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# CORNELL LAW REVIEW

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## ADAM SMITH'S JURISPRUDENCE—BETWEEN MORALITY AND ECONOMICS\*

*Peter Stein*†

Adam Smith is best known as the father of political economy, the author of *The Wealth of Nations*,<sup>1</sup> published in 1776,<sup>2</sup> and the apostle of free enterprise. He died in 1790, although there are some who seem to believe that he is alive and well and living in retirement at the University of Chicago. By profession, however, he was a philosopher. He held the Chair of Moral Philosophy at the University of Glasgow from 1752 to 1763 and regarded as his most important work<sup>3</sup> *The Theory of Moral Sentiments*,<sup>4</sup> which first appeared in 1759.

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<sup>1</sup> A. SMITH, *THE WEALTH OF NATIONS* (R. Campbell, A. Skinner & W. Todd eds. 1976). All quotations from Adam Smith's writings are from the "Glasgow Edition" of his works, which include A. SMITH, *THE THEORY OF MORAL SENTIMENTS* (D. Raphael & A. Macfie eds. 1976) [hereinafter cited as *THEORY OF MORAL SENTIMENTS*]; A. SMITH, *THE WEALTH OF NATIONS* (R. Campbell, A. Skinner & W. Todd eds. 1976); and A. SMITH, *LECTURES ON JURISPRUDENCE* (R. Meek, D. Raphael & P. Stein eds. 1978) [hereinafter cited as *LECTURES ON JURISPRUDENCE*].

<sup>2</sup> The literature stimulated by the bicentenary of *THE WEALTH OF NATIONS* is enormous. See Recktenwold, *An Adam Smith Renaissance, anno 1976? The Bicentenary Output—A Reappraisal of His Scholarship*, 16 J. ECON. LIT. 56 (1978). For especially interesting contributions, see D. WINCH, *ADAM SMITH'S POLITICS: AN ESSAY IN HISTORIOGRAPHIC REVISION* (1978); *ESSAYS ON ADAM SMITH* (A. Skinner & T. Wilson eds. 1975).

<sup>3</sup> I MEMOIRS OF SIR SAMUEL ROMILLY 403 (1840) (quoted in J. RAE, *LIFE OF ADAM SMITH* 436 (1895)).

<sup>4</sup> *THEORY OF MORAL SENTIMENTS*, *supra* note 1.

At one time there was thought to be an "Adam Smith problem" in the sense of a basic incompatibility between the ethics of *The Theory of Moral Sentiments*, which was concerned with sympathy for one's fellows, and *The Wealth of Nations*, which stressed self-interest and rejected benevolence as a force in economic relations. More recently scholars have recognized that Smith's various studies were parts of a single whole, the study of man in society. Smith organized this study around the moral virtues of prudence, justice, and benevolence.<sup>5</sup> *The Wealth of Nations* dealt with prudence; *The Theory of Moral Sentiments* treated of benevolence. At Smith's death, the study remained incomplete, for he never published, as he intended to do, a third book exploring the virtue of justice. Today, I will attempt to sketch the main themes in Smith's view of justice, drawing on two reports, based on students' notes, of lectures on jurisprudence which he gave as part of the Moral Philosophy course at the University of Glasgow.<sup>6</sup>

## 1

## SMITH'S PHILOSOPHICAL FRAMEWORK

Smith recognized that a scientific understanding of man's relations with his fellows could only be developed by the experimental method used by Newton in the physical sciences. Such an understanding must be based on observation of how men actually behave in different situations. He also accepted that, although the conditions of society vary considerably in different places and different ages, human nature remains constant; man tends everywhere and at all times to have the same aspirations and feelings. But these aspirations and feelings are complex. In general, man wants to better his condition, to enjoy life, to seek pleasure and avoid pain; *i.e.*, his motives are self-regarding. However, in certain situations he has strong feelings of benevolence towards others and on occasion he will act against his own interests because he thinks it right to do so.

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<sup>5</sup> See notes 10-17 and accompanying text *infra*.

<sup>6</sup> The first of the two reports to be discovered was originally published as LECTURES ON JUSTICE, POLICE, REVENUE, AND ARMS, DELIVERED IN THE UNIVERSITY OF GLASGOW BY ADAM SMITH (E. Cannan ed. 1896). Both this report and a longer version, which was discovered in 1958, appear in LECTURES ON JURISPRUDENCE, *supra* note 1. For a more complete discussion, see *id.*, *Introduction*, at 5-13. The present study is based on the fuller version, which is derived from his course in the academic year 1762-63.

### A. *The Impartial Spectator*

In *The Theory of Moral Sentiments*, Smith discussed the basis for man's approval of certain acts as right and his disapproval of others as wrong. He rejected the idea that every man is endowed by nature with an innate moral sense. What then do we mean when we say that our conscience or "the man within the breast" tells us that this is what we ought to do or ought not to do? Smith sought the answer in the notion of sympathy, that there is in all men a desire to identify themselves with the joys and sorrows of others.

Hutcheson and Hume had referred to the approval and disapproval of spectators or observers in their analyses of moral judgment. Smith developed the notion of the impartial spectator to explain the judgment of conscience made by the agent about his own actions.<sup>7</sup> The approval and disapproval of oneself, which we call conscience, is an indirect effect of the judgments made by spectators. We all judge others as spectators and we all find others judging us; we then come to judge our own conduct by imagining whether an impartial spectator would approve or disapprove of it.

In seeking the good will of our fellows in society, we examine our feelings and actions and consider how they must appear to them. This is not easy. As Smith's account inspired his contemporary, Robert Burns, to put it:

Oh, wad some Power the giftie gie us  
To see oursels as ithers see us!  
It wad frae mony a blunder free us  
An' foolish notion.<sup>8</sup>

Smith recognized that the actual spectator will usually not feel as strongly as the agent himself. The spectator's emotions will be apt to fall short of the violence of what is felt by the sufferer. Sympathy can never be exactly the same as the original feeling, so when he is judging himself, the sufferer must lower "his passion to that pitch, in which the spectators are capable of going along with him."<sup>9</sup>

<sup>7</sup> E. WEST, ADAM SMITH, THE MAN AND HIS WORKS 95-127 (1976).

<sup>8</sup> *To A Louse*, in 1 *The Complete Works of Robert Burns* 257, 261 (J. Hunter ed. 1886). Cf. A. MACFIE, THE INDIVIDUAL IN SOCIETY 66 (1967).

<sup>9</sup> THEORY OF MORAL SENTIMENTS, *supra* note 1, at 22.

### B. *The Three Virtues*

The judgments of the impartial spectator thus provide the basis for a set of rules of conduct. Smith classified these rules under the three aforementioned virtues: prudence, justice, and beneficence (or benevolence).<sup>10</sup> "The man who acts according to the rules of perfect prudence, of strict justice, and of proper benevolence, may be said to be perfectly virtuous."<sup>11</sup>

Prudence is dictated by concern for our own interests, while justice and benevolence are dictated by concern for the interests of others. Prudence promotes the calculating behaviour by which a man preserves and increases his fortune. It is therefore the basis of saving and capital formation. By prudence a man puts himself in a position from which he can then help others. Smith observed that before we can feel much for others we must in some measure be at ease ourselves. But no one can be compelled to be prudent. It is up to the man himself; and prudence is not a very attractive virtue to others. "It commands a certain cold esteem," Smith says wistfully, "but seems not entitled to any very ardent love or admiration."<sup>12</sup>

Smith understood justice, in a narrow sense, as the observance of the legal rules which safeguard the citizen's life, liberty and property. Justice sets limits to the individual's pursuit of self-interest. It is on most occasions merely "a negative virtue, and only hinders us from hurting our neighbour. . . . We may often fulfil all the rules of justice by sitting still and doing nothing."<sup>13</sup> Unlike prudence, its exercise is not left to the individual's discretion; he is compelled by the law to keep within the limits. In short, justice is the necessary foundation of civil society.

Beneficence, on the other hand, improves society but is not a necessary condition; it is the "ornament which embellishes, not the foundation which supports the building."<sup>14</sup> Beneficence is the highest virtue: "[T]o feel much for others and little for ourselves, . . . to restrain our selfish, and indulge our benevolent affections, constitutes the perfection of human nature. . . ."<sup>15</sup> Although it is

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<sup>10</sup> See Campbell, *Adam Smith's Theory of Justice, Prudence and Beneficence*, AM. ECON. REV., May, 1967, at 571.

<sup>11</sup> THEORY OF MORAL SENTIMENTS, *supra* note 1, at 237.

<sup>12</sup> *Id.* at 216.

<sup>13</sup> *Id.* at 82.

<sup>14</sup> *Id.* at 86.

<sup>15</sup> *Id.* at 25.

the most important social virtue, beneficence is merely an aspiration of man; it "is always free, it cannot be extorted by force, the mere want of it exposes to no punishment."<sup>16</sup> The impartial spectator inside us may reprove us for lack of beneficence, but he can do nothing more than reprove, "because the mere want of beneficence tends to do no real positive evil."<sup>17</sup>

## II

### JUSTICE

Smith certainly intended to devote a third book to the virtue of justice. This idea, however, involved special problems. Until the middle of the eighteenth century, jurisprudence was dominated by the theorists of natural rights, exemplified by the Dutchman Hugo Grotius and the German Samuel Pufendorf.<sup>18</sup> They sought to establish the existence of universal principles of natural law binding on all men, without regard to time and place. These principles were axiomatic; they had the same certainty and universality as mathematical propositions. Of course, Grotius and Pufendorf recognized that much of a society's law was not natural but positive and varied from one society to another. Positive law should approximate to natural law as far as possible but since it depends on the will of the ruler, it was regarded as incapable of systematic treatment, and largely ignored by these theorists.

The publication of Montesquieu's *Spirit of the Laws* in 1748 changed the direction of legal thought.<sup>19</sup> Montesquieu showed for the first time that laws are connected with the circumstances of society. We take it so much for granted today that an adequate exposition of legal rules must take account of their social context that we have difficulty in grasping the tremendous originality of Montesquieu's work. He acknowledged that laws must be based on "the nature of things," but argued that the nature of things varies from one society to another and that among the factors affecting a society's laws are climate, manners, tradition of government and so on.

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<sup>16</sup> *Id.* at 78.

<sup>17</sup> *Id.*

<sup>18</sup> See generally H. GROTIUS, *DE JURE BELLI AC PACIS* (F. Kelsey trans. 1925) (1st ed. Paris 1625); S. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (C. Oldfather & W. Oldfather trans. 1934) (1st ed. Lund 1672).

<sup>19</sup> For a more complete discussion of these developments, see generally P. STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA*, chs. 1-2 (1979).

Montesquieu largely contented himself with showing how factors such as these can account for differences in the laws of different societies; he did not concern himself much with the way in which a society's circumstances change or progress. Within a decade of the publication of his great work, however, the question of the process of legal change through the progress of society was a matter of considerable debate, both in France and in Scotland. So when, at the end of *The Theory of Moral Sentiments*, Smith announced a further study devoted to justice, he described it as an account of "the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society."<sup>20</sup>

#### A. *Man's Rights*

Since the virtue of justice, for Smith, was the strict observance of the legal rules protecting the citizen and his property, the theory of justice formed the major part of jurisprudence, that is, "the theory of the rules by which civil governments ought to be directed."<sup>21</sup> More specifically, he defined justice in terms of property rights:

The first and chief design of every system of government is to maintain justice; to prevent the members of a society from in-  
croaching on one another's property . . . .<sup>22</sup>

....

. . . Justice is violated whenever one is deprived of what he had a right to and could justly demand from others, or rather, when we do him any injury or hurt without a cause.<sup>23</sup>

In treating of rights, Smith took as his model the scheme adopted by Francis Hutcheson, his own teacher and a predecessor in the Glasgow Chair. At first sight his treatment seems squarely in the tradition of Grotius and Pufendorf. Rights are divided into three classes: those which a man enjoys as an individual, those he has as a member of a family and those which he has as a citizen of a state.<sup>24</sup> The injury which he suffers, and consequently the right

<sup>20</sup> THEORY OF MORAL SENTIMENTS, *supra* note 1, at 342.

<sup>21</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 5. Other parts of jurisprudence were "police" (regulation of commerce), "revenue" and "arms" (including public international law).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 7.

<sup>24</sup> Man's rights as an individual and as a family member are discussed below. *See* notes

which he enjoys, is in each case peculiar to the role in which he is considered.<sup>25</sup> Throughout his discussion Smith confines himself to legal rights, enforceable by legal action.<sup>26</sup>

### 1. *Rights as an Individual*

The rights which a man enjoys as a man are natural in the sense that they arise independently of any human action. They are reducible to three: his rights to his person, to his reputation, and to his estate. Estate includes both rights to property and personal rights arising from contract or delinquency. So far, Smith adhered to the standard natural rights scheme. It was when he proceeded to consider the various ways in which property arises that he began to diverge from his predecessors. They had treated natural rights as applicable in any society. Smith observed that the rules concerning the acquisition of property were far from universally applicable. They varied considerably according to the state that the society in question had reached. He then introduced the four stages through which societies pass as they develop: hunters, shepherds, farmers, and manufacturers and traders.

The theory of the stages of society appeared almost simultaneously in Scotland and in France, and grew out of the debates which followed the publication of Montesquieu's *Spirit of the Laws*.<sup>27</sup> Montesquieu's followers developed his remarks in two ways. First, they concentrated on one of the many factors which he had identified as affecting the character of a society's laws, namely, the mode of subsistence of the inhabitants. Secondly, they seized on his reference to three such modes, farmers, huntsmen and shepherds, and converted it into a scheme of development applicable to societies generally—first a three- and then a four-stage theory.

In Scotland, the theory appeared in a group of thinkers who gathered around the genial figure of Henry Home, Lord

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27-55 and accompanying text *infra*. It is not possible in a short article to deal adequately with Smith's analysis of man's rights as a citizen.

<sup>25</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 7.

<sup>26</sup> Smith departed from tradition in distinguishing sharply between legal or "perfect" rights, on the one hand, and moral or "imperfect" rights, on the other. He was critical of the natural rights theorists for blurring this distinction and made it clear that he was only concerned with perfect rights, that is, legal rights relating to what we have a title to demand and to compel another to perform within the limits of the legal process. *Id.* at 9. Moral rights "correspond to those duties which ought to be performed to us by others but which we have no title to compel them to perform . . ." *Id.* (footnote omitted).

<sup>27</sup> See R. MEEK, SOCIAL SCIENCE AND THE IGNOBLE SAVAGE 102-107 (1976).



Kames.<sup>28</sup> This group included David Hume (the philosopher), Adam Smith, John Millar, and John Dalrymple. It was Dalrymple's *An Essay Towards a General Theory of Feudal Property in Great Britain*, published in 1757, which first mentioned the four-stage theory in print. There is good reason to think, however, that Adam Smith first suggested it; certainly, the *Lectures on Jurisprudence* show that he first applied it consistently in his treatment of rights.

Smith was more interested than Montesquieu in primitive societies. He had a more critical understanding of the evidence provided by the literature of classical antiquity.<sup>29</sup> In addition he had studied the writings on the customs of the American Indians by two French Jesuits, Lafitau<sup>30</sup> and Charlevoix.<sup>31</sup> Lