *Rivista internazionale di diritto comune* 27 (2016): 310.
 34. This section draws on research previously published in greater detail in Wim Decock, “The Catholic Spirit of Capitalism? Contrasting Views on Profit-Making Through Capital Investment in the Age of Reformations,” in *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, Refo500 Academic Series 20, ed. Wim Decock et al. (Göttingen, Vandenhoeck & Ruprecht, 2014), 22–44.

35. Hans-Jürgen Becker, “Das Zinsverbot im lateinischen Mittelalter,” in *Was vom Wucher übrigbleibt*, ed. Matthias Casper, Norbert Oberauer, and Fabian Wittreck (Tübingen: Mohr, 2014), 40.
36. Decock, “The Catholic Spirit of Capitalism?” 22.
37. Lawrin Armstrong, *The Idea of a Moral Economy: Gerard of Siena on Usury, Restitution and Prescription* (Toronto: University of Toronto Press, 2016), 5.
38. Decock, “The Catholic Spirit of Capitalism?” 32.
39. Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburgh: University Press, 2000), 135–37.
40. Italo Birocchi, “Tra elaborazioni nuove e dottrine tradizionali. Il contratto trino e la natura contractus,” *Quaderni fiorentini per la storia del pensiero giuridico moderno* 19 (1990): 243–322.
41. Decock, “The Catholic Spirit of Capitalism?” 26–27.
42. Toon Van Houdt, “Lack of Money: A Reappraisal of Lessius’ Contribution to the Scholastic Analysis of Money-Lending and Interest-Taking,” *The European Journal of the History of Economic Thought* 5 (1998): 1–35.
43. Pierre de Jean Olivi, *Traité des contrats*, ed. Sylvain Piron (Paris: Les Belles Lettres, 2012), ET: Peter of John Olivi, *A Treatise on Contracts*, trans. R. Thornton and M. Cusato (St. Bonaventure, NY: Franciscan Institute Publications, 2016).
44. Wim Decock, “Leonardus Lessius (1554–1623) y el valor normativo de ‘usus et consuetudo mercatorum’ para la resolución de algunos casos de conciencia en torno de la compra de papeles de comercio,” in *Entre hecho y derecho*, ed. M. Madero and E. Conte (Buenos Aires: Manantial, 2010), 75–94.
45. For further details, see Decock, “The Catholic Spirit of Capitalism?” 28–31.
46. John Thomas Noonan, *The Scholastic Analysis of Usury* (Cambridge, MA: Harvard University Press, 1957), 222, 264.
47. Decock, “The Catholic Spirit of Capitalism?” 34–36.
48. On *mohatra* contracts, see Lessius, *On Sale, Securities and Insurance*, 107–11.
49. Wim Decock, “Spanish Scholastics on Money and Credit: Economic, Legal and Political Aspects,” in *Money in the Western Legal Tradition: Middle Ages to Bretton Woods*, ed. Wolfgang Ernst and David Fox (Oxford: Oxford University Press, 2016), 279.
50. Noonan, *The Scholastic Analysis of Usury*, 220.
51. Decock, “The Catholic Spirit of Capitalism?” 32.

52. The term is borrowed from Ben Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Politics* (Cambridge: Cambridge University Press, 2017), 47.
53. For further details about moral probabilism, see Decock, *Theologians and Contract Law*, 73–82, containing references to further literature. See also Stefania Tutino, *Uncertainty in Post-Reformation Catholicism: A History of Probabilism* (Oxford: Oxford University Press, 2018), 52–88.
54. Juan de Salas, *Tractatus de legibus in primam secundae S. Thomae, Opus non solum theologis moralibus, sed etiam iuris utriusque consultis pernecessarium* (Lyon, 1611), available at https://books.google.be/books/about/R_Patris_Ioan_de_Salas_Tractatus_de_legi.html?id=ZgzEnJqOGO4C&redir_esc=y.
55. The frontispiece of this work has been chosen for the cover page of Decock and Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit*.
56. Johannes Michael von der Ketten, *Apelles symbolicus*, vol. 1 (Amsterdam, 1699), 415.
57. Holland, *The Moral Person of the State*, 29; cf. A. Brett, “Human Freedom and Jesuit Moral Theology,” in *Freedom and the Construction of Europe*, vol. 2: *Free Persons and Free States*, ed. Quentin Skinner and Martin van Gelderen (Cambridge: Cambridge University Press, 2013), 9–26.
58. For a more detailed exposition of Perez’s views, see Decock, *Theologians and Contract Law*, 77–79.
59. For citations from the primary sources, see Wim Decock, “Lessius of de Kempense geest van het kapitalisme,” *Taxandria* 88 (2016), 57–58.