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Adam Smith's Lectures on Jurisprudence-Justice, Law, and the Moral Economy

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ADAM SMITH'S LECTURES ON JURISPRUDENCE – JUSTICE, LAW, AND THE MORAL ECONOMY

Abstract:

Adam Smith, a leading thinker of the British Enlightenment, is universally known as the author of the Wealth of Nations and an economic theorist. He is less well known as the author of a Theory of Moral Sentiments and an ethicist. And known almost not at all for his Lectures on Jurisprudence or as a legal theorist.

This essay looks at Smith's thought through the lens of his Lectures on Jurisprudence. It highlights the almost paradoxical positions Smith had on self-interest, markets, government, and economic expansion. Obscured by his reputation and these paradoxes are his views on justice, equality, and power. This essay concludes that Smith's "justice" is deficient and no substitute for the "bread nexus" of the moral economy.

The question of the origin of the 'Scottish Renaissance – that remarkable efflorescence of the mid-eighteenth century with its roll call of great names: Hume, Smith, Robertson, Kames and Ferguson – is one of those historical problems that have hitherto stubbornly resisted a definite solution . . . **the lawyers undoubtedly played the most important role.**¹

This essay was inspired by Amartya Sen's understanding of Adam Smith's thought as "open impartiality" focused on the lives that people are actually able to lead.² It suggested the possibility of using Smith's jurisprudence as a bridge between the sometimes assertive commitment to possessive individualism and a positivist almost textualist, even literalist view of the law, and something like a

¹ J. Clive, **Not by Fact Alone: Essays on the Writing & Reading of History**, 149, 152 (1989).

² A. Sen, **The Idea of Justice** (2009).

medieval communitarianism, a natural law view that law is a moral idea; even to the point that an unjust law is no law at all. It was propelled forward by reflections on themes developed at the 2007 Birkbeck College conference on critical jurisprudence: “Jurisprudence as the consciousness and conscience . . . of law; law as the thread that knots together individual existence and social being; and, an understanding of injustice that it necessarily starts with the victim and in many instances there is no clear agent of the injustice.”³

Part I is a general introduction to the British Enlightenment and contemporary political-economic views. This is the context in which Smith wrote and lectured. Part II is a very brief summary of legal theory and practice in Britain at that time. Part III is an even more summary section on the moral and political theories influencing Smith. Part IV outlines Smith’s theories as presented in his two major works: The Theory of Moral Sentiments and An Inquiry Into the Nature and Causes of the Wealth of Nations. Part V focuses in some depth on his much less well known and surprisingly little discussed in legal literature, Lectures on Jurisprudence. Part VI elaborates the place of justice in Smith’s science of a legislator, and Part VII offers some concluding thoughts about Smith’s views on equality, justice, and power.

³ C. Douzenas & A. Gearey, *Critical Jurisprudence – The Political Philosopher of Justice* (2005).

I.

The British Enlightenment

The 18th century is the "Age of Enlightenment." But what is it that one understands the essence of the Age of Enlightenment to have been? Was it marked by "the rise of modern paganism (and) the science of freedom"⁴ or was it a "dialectic," resulting in a disciplinary rationality imposing an "administered life" thereby reducing society to a "universal concentration camp"⁵ Perhaps it was the "pernicious and dangerous" Spinozarism of the "radical Enlightenment"⁶

Closer to home, Adam Smith's and ours, we do better to focus on Britain and more particularly Scotland. The 18th century in Britain was a period of transformations; or is the better prefix "re"? Was what happened planned, even envisioned, or was it all a happening? Either or both, there was "the overthrow of absolutism, accelerating population growth, urbanization, a commercial revolution marked by rising disposable income, (and) the origins of

⁴ P. Gay, *The Enlightenment: The Rise of Modern Paganism (1966) and The Science of Freedom (1969)*.

⁵ M. Horkheimer & T. Adorno, *Dialectic of Enlightenment: Philosophical Fragments (2002)*.

⁶ J. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* 161 (2001).

industrialization, and innovations in scientific, theological, psychological, social and political discourse."⁷

A single paragraph can serve as a summary of the "predicament" which is at the center of Smith's interests and concerns:

"In Britain, at least, the Enlightenment was thus not just a matter of pure epistemological breakthroughs; it was primarily the expression of new mental and moral values, new canons of taste, styles of sociality and views of human nature. And these typically assumed practical embodiment: urban renewal; the establishment of hospitals, schools, factories and prisons; the acceleration of communications; the spread of newspapers, commercial outlets and consumer behavior; the marketing of new merchandise and cultural services. All such developments re-patterned the loom of life, with inevitable repercussions for social prospects and agendas for personal fulfillment."⁸

There also was a "qualitative change in labour relations whose nature is obscured if we see it only in terms of an increase in the scale and volume of manufacture and trade. This occurred, of course. But it occurred in such a way that a substantial proportion of the labour force actually became *more* free from discipline in their daily work, more free to choose between employers and between work and leisure, less situated in a position of dependence in their whole way of life, than they had been before or than they were to be in the first

⁷ R. Porter, *The Creation of the Modern World: The Untold Story of the British Enlightenment* 12 (2010).

⁸ *Id.* at 14.

decades of the discipline of the factory and of the clock.”⁹ And it was at the same time the century in which the “commoners finally lost their land, in which the number of offenses carrying the capital penalty multiplied, in which thousands of felons were transported, and in which thousands of lives were lost in imperial wars; a century which ended, despite the agricultural ‘revolution’ and the swelling rent-rolls, in severe rural immiseration.”¹⁰ This is a reminder that all progress is to be evaluated as a “net” phenomenon. “Change there would be and change might bring improvement . . . But the gains might be only net gains; they might be achieved at severe cost . . .”¹¹

As all that was solid melted into air,¹² the most pressing predicament was seen as how to achieve and maintain sufficient social order to permit, actually facilitate, the pursuit of happiness, even opulence. Could nature and commerce replace the “moral economy” as the glue that held things together, as the base on or center around which life was lived? The “moral economy” I’m positing is one with an expensive understanding of “the commons;” which concerns itself with the distribution question and values equality as of the essence of participation in

⁹ E.P.T. Thompson, *Customs in Common: Studies in Traditional Popular Culture* 38 (1993).

¹⁰ *Id.* at 18.

¹¹ D. Winch, *Adam Smith’s Politics: An essay in Historiographic Revision* 182 (1978).

¹² K. Marx & F. Engels, *The Communist Manifesto: A Road Map to History’s Most Important Political Document* Part 1, ¶ 18 (P. Gaspar ed. 2005).

key governance decisions; and is characterized by a “bread nexus” not a “cash nexus.”¹³ “Although historians associate the ‘moral economy’ with the poor, the middling also believed that economic life had an ethics. They, too, thought government was obliged to secure not only order, but social order, meaning safety, security, and sufficiency.”¹⁴

That is the challenge Smith turned his mind to.¹⁵ It is addressed in its multiple dimensions throughout his Theory of Moral Sentiments and his Inquiry into the Nature and Causes of the Wealth of Nations; and most significantly for present purposes in his Lectures on Jurisprudence.

Smith's Theory of Moral Sentiments was first published in 1759 and revised until 1790, the year of his death. The Wealth of Nations was first published in 1776 and extensively revised in 1784; in all there were five editions. The Lectures on Rhetoric and Belles Lettres are from 1763; and the Lectures on Jurisprudence are from 1762-63 and 1763-64.

While I am finessing the "Adam Smith problem," the question of whether there is an early Smith focused on ethics based on sympathy, and a later Smith,

¹³ **Thompson**, *supra* n. 9 at 178.

¹⁴ **B. Smith**, *The Freedom We Lost: Consent and Resistance in Revolutionary America* 54 (2010).

¹⁵ **Pace I. Hont**, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* 389 (2005).

focused on economics and self-interest,¹⁶ one could of course also think of *homo socius* as the hero of Theory of Moral Sentiments; *homo economicus* as the hero of the Wealth of Nations; and *homo civicus* as that of the Lectures on Jurisprudence. Significantly absent, *pace* Winch, is *Aristotle's homo politicus*.¹⁷ Be that as it may be, this essay is primarily concerned with Smith's Lectures on Jurisprudence.

It has been written that Smith's style has made him "the most widely referred to and most rarely read" economist.¹⁸ Even economists give his actual texts little attention. For instance, Andre Gunder Frank a noted economic historian and theorist in commenting on his own university experience wrote "the first three out of the thirty-two chapters of the Wealth of Nations is about as far as any ill-advised modern reader is likely to get in the book. That is as far as we got in Frank Knight's course on the history of economic thought at the University of Chicago. Milton Friedman all but abandoned Smith altogether, preferring to replace him by Alfred Marshall instructing us to learn from the footnotes of Marshall's Principles of Economics and to relegate virtually the entire empirically

¹⁶ J. Otteson, *The Recurring Adam Smith Problem*, 1 HIST. OF PHILO. Q. 51 (2000).

¹⁷ **Winch**, *supra* n. 11 at 174.

¹⁸ R. Heilbroner, **The New Yorker**, July 8, 1991 at 73.

rich text and appendixes (of Smith) to oblivion."¹⁹ In this regard, a computer search shows there are 31 brief passing references to Smith's Wealth of Nations and none to either The Theory of Moral Sentiments or The Lectures on Jurisprudence in U.S. Supreme Court opinions.²⁰

II.

Legal Theory and Practice

Before looking into the Lectures on Jurisprudence and whatever insights about Smith's views of law can be garnered from his more well-known books, a

¹⁹ G. Arrighi, *Adam Smith in Beijing – Lineages of the Twenty-First Century* 42 n. 3 (2007).

²⁰ **Search for Adam Smith:** *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n. 12 (2007); *Granholt v. Heald*, 544 U.S. 460, 496 (2005); *Xerox Corp. v. Harris County Tex.*, 459 U.S. 145, 150 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 593 (1980); *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 784 (1976); *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974); *North Dakota State Bd. Of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165-66 (1973); *Bell v. State of Maryland*, 378 U.S. 226, 267 (1964); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963); *American Federation of Labor v. American Sash & Door Corp.*, 335 U.S. 538, 543 (1949); *Mercoide v. Mid-Continent Inv. Co.*, 320 U.S. 661, 673 (1944); *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940); *United States v. Miller*, 307 U.S. 174, 179 (1939); *German Alliance Ins. Co. v. Lewis*, 223 U.S. 389, 416-17 (1914); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 203 (1905); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 627 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 559 (1895); *United States v. Martin*, 94 U.S. 400, 403 (1876); *Slaughter-House Cases*, 83 U.S. 36, n. 39 (1872); *Veazie Bank v. Fenno*, 75 U.S. 533, 535 (1869); *Paul v. Virginia*, 75 U.S. 168, 171-72 (1868); *Pacific Ins. Co. v. Soule*, 74 U.S. 533, 437 (1868).

Search for THE WEALTH OF NATIONS (additional opinions): *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 446 U.S. 243, 271 (1984); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457 (1978); *Knowlton v. Moore*, 178 U.S. 41, 47 (1900); *Springer v. United States*, 102 U.S. 586, 1880 WL 18806, at *3 (1880); *Slaughter-House Cases*, 83 U.S. 36, 111 (1872); *Legal Tender Cases*, 79 U.S. 457, 605 (1870); *Johnson v. McIntosh*, 21 U.S. 543 (1923); *Fletcher v. Peck*, 10 U.S. 87, 121 (1810); *Hylton v. United States*, 3 U.S. 171, 180-81 (1796).

brief summary of the state of legal theory and practice in Britain at that time will be helpful.

E.P. Thompson claims that "the law was elevated during this century (18th) to a role more prominent than at any period (of English history)."²¹ Harold Berman sees a series of legal revolutions with the Papal Revolution of 1075-1122 as formational of the Western legal tradition²² Be that as it may be, in the 18th century there was a powerful sense that law was central to human concerns. Burke boasted "The science of jurisprudence is the pride of human intellect ... the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns."²³ And, Blackstone saw "the science of legislation (as) the noblest and most difficult of any ..."²⁴

At the beginning the 18th century there was a substantial remnant of the moral economy that had existed since the middle ages: e.g., "laws limiting prices, laws fixing the rates of wages laws as to apprenticeship, laws against engrossing."²⁵ Additionally there were rights to the commons guaranteed since Magna Carta under the Charter of the Forest: "Herbage is common of pasture,

²¹ **Thompson** *supra* n. 9 at 34.

²² **H. Berman**, *Law and Revolution: The Formation of the Western Legal Tradition* (1985).

²³ **D. Lieberman**, *The Province of Legislation Determined; Leal Theory in Eighteenth Century Britain* 2 (1989).

²⁴ **W. Blackstone**, *1 Commentaries on the Laws of England* 9 (Univ. of Chgo. 1979).

²⁵ W.S. Holdsworth, *The Importance of Adam Smith's Wealth of Nations in English Legal History*, 2 U. CHGO. L. REV. 533, 534 (1935).

like agistment, which permitted livestock to roam in the forest. Pannage is the right to let the pigs in to get acorns and beech mast. Assarts and swidder are aspects of arable tillage. Firebote, snapwood, turbacy, lops and tops refer to fuel. Estovers, cartbote, and housebote refer to tools and building. Chiminage refers to transportation...(in other words), a world of use values.”²⁶ There were also mercantilist laws e.g., “laws which prohibited the export of bullion, laws which fixed the rate of interest” concerned more with exchange values.²⁷ E.P. Thompson described this era as three competing economies – a moral economy of the poor, a paternalistic economy of the elites, and the laissez-faire economy of the harbingers of commercial society.²⁸

During the 18th Century “on the one hand, the legislative restrictions on freedom of industry were either repealed, or fell into disuse. On the other hand, colonial and foreign trade was regulated by a complex mass of statutes, which were constantly being added to or modified, in order to ensure the prosperity of the British manufacturer and trader amidst the constantly shifting commercial condition of the day.”²⁹ As a result the legal forms and structures of business practices and organization expanded and developed. Ron Harris aptly entitles his

²⁶ P. Linebaugh, *The Magna Carta Manifesto: Liberties and Commons For All* 42, 43 (2008).

²⁷ Holdsworth, *supra* n. 25 at 534.

²⁸ Thompson, *supra* n. 9 at 201.

²⁹ Holdsworth, *supra* n. 25 at 534.

book focused on the period from 1720 to 1844 as “Industrializing English Law.” He sees a varied but dynamic relationship between the practices and need of the economy and the practice and needs of the law. Within the more formal legal rules and structures there were enough more or less protean concepts and gaps that business people and their lawyers were able to do what they wanted to do; modifying existing organizational forms and creating new ones. The three most important legal forms were the corporation, the partnership, and the trust. And the four most critical question about such forms were their “legal personality, the transferability of interests, managerial structure, and limitation of liability.”³⁰ Harris concludes that “joint-stock businesses were much more widespread in England by 1810 than they had been in 1740, and their impact on the economy as a whole during its growth and industrialization period should not be overlooked.”³¹

William Blackstone, the author of perhaps the most recognized text in the Anglo-American common law tradition, was a practicing lawyer, judge, scholar, professor, and administrator. His four volume Commentary on the Laws of England was published between 1765-1769. Blackstone’s purpose in writing the

³⁰ R. Harris, **Industrializing English Law – Entrepreneurship and Business Organization 1720-1844** 15 (2000).

³¹ Harris, *id.* at 198.

Commentaries was “to work out a plan of the laws of England so comprehensive as that every title might be reduced under some or other of its general heads, which the student might afterwards pursue to any degree of minuteness; and at the same time so contracted, that the gentleman might with tolerable application contemplate and understand the whole.”³²

Blackstone’s view “of the nature of laws in general “ has been summarized in the following decalogue.

1. Law is a rule of action, prescribed by a superior power.
2. Natural Law is the rule of human action, prescribed by the creator, and discoverable by the light of reason.
3. The divine, or revealed law (considered as a rule of action) is also the law of nature, imparted by God himself.
4. The law of nations is that which regulates the conduct and mutual intercourse of independent states with each other, by reason and natural justice.
5. Municipal, or civil law, is the rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.
6. Society is formed for the protection of individuals; and states, or government, for the preservation of society.
7. In all states, there is an absolute supreme power, to which the right of legislation belongs; and which, by the singular constitution of these kingdoms, is vested in the king, lords, and commons.
8. The parts of a law are one, declaratory; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another, *directory*: whereby the subject is instructed and enjoined to observe those rights, and to

³² W. Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 Yale J. of L. & Humanities 103, 118 n. 61 (2013).

abstain from the commission of those wrongs: a third, *remedial*: whereby a method is pointed out to recover a man's private rights, or redress his private wrongs; to which may be added a fourth, usually termed the *sanction*, or *vindictory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

9. To interpret a law, we must enquire after the will of the maker: which may be collected either from the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the Law.
10. From the latter method of interpretation arises equity, or the correction of that, wherein the law (by reason of its universality) is deficient.³³

In emotive words Blackstone wrote that the common law was once a “regular edifice” with each segment “properly disposed” united in “one beautiful symmetry.” Since then the structure has been “swollen, shrunk, curtailed, enlarged, altered, and mangled.”³⁴ These “mischiefs ... perplexed questions... owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament.”³⁵

Blackstone was particularly concerned about parliamentary and judicial limitations on juries. He considered juries “the glory of the English law.”³⁶ in that juries checked the power of the King and of the judiciary itself. He specifically

³³ J. Finnis, *Blackstone's Theoretical Intentions*, 12 Nat. L. Forum 163, 168 n. 30 (1967).

³⁴ W. Blackstone, *Letter to Earl of Reading*, 32 HARV. L. REV. 974, 975-76 (1919).

³⁵ 1 **Blackstone**, *supra* n. 24 at 10.

³⁶ 3 **Blackstone**, *supra* n. 24 at 379.

challenged Montesquieu “who conclude(d) that because Rome, Sparta, and Carthage have lost that liberties, therefore those of England in time much perish ... (He) should have recollected that Rome, Sparta, and Carthage at the time their liberties were lost, were strangers to trial by jury.”³⁷

John Finnis a leading natural law theorist finds Blackstone to have had a genuine interest in natural law as indicated by numerous references to natural law or the law of nature throughout;³⁸ yet Blackstone’s “definition of municipal law was free from any reference to natural law.”³⁹ In Finnis’ words “in Blackstone’s explicit theory, society and law add little or nothing to human life ... the bulk of human law has no foundation in nature ...(any) semblance of the common good ... has virtually disappeared. The only natural good is individual and presocial, and the great ends of law are the protection of pre-existing individual rights.”⁴⁰

Henry Home, Lord Kames the leading Scots jurist of the period did not share Blackstone’s view that the common law was nearly perfect. However, lacking a separate legislative body in Scotland, Kames nonetheless looked to the courts for law reform. He as a follower of the moral theory of Francis Hutcheson

³⁷ *Ibid.*

³⁸ Finnis, *supra* n. 33 at 176 n. 94.

³⁹ *Id.* at 163.

⁴⁰ *Id.* at 180-81.

believed that in addition to reason, divine law, and self-interest to guide judgment, people also had a separate moral sense. In addition to recognizing that law had to be understood historically Kames placed equity at the center of his jurisprudence.⁴¹

Finally, “In the reign of George II England had grown into the greatest manufacturing and commercial country in the world, while her jurisprudence had by no means been expanded or developed in the same proportion.” It fell to William Murray, Chief Justice Mansfield, to play a leading role in addressing this problem by helping to develop the separate system of legal rules known as the “law merchant.”⁴²

During this period the conflict between the moral economy and the industrializing law was intense. While in its nature something that can never be settled finally or forever, and however “unequal were the terms of power in (the 18th and are in the 21st century) yet power (then and now) must submit to some constraints. Not only because custom (the moral economy then, the safety net now) had juridical endorsement and could itself be a ‘property’ (like the “new property” of Charles Reich) but also because power might (does) bring itself into danger if abuses of customary rights outrage the populace. (For instance) Charles

⁴¹ Lieberman, *supra* n. 23 115-17.

⁴² *Id.* at 99.

l's high handed pursuit of revenue in the royal forests had weakened his throne. Even the most predatory of the Hanoverian Whigs had not forgotten the lesson. George II's consort Queen Caroline had wished to shut up St. James Park (from demonstrators and riff raff), and asked Sir Robert Walpole what it would cost her to do it. He replied 'only a Crown Madam'."⁴³

III.

Moral and Political Theories

Smith also developed his jurisprudential views in the shadow of earlier moral traditions concerned with social order: Christian, civic republican, and natural jurisprudence.⁴⁴ Christianity understood virtue as individual righteousness aligned with God's will. It was duty-bound and rigidly hierarchical. Civic republicanism by contrast saw virtue in participation in society and concern for the public good. Natural jurisprudence as it came to be called developed from the Roman Corpus Juris Civilis recovered in the 11th and 12th centuries. Its concern had been "capturing bare life - in terms of the relations between private individuals" not as "a law of individuals, but rather, a law first of citizens ...

⁴³ **Thompson**, *supra* n. 9 at 100-111.

⁴⁴ **J. Muller**, *Adam Smith in His Times and Ours* 40, 47 (1993).

centered more on property than on contract; a law based on personal statuses and not on 'economic' individuals ..."⁴⁵

With the fracturing of Christianity in the Reformation-era there developed the need for a vision of social order that recognized and at least tolerated intractably different understandings of the Good. Hugo Grotius dared to speculate about the absence of God from such a vision and asserted that "there are several ways of Living, some better than others, and everyone may choose what he pleases of all those Sorts."⁴⁶ In a sense Grotius' modern natural law theory puts more emphasis on the natural and less on the law. He speaks of the laws of (human) nature and less of (transcendent) law. Samuel von Pufendorf secularized modern natural law further by applying the intellectual method of Thomas Hobbes. In doing this Pufendorf committed himself to an individualistic premise for his argument and to an anthropology that systematically compared human with animal nature in order to underline the contrast between civilization and barbarism. The product of this approach was a new concept of sociability that led some eighteenth-century commentators to describe Pufendorf and his close followers as "socialists."⁴⁷

⁴⁵ **A. Schiavone, *The Invention of Law in the West* 12, 457-58 (2012).**

⁴⁶ **Muller, *supra* n. 44 at 46.**

⁴⁷ **Hont, *supra* n. 15 at 159.**

Francis Hutcheson, whose moral philosophy especially influenced Smith, criticized Pufendorf's secularized Augustinian views:

We scarce ever hear anything from (such moralists) of the bright side of human nature. They never talk of any kind of instincts; of natural affections to associate; of natural affections to compassion, of love of company, a sense of gratitude, a determination to honour and love the authors of any good offices toward any part of mankind, as well as of those toward our selves; and of a natural delight men take in being esteemed and honoured by others for good actions: which yet all may be observed to prevail exceedingly in humane life. ⁴⁸

Pufendorf and Mandeville, among others, “stressed the weakness of human nature, the frailty of reason, the delusive power of the imagination, the turbulence of the passions, and the difficulty of living virtuously in a corrupt world without the consolations of religion. Like Hutcheson, Smith (found) this outlook on human nature uncongenial and even silly.”⁴⁹ There were also the comparativism of Montesquieu and most influentially the "philosophical politics" of Hume, based on his assertions that reason is, and ought only to be the slave of the passions and nothing can oppose or retard the impulse of passion but a contrary impulse.⁵⁰

⁴⁸ N. Phillipson, *Adam Smith – An Enlightened Life* 46 (2010).

⁴⁹ *Id.* at 61.

⁵⁰ K. Haakonssen, *The Science of a Legislation – The Natural Jurisprudence of David Hume and Adam Smith* 2 (1981).

IV.

Smith's Moral and Economic Treatises

Certainly "the dominant image of Adam Smith is as an advocate of unhampered self-interest, an opponent of government, and an icon of individualism, rugged or not."⁵¹ Yet it has been said "Three myths in particular surround his legacy: that he was a theorist and advocate of 'self-regulating' markets; of capitalism as an engine of 'endless' economic expansion; and that . . . of the kind of division of labor that occurred in the pin factor described in the Wealth of Nations."⁵² These conflicting views evidence the paradoxes even contradictions in Smith's corpus.

Smith has said "He is certainly not a good citizen who does not wish to promote, by every means in his power, the welfare of the whole of society of his fellow-citizens" (TMS v.ii.2) and "All government is but an imperfect remedy for the deficiency of (wisdom and virtue)" (TMS iv.ii) making him something of an iconoclast of individualism. In other words "far from theorizing a self-regulating market that would work best with a minimalist state or with no state at all, the Wealth of Nations, no less than the Theory of Moral Sentiments, and the unpublished Lectures on Jurisprudence, presuppose the existence of a strong

⁵¹ Muller, *supra* n. 44 at 7.

⁵² Arrighi, *supra* n. 19 at 42.

state that would create and reproduce the conditions for the existence of the market; . . . use the market as an effective instrument of government' ... regulate its operation; and ... actively intervene to correct or counter its socially or politically undesirable outcomes."⁵³

It is also assumed by many that the stream of thought from Hobbes and Locke goes straight to Bentham carrying along all in between, including Smith.⁵⁴ Rather Smith sought "to reconcile classical and Christian demands for altruism and benevolence in human relations with recent arguments by Thomas Hobbes and Bernard Mandeville that both egoism and self- interest were the driving force in society, ... without resorting to the disputed authority of revelation."⁵⁵ He ultimately rejected both a "state of nature" and the "social contract" rather he began his theorizing with persons in already functioning societies, in a sense, trying to find their place.⁵⁶ As he saw it people have a natural preference for their own needs and interests. At the same time people are dependent on others. In fact there is a "propensity to truck, barter, and exchange 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. We address ourselves, not to their

⁵³ *Id.* at 42-43.

⁵⁴ **Winch** *supra* n. 11 at 13 et seq.

⁵⁵ **Muller**, *supra* n. 44 at 17.

⁵⁶ **Haakonssen**, *supra* n. 50 at 62, 129.

humanity but to their self-love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow-citizens." (WN I.ii.2) To carry Smith's thoughts on "police" or what we now consider economic policy quickly to his conclusion it has been said "self-interest leads to market exchange, which fosters the division of labor, which leads in turn to specialization, expertise, dexterity, and improved machinery, and ultimately creates greater wealth."⁵⁷

To truly understand Smith's political and legal thinking, as well as the actual complexity of his economic thought it is necessary to further contextualize them in his Theory of Moral Sentiments.

How is it a person knows right from wrong, good from bad? Propriety – impropriety, and merit – demerit – are dualities at the center of Smith's moral – ethical thinking.⁵⁸ He answers the questions about each by means of an imaginative projection, by means of sympathy.

"when I endeavor to examine my own conduct ... it is evident that, in all such cases, I divide myself, as it were, into two persons ... The first is the spectator (examiner and judge), whose sentiments with regard to my own conduct I endeavor to enter into ... by placing myself in his situation, and by considering how it would appear to *me*, when seen from that particular point of view. The second is the agent, the person whom I properly call myself and of whose conduct, under the

⁵⁷ Muller, *supra* n. 44 at 69.

⁵⁸ Haakonssen, *supra* n. 50 at 63-66.

character of the spectator, I was endeavoring to form some opinion."
(TMS III.i.6).

There is a mutuality of observation, of sympathy at work. This mutuality causes us to ponder further our judgment of ourselves as we realize the actual spectator is another person who is self-interested. "Instead of the propriety of social morality, of the actual spectators, we are thus led to try and judge ourselves in terms of an absolute propriety for each given situation" *i.e.*, from the perspective of "an impartial observer."⁵⁹ These judgments all occur in two different relations; one as to cause or intention, the other as to end or consequence. Smith links mean, cause, or intention to "propriety or impropriety" and that of end or consequence to "merit or demerit."⁶⁰

These judgments of propriety and impropriety, and merit and demerit are societal judgments resulting from personal "sympathy" filtered through an impartial spectator. They are judgments of one's own or another person's actions in a particular situation. They are judgments based on sentiments about situational congruence and proportionality. Smith elaborates on this social nature of humans. "Nature ... endowed him with an original desire to please, and an original aversion to offend ... But this desire ... would not alone have rendered

⁵⁹ *Id.* at 56.

⁶⁰ *Id.* at 63.

him fit for society ... Nature, accordingly, has endowed him (also) with a desire of being what ought to be approved of ... This self-approbation ... the love of it, is the love of virtue." (TMS III.ii).

To illustrate this Smith asks "what is it which prompts the generous, upon all occasions, and the few upon many, to sacrifice their own interests to the greater interests of others? ... It is not that feeble spark of benevolence which Nature has lighted up in the human heart It is not the love of our neighbor, it is not the love of mankind ... It is a stronger love ... the love of what is honorable and noble, of the grandeur, a dignity, and superiority of our own character." Despite this (what Smith calls "reason, principle, conscience") (TMS III.iii) "so partial are the views of mankind with regard to ... their own conduct (that) this self-deceit, this fatal weakness ... is the source of half the disorders of human life." (TMS III.iv) Happily, however, Nature has not "abandoned us entirely to the delusion of self-love. Our continual observations upon the conduct of others, insensibly lead us to form to ourselves certain general rules concerning what is fit and proper either to be done or to be avoided ... It is this that the general rules of morality are formed." (TMS III.iv). This "regard of general rules of conduct, is what is properly called a sense of duty ... the only principle by which the bulk of mankind are capable of directing their actions." (TMS III.v).

Smith views religion as re-enforcing this natural sense of duty. (TMS III.v). He also sees "utility" (in the sense of the "fitness" of the means to its purpose) as contributing to approbation of action. (TMS IV.i) On the other hand, he views custom and fashion as "the chief causes of the many irregular and discordant opinions which prevail in different ages and nations." (TMS V.i) His criticism, however, is less of the general effect of custom than of particular usages. He specifies for instance customs that hurt children such as abandoning infants to starve to death. In these regards he calls out both Aristotle and Plato.

To end this all too brief outline of Smith's "moral theory" it needs to be added that Smith's ideal person manifests "self-command," and "acts according to the rules of perfect prudence, of strict justice, and of proper benevolence." (TMS VI.iii) Yet he is assertive in stating that "the care of the universal happiness of all rational and sensible beings, is the business of God and not of man. To man is allotted a much humbler department, but one much more suitable to the weakness of his powers, and to the narrowness of his comprehension; the care of his own happiness, of that of his family, his friends, his country" (TMS VI.ii)

It must be pointed out here that "the fascination of greatness ... is so powerful, that the rich and the great (successful) are too often preferred to the wise and the virtuous Nature has wisely judged that the distinction of ranks, the

peace and order of society, would rest more securely upon the plain and palpable difference of birth and fortune . . ." (TMS VI.ii.I). Even Smith's "impartial observer" can fall under the spell of "success." "Success covers from his eyes not only the great imprudence, but frequently the great injustice of their enterprises; and far from blaming this defective part of his character, he often views it with the most enthusiastic admiration." (TMS VI.iii). More than a little surprisingly Smith continues "the pleasures of vanity and superiority are seldom consistent with perfect tranquility, the principle and foundation of all real and satisfactory enjoyment." (TMS III.iii) He cautions that misfortune follows from not knowing when it is proper "to sit still and to be contented." He quotes the inscription on a tombstone: "I was well, I wished to be better; here I am." Thus the way of "avarice and ambition." (TMS III.iii).

V.

Smith's Legal Treatise

Let me begin this section specifically on the Lectures on Jurisprudence, with the language Smith ends his Theory of Moral Sentiments.

It might have been expected that the reasonings of lawyers, upon the different countries, should have given occasion to an inquiry into what were the natural rules of justice independent of all positive institution. It might have been expected that these reasonings should have led them to aim at establishing a system of

what might properly be called natural jurisprudence, or a theory of the general principles which ought to run through and be the foundation of the laws of all nations. But though the reasonings of lawyers did produce something of this kind, and though no man has treated systematically of the laws of any particular country, without intermixing in his work many observations of this sort; it was very late in the world before any such general system was thought of, or before the philosophy of law was treated by itself, and without regard to the particular institutions of any one nation. In none of the ancient moralists, do we find any attempt towards a particular enumeration of the rules of justice. Cicero in his Offices, and Aristotle in his Ethics, treat of justice in the same general manner in which they treat of all the other virtues. In the laws of Cicero and Plato, where we might naturally have expected some attempts towards an enumeration of those rules of natural equity, which ought to be enforced by the positive laws of every country, there is however nothing of this kind. Their laws are laws of police, not of justice. Grotius seems to have been the first who attempted to give the world anything like a system of those Principles which ought to run through, and be the foundation of the laws of all nations; and his treatise of the laws of war and peace, with all its imperfections, is perhaps at this day the most complete work that has yet been given upon this subject. I shall in another discourse endeavor to give an account of the general principles of law and government, and of the different revolutions they have undergone in the difference ages and periods of society, not only in what concerns justice, but in what concerns police, revenue, and arms, and whatever else is the object of law. I shall not, therefore, at present enter into any further detail concerning the history of jurisprudence. (emphasis added) (TMS VIII.iv).

There are two sets of student notes now referred to as Smith's Lectures on Jurisprudence. One set was first discovered in 1895 and covers lectures from 1763-64. The other was first discovered in 1958 and covers lectures from 1762-

63. The earlier lectures are referred to as LJ (A), the later LJ (B). Both are available in a single volume from Liberty Fund.

"Jurisprudence" is the first word of each set of notes, of both LJ (A) and LJ (B), "Jurisprudence is the theory of the rules by which civil governments ought to be directed "LJ (A); "(it) is that science which inquires into the general principles which ought to be the foundation of the laws of all nations" LJ (B).⁶¹

The first thing to notice is that jurisprudence, be it either theory or science, is normative, is about what government and law "ought" to be. This is most unlike either TMS or WN both of which are primarily positive, about what "is." And as will be shown later Smith's interest in "justice" in his Lectures is limited to commutative justice and the security of property. He explicitly dismisses distributive justice as a matter for private beneficence.

Natural jurisprudence in the Scottish Enlightenment has been described as

"first of all a theory of justice. Understood in this way, there are at least a couple of characteristics which give Scottish natural jurisprudence a specific difference from other major schools of thought and lend it a certain coherence for a century or more. One of them is that justice was not seen as a particular state of affairs or condition of the world in general. Scottish justice is not directly a matter of the distribution of goods or relations between classes of people. Nor is justice a formal quality of law in the abstract, a criterion for whether a rule in some sense really is 'valid law'. To put it more directly, eighteenth-century Scottish natural jurisprudence is

⁶¹ LJ(A) p. 1; (B) p. 1.

neither Platonic, Aristotelian, Thomistic, Kantian nor utilitarian. In several of its expressions, it does have features in common with the empirical and naturalistic sides of Aristotelianism and utilitarianism, but neither suffices to characterize it. The common feature of the various Scottish theories of natural jurisprudence is that justice is to be treated as a characteristic of the individual person. Of course, a society or a world consisting of people with this feature is just, but that quality derives from the individuals making up the collective, and in the same way the justice of just law is a matter of the character of the individuals who adhere to such law."⁶²

Thus Smith's jurisprudence and understanding of justice is not typical of the "natural jurisprudence" of the Enlightenment. Smith's justice by contrast was relational and materialistic.

LJ (A) lists "four things which will be the design of every government" and LJ (B) lists the "four great objects of law."⁶³ In both instances they are the same, in the same sequence: justice, police, revenue, and arms. In turn each is defined or described. **Justice** "to prevent the members of a society from encroaching on one another's property" LJ (A); its object "is the security from injury." LJ (B).⁶⁴ **Police** "promoting the opulence of the state ... whatever regulations are made with respect to the trade, *commerce*, agriculture, manufacturers of the country LJ (A); its objects "are the cheapness of commodities, public security and cleanliness ..."

⁶² K. Haakonssen, *Natural Jurisprudence and the Theory of Justice* in **Cambridge Companion to the Scottish Enlightenment** 1 (Broadie ed. 2006).

⁶³ LJ(A) ¶ 1; (B) ¶1.

⁶⁴ LJ(A) ¶ 1; (B) ¶6.

LJ (B).⁶⁵ **Revenue** "the different methods which have been taken to raise the sum necessary for the expense of the state in different countries, and how far they are adapted to do this with the least loss or hindrance to the industry of the people, which ought to be the chief thing in view." LJ (A); "the proper means of levying revenue, which must come from the people by *taxes*, duties, etc." LJ (B).⁶⁶ **Arms** "protecting the state from foreign injuries" LJ (A); under this head will be shown the different species of arms ... the constitution of standing army, militias, etc. (and) the laws of nations." LJ (B).⁶⁷

Smith postulated a system of rights and offenses modeled after that of the Corpus Juris. The two following pages diagram these systems.⁶⁸

⁶⁵ LJ(A) ¶ 1; (B) ¶ 5.

⁶⁶ LJ(A) ¶ 6; (B) ¶ 5.

⁶⁷ LJ(A) ¶ 7; (B) ¶ 6.

⁶⁸ **Haakonssen**, *supra* n. 50 at 105, 118.

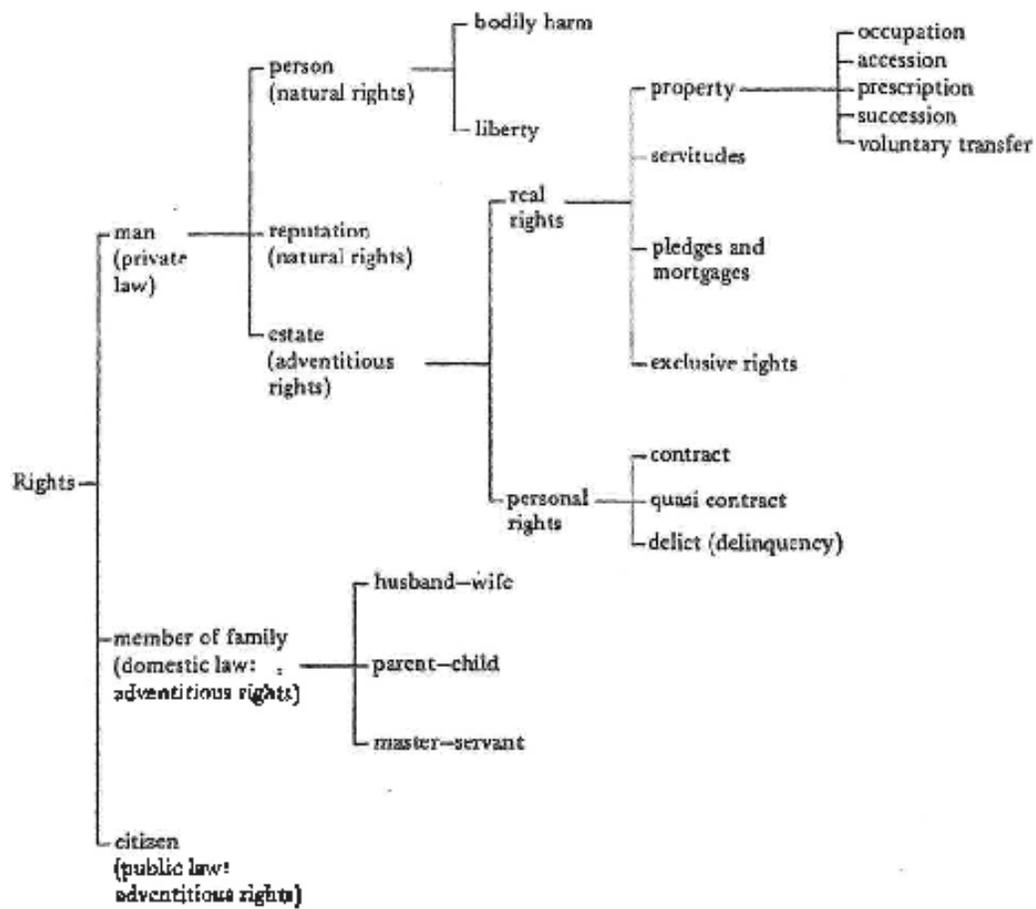


Fig. 1 Adam Smith's system of natural jurisprudence

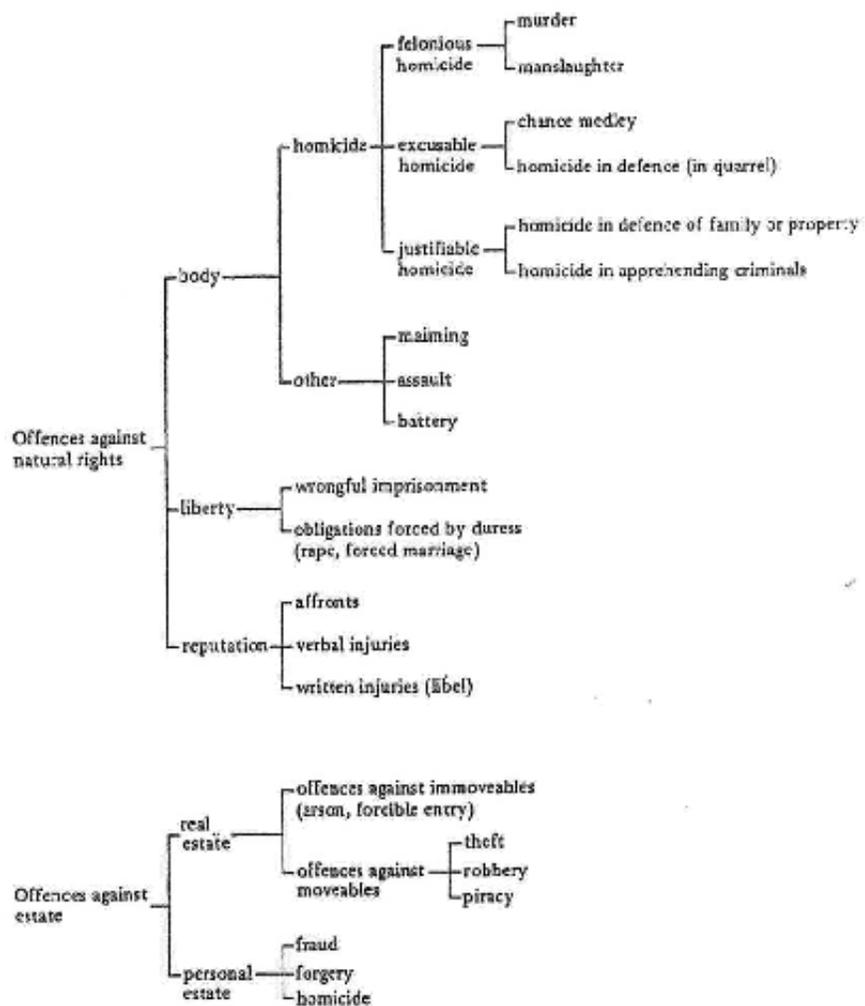


Fig. 2. Offences within private law

Smith discusses each and all of these rights in "lectures" of varying length. The private rights are discussed from the perspective of the "impartial spectator" of The Theory of Moral Sentiments. For instance, discussing occupation as one of the five ways to acquire property Smith says "Occupation seems to be well founded when the spectator can go along with my possession of the object, and approve me when I defend my possession by force."⁶⁹ (LJ (B) ¶ 150) Discussing punishment for delicts he asserts "Injury naturally excites the resentment of the spectator; and the punishment of the offender is reasonable as far as the indifferent spectator can go along with it."⁷⁰ (LJ (B) ¶ 182).

In his discussion of public rights, Smith distinguishes rights of the sovereign against its citizens, and those of citizens against their government.⁷¹ He finds these matters have almost always been settled by force and violence.⁷² He does however recognize that sovereign authority contains three powers, executive or federative, judicial and legislative which can be separated.⁷³ Smith distinguishes monarchy from republican government; recognizes that all government rests on opinion; and that "wide individual liberty is not even a possibility without strong

⁶⁹ LJ(B) ¶ 150.

⁷⁰ LJ(B) ¶ 182.

⁷¹ LJ(A) v. 54-91; 102-140; LJ(B) 78-79; 91-99.

⁷² LJ(A) 103-04.

⁷³ LJ(A) v. 104-111; LJ(B) 92-93.

government.” Smith’s view of sovereignty precludes “any form of constitutionalism – either for the Ancient Constitutions, consent, (the) right of resistance . . . or . . . a written constitution.”⁷⁴

As regards the role of the Courts and Judges, Smith emphasizes that Judges do and should have “little power in explaining, altering, or extending or correcting the meaning of the laws, and the great exactness with which they must be observed according to the literal meaning of the words.”⁷⁵ In TMS he explains that “the rules of justice may be compared to the rules of grammar; the rules of the other virtues, to the rules which critics lay down for the attainment of what is sublimed elegant in composition. The one, are precise, accurate, and indispensable. The other, are loose, vague, and indeterminate.” (TMS iii.vi).

To illustrate the limits of such literalism as an interpretive strategy consider a law as simple and clear as “No vehicles in parks.” Certainly no motor cars are permitted. But what about motorized wheelchairs or even baby buggies? Lawyers today recognize that all four words in the law need to be interpreted. Literalism, whatever that is, will be inadequate in many cases.⁷⁶

⁷⁴ Haakonsen, *supra* n. 50 at 131, 132.

⁷⁵ L (A) v. 16.

⁷⁶ FREDERICK SCHAUER, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008).

Without entering further into the continuing debates about legal interpretive methodology let me quote James Madison on why reasoned analysis is always required.

All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions,

must have experienced the full effect of them all.⁷⁷ (Madison 1961, 229).

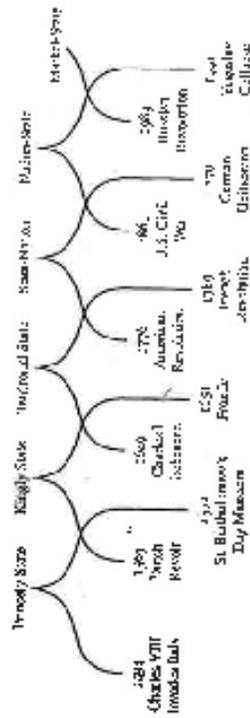
In discussing both public and private law Smith employs a "four stages" theory of history focusing primarily on the economy, law, and the constitution of society, but also including references to changes in weapons technology.⁷⁸ (LJ (A) I ¶ 26-35; iv ¶ 8-40 – LJ (B) ¶ 18-78; 149-151) Philip Bobbitt has represented the 500 years of history surrounding the Enlightenment from these same perspectives in the following charts from his Shield of Achilles updating and adding nuance to Smith's interpretations.⁷⁹

⁷⁷ J. Madison, *Federalist* #37.

⁷⁸ LJ (A) I ¶ 26-35, iv ¶ 8-40; LJ (B) ¶ 18-78, 149-151.

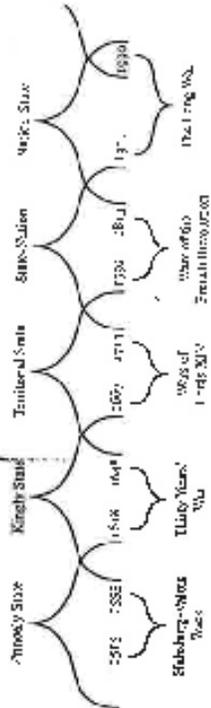
⁷⁹ P. Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* 346-47 (2002).

PLATE 12: THE CONSTITUTIONAL ORDERS



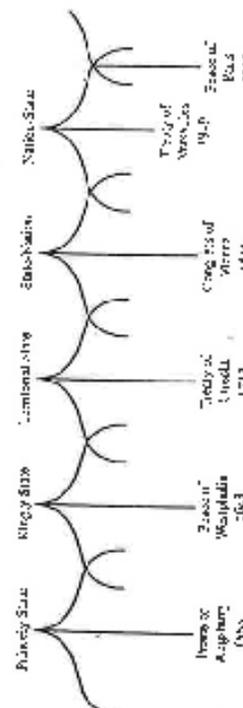
These have been the further constitutional orders of the same order of first emergence during the Renaissance.

PLATE 11: THE SPECIAL WARS



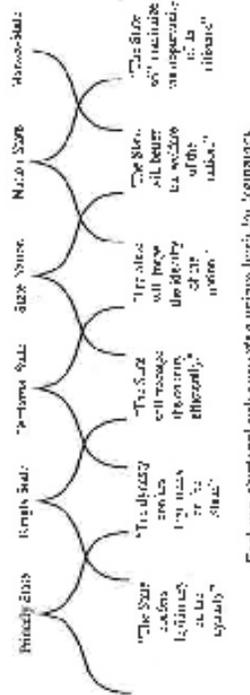
Each special war brought a particular constitutional order in progress.

PLATE 13: THE CONSTITUTIONAL ORDERS



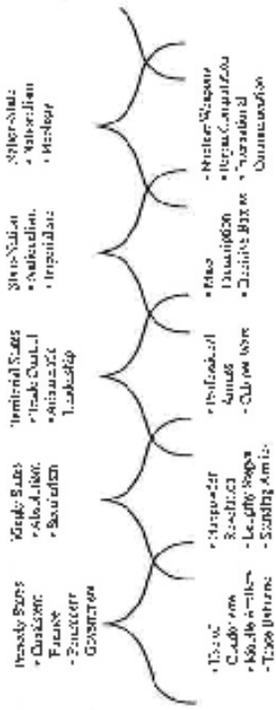
The present constitution has not escaped from reality in particular constitutional order for the country of France.

PLATE 14: BANKS FOR LEGITIMACY



Each constitutional order awards a unique legacy for legitimacy.

PLATE 15: HISTORIC, STRATEGIC, AND CONSTITUTIONAL INNOVATIONS



A constitutional order and strategic determination by best exploring the strategic and constitutional innovations of the past.

There are continuing debates about the source of the "four stages" theory; about priority of conceptualization; and about the quality of the history reported in his Lectures on Jurisprudence and the Wealth of Nations.⁸⁰ It seems to me that many miss the fundamental reason Smith uses and develops this theory. It has less to do with history as such and more to do with the relationship between governance and the economy. Smith's purpose is to better understand how norms, especially those concerning property, developed or might have developed according to his theory of human motivation (moral sentiments) in the four different political-economic circumstances then widely discussed: the age of Hunters; the age of Shepherds; the age of Agriculture; and the age of Commerce.⁸¹

Hunter society is by its nature small, poor, weak, flat in terms of governance. Wealth and noble birth are unknown, so authority comes from mastery of skills necessary for the survival of the group. In Schumpeter's terms, none of the most important elements of Smith's sociology are yet present (division of labor, private property in land, control over nature, economic

⁸⁰ A. Brewer Adam Smith's Stages of History, Discussion Paper No. 08/601 Department of Economics, University of Bristol

<http://www.efm.bris.ac.uk/economics/workingpapers/pdf/files/dpo86al.pdf>

⁸¹ Haakonssen, *supra* n. 50 at 154-55.

freedom, and legal security).⁸² These elements are also absent in Shepherd society. However, when individual ownership of animals becomes common, inequality results. The society is bigger and there is the beginning of divisions of labor and hierarchy. Also, there is the need for more formal governance than in the Hunter society. Smith describes the transition from Hunter to Shepherd society as "the greatest in the progression of society, for by it the notion of property is extended beyond possession . . ."⁸³ Haakonssen, adds "at the end of the process so many institutional factors have developed in mankind's situation that we can no longer explain the further social evolution by reference to the simple needs of survival."⁸⁴

Smith continues by describing Agricultural and Commercial society from the same perspective. With the arrival in Agricultural society, of the most important elements of Smith's sociology as identified by Haakonssen military, political, religious, judicial, and intellectual problems begin to require the "science of a legislator" to establish, and maintain the balance necessary for justice and ultimately societal survival.⁸⁵

⁸² Arrighi, *supra* n. 19 at 40.

⁸³ LJ(A) I 97.

⁸⁴ Haakonssen, *supra* n. 50 at 157.

⁸⁵ *Id.* at 85.

So what then are "the general principles which ought to be the foundation of the laws of all nations"?

VI.

Positive Law – Natural Justice

Dugald Stewart cited from a lost manuscript of Smith's the following:

Little else is requisite to carry a state to the highest degree of opulence from the lowest barbarism, but peace, easy taxes, and a tolerable administration of justice; all the rest being brought about by the natural course of things. All governments which thwart this natural course, which force things into another channel, or which endeavor to arrest the progress of society at a particular point, are unnatural, and to support themselves are obliged to be oppressive and tyrannical.⁸⁶

As was pointed out at the beginning of the prior section Smith specifies the role of justice as the prevention of members of a society encroaching on one another's property, its object being the security from injury. And in contrast to Locke Smith sees such rights as adventitious or acquired, not natural.⁸⁷ "Injury" as explained by Haakossen, is in turn "understood in pure spectator terms: what the relevant, actual spectators – such as judges and juries – in a given society recognize as injury."⁸⁸ This understanding of injury ought to have foregrounded

⁸⁶ Stewart, *Account of the Life and Writings of Adam Smith LL.D. in Transactions of the Royal Society of Edinburgh*, printed in **Collected Works of Dugald Stewart** vol. 10, p. 1-98 at 38-39.

⁸⁷ Winch, *supra* n. 11 at 58-59.

⁸⁸ Haakonssen, *supra* n. 50 at 100.

interest in and concern about externalities. Yet throughout the Lectures Smith seems to consider property and its use as enclosed within its boundaries. Locke by contrast recognized as is common today that the concept of property as exclusive in and of itself raises concerns about its effects on others. He famously limited legitimate property claims to those that left enough and as good for others.⁸⁹

Smith refers to a 'tolerable' administration of the state. He criticized projectors and speculative statesmen as men who ardently desire the betterment and thorough reform of human affairs as arrogant in their enthusiasm. He also criticized politicians for following opinion, and what he called men of system for ignoring opinion. The Legislator for his part is able to moderate and accommodate opinion. His recognition of the weaknesses of human understanding and limited knowledge makes him prudent in judgment. (TMS vi.ii.2) This recognition points toward Hayek.⁹⁰

Despite prudence, and because of the claims of justice as Smith understood them, he acknowledged that "laws and government may be considered in this, and indeed, in every case, as a combination of the rich to oppress the poor."⁹¹ In

⁸⁹ J. Locke, **Two Treatises of Government** 288 (P. Laslett ed. 1988).

⁹⁰ F. Hayek, *The Use of Knowledge in Society*, 35 *Amer. Eco. Rev.* 519 (1945).

⁹¹ LJ (A) iv. 23; LJ (B) 20.

effect the government tells the poor "they must either continue poor, or acquire wealth in the same manner as (the rich) have done."⁹²

And just how did the rich acquire wealth? The implication of the quote is that it was done in a manner consistent with justice i.e. without encroaching on other's property, without injury to others. Yet "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, over some contrivance to raise prices." (WN I.x).

The result often is that

“the joint-stock companies, which are established for the public spirited purpose of promoting some particular manufacture, over and above managing their own affairs ill, to the diminution of the general stock of the society, can in other respects scarce ever fail to do more harm than good. Notwithstanding the most upright intentions, the unavoidable particularity of their directors to particular branches of manufacture . . . is a real discouragement to the rest, and necessarily breaks, more or less that natural proportion which would otherwise establish itself between judicious industry and profit . . .” (WN v.i.iii)

Thus, “in no country do the decisions of positive law coincide exactly, in every case, with the rules which the natural sense of justice could dictate.

Systems of positive law, therefore, though they deserve the greatest authority, as the records of the sentiments of mankind in different ages and nations, yet can never be regarded as accurate systems of the rules of natural justice.” (TMS VII.iv)

⁹² LJ (A) iv. 23.

Dare I say that Smith's views on law, justice, and government generally manifest a "despair of the efficacy of virtue"?⁹³

VII.

Equality, Justice and Power

Let me move towards my conclusions with what has been referred to as "the prime concern of (Smith's) economic policy."⁹⁴ First recall President Obama's "you didn't build it" remark. Smith in discussing the production of a "woolen coat" says "without the assistance and co-operation of many thousands, the very meanest person in a civilized country could not be provided, even according to what we very falsely imagined, the easy and simple manner in which he is commonly accommodated." (WN I.i). He adds "no society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable ... It is but equity, besides, that they who feed, clothe and lodge the whole body of the people, should have such a share of the produce of their own labor as to be themselves tolerably well fed, clothed and lodged." (WN I.viii). It is this, the welfare of the servants, laborers, and workmen that is the chief economic concern of the legislator. And how is this to be done? What is the "science of a legislator"?

⁹³ J. Zamitto, *Kant, Heider and the Birth of Anthropology* 113 (2002).

⁹⁴ Phillipson, *supra*, n. 48 at 75.

Smith says “little else’s requisite to carry a state to ...opulence...but peace, easy taxes, and a tolerable administration of justice – all else if oppressive and tyrannical.”⁹⁵ He continues “the civil magistrate is entrusted with the power not only of preserving the public peace by restraining injustice, but of promoting the prosperity of the commonwealth by establishing good discipline, by discouraging ... vice and impropriety; he may prescribe rules therefore which ... command mutual good offices to a certain degree”. (TMS II.ii)

And just what is and how is that “certain degree” determined? By pursuing “natural liberty,” both as a means and an end:

As a mean: “According to the system of natural liberty, the sovereign has only three duties to attend to; three duties of great importance, indeed, but plain and intelligible to common understanding: first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions which it can never be for the interest of any individual, or small number in individuals, to erect and maintain; because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.”

As the end: ‘When laws were natural, men were natural, then liberty was natural too. Natural liberty meant the lack of non-natural that is artificial or political hierarchy between men. Under natural

⁹⁵ *Id.* at 105-106.

liberty there were not rulers and subjects. The story of how this natural liberty had been lost was also well known. It was none other than the story of the birth and rise of the civitas, the political community. The opposite of natural liberty was politics itself.”⁹⁶

In Smith’s “natural” world the operation of the invisible hand could be thought of as creative construction of the public interest or common good.

However, in the modern economy where most transactions are not face to face

and capital has become fugitive there is what Shumpeter called “creative

destruction.”⁹⁷ Things are no longer matters of mutual gain with no significant

negative externalities. Rather these are negatives and many matters are net

negatives. And these are often overlooked, especially by Smith. John Finnis says of

Smith, “Not only is he sublimely optimistic about the automaticity of the trickle-

down benefits to the poor. He is also entirely inattentive to the question of the

harmful side effects of the processes of production, distribution, and

consumption by the ‘vain and insatiable’ wealthy.”⁹⁸

Nevertheless Smith’s sees hierarchy and inequality as essential to achieving

societal opulence. Here’s how he describes a “civilized society”: “there is no

equal division, for there are a good many who work none at all. The division of

opulence is not according to the work. The opulence of the merchant is greater

⁹⁶ Hont, *supra* n. 15 at 388.

⁹⁷ T. McCraw, **Prophet of Innovation: Joseph Schumpeter and Creative Destruction** (2007).

⁹⁸ J. Finnis, *Allocating Risks and Suffering: Some Hidden Traps* in **Philosophy of Law** 337 (2013).

than that of all his clerks, though he works less; and they again have six times more than an equal number of artisans, who are more employed. The artisan who works at his ease within doors has far more than the poor laborer who trudges up and down without intermission. Thus he who, as it were, bears the burden of society has the fewest advantages.”⁹⁹ Smith’s economic hierarchy & its disparities can be thought of as an escalator gradually rising; not an express elevator skipping floors from bottom to top as does the gradient in the American economy these days.

Despite this inequality, what most would call injustice, laborers in the then current society had a better standard of living than “many an African King, the absolute master of the lives and liberties of ten thousand naked savages.” (WN) How is this possible? Smith answered: it is the division of labor that works this economic miracle. And how does it do this? The increase in dexterity, the savings of time lost in moving from one phase of a project to another, and the invention of machinery.¹⁰⁰

Frankly the assertion while not as extreme as it was or seemed in Smith’s time is still a powerful (if provincial) argument for the British economic system that made it so. What is too often over-looked in praising Smithism is that the

⁹⁹ LJ (B) 213.

¹⁰⁰ LJ (B) 216.

economy that made it so then was not the laissez-faire economy of the 19th century. It was rather the mixed economy of the 17th and early 18th centuries. Further there are at least two problems with Smith's depending on growth led by productivity increases.¹⁰¹ One, the end point of fewer and fewer people being able to make more and more is robots; no human jobs. And two, and this Smith recognizes, "the man whose whole life is spent performing a few simple operations, of which the effects are always the same has no occasion to exert his understanding or inventions ... He naturally loses the habit of execution and generally becomes as stupid and ignorant as it's possible for a human creature to become". (WN v.1.)

Stupid and ignorant workers and an elite, many of whom work not at all, doesn't seem a formula for an opulent society; to say nothing about a just society. And the remedy for the ignorance of the people is education. But education so "they feel themselves... more disposed to respect their superiors." (WN v.1) This subservience hardly increases justice.

As has been noted Smith's limits his Lectures to a discussion of commutative justice and defines justice as essentially protection of property interests. He in effect reduces justice to a principle of positive law. Further,

¹⁰¹ **Hont**, *supra* n. 15 at 414.

justice is left without any communal dimensions, without any (direct) concern with a common good. This narrow understanding of justice accepts the then current distribution of property as appropriate. Yet there are fundamental justice questions, involved in evaluating the distribution question both as an initial position, as well as an outcome. For instance, Sen illustrates this with the kind of hypothetical Smith famously uses, that is one that is simple and person centered.

“Which of three children – Anne, Bob and Carla – should get a flute about which they are quarrelling. Anne claims the flute on the ground that she is the only one of the three who knows how to play it (the others do not deny this), and that it would be quite unjust to deny the flute to the only one who can actually play it. If that is all you knew, the case for giving the flute to the first child would be strong.

In an alternative scenario, it is Bob who speaks up, and defends his case for having the flute by pointing out that he is the only one among the three who is so poor that he has no toys of his own. The flute would give him something to play with (the other two concede that they are richer and well supplied with engaging amenities). If you have heard only Bob and none of the others, the case for giving it to him would be strong.

In another alternative scenario, it is Carla who speaks up and points out that she has been working diligently for many months to make the flute her own labour (the others confirm this), and just when she had finished her work, ‘just then’, she complains, ‘these expropriators came along to try to grab the flute away from me’. If Carla’s statement is all you had heard, you might be inclined to give the flute to her in recognition of her understandable claim to something she has made herself.

Having heard all three and their different lines of reasoning, there is a difficult decision that you have to make. Theorists of different persuasions, such as utilitarians, or economic egalitarians,

or no-nonsense libertarians, may each take the view that there is a straight forward just resolution staring at us here, and there is no difficulty in spotting it. But almost certainly they would respectively see totally different resolutions as being obviously right.”¹⁰²

Smith does not even consider these kinds of questions as proper subjects for jurisprudence. Distributive justice is outside its scope; a matter rather for the benevolence of individuals.

Finally, Smith’s reliance on moral sentiment, the division of labor, and an invisible hand to attain the common good also mutes the presence of power in society. Yet power is present in fact and manifests itself in various forms through time and place as Smith himself at least implicitly recognizes. – The following chart is from Elliott’s important article Adam Smith’s Conceptualization of Power, Markets, and Politics identifying points of power throughout Smith’s political economic system.¹⁰³

¹⁰² Sen, *supra* n. 2 at 13.

¹⁰³ J. Elliott, **Adam Smith’s Conceptualization of Power, Markets and Politics**, 58 REV. OF SOCIO. ECO. 429, 452.

Table 1: Adam Smith’s typology of power and politico economic systems

| | <i>Wealth power</i> | <i>Monopoly power</i> | <i>Employer power</i> | <i>Political power</i> |
|--|---|---|---|--|
| Most Libertarian/ Egalitarian | Early/Rude State Of Society | Perfect Liberty/ Free Competition | Dominant Proprietary Sector | Anarchy/ Equality |
| Substantial Liberty/Equality | Modern Commercial Society, w/dominant Independent Proprietors | Robust Liberty, Substantial Equality (Some) Exceptions to Free competition | Large Proprietary, Strong labor, weak Capitalist sectors | Liberal & (moderately) Democratic; Countervailing Powers |
| “Perfect Liberty,” Significant Inequalities | Modern Commercial Society w/dominant Capitalist sector | No or few departures From free competition | Small proprietary, Weak labor, powerful Capitalist sectors | Mixed government, Countervailing Powers |
| More Authoritarian Inegalitarian | Modern Commercial Society, w/large Inequalities in land and capital | Moderate Liberty, Substantial inequality; Major exceptions To free competition; Monoploid | Small proprietary, weak labor, large Kist sectors | Liberal or Absolute Monarchy |
| Most Authoritarian & Inegalitarian | Large inequalities of Land, capital; Pre- Modern Society | Perfect Monopoly | Slave/Feudal | Authoritarian, but local |

It is clear from the chart that Smith recognized that the invisible hand, despite its beneficent operation was ultimately no match for the corrupting effects of private economic power or public political power even in his own day. This seems more obvious in today's globalized political-economy.

When all is said and done, in Smith's words, the rich will be "led by an invisible hand to make nearly the same distribution of the necessities of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without in ending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species." (TMS iv. 1. 10) This utopian vision may be "just" in Smith's terms, but it is not a substitute for a moral economy.

Back to where we began. My time with Smith's two books and the Lectures persuade me that "to see Smith as an advocate of pure capitalism, with complete reliance on the market mechanism guided by pure profit motive, is altogether misconceived."¹⁰⁴ (Sen 2009, xiii). He certainly acknowledged, despite his cramped view of justice in the law, a moral element in the workings of a properly functioning political-economy. As Amartya Sen argues in his introduction to The Theory of Moral Sentiments Smith's principles reflect a connectedness of ethics

¹⁰⁴ Sen, *supra* n. 2 at xiii.

and economics, and also of those of markets to society's other institutions, especially for our purposes, the law. Thus, while I conclude that familiarity with Smith puts free market and positivist legal theorist into fruitful conversation with communitarianism and natural law theorists, it is more in the order of technique or craft rather than the moral order.¹⁰⁵

¹⁰⁵ **Finnis**, *supra* n. 100 at 338.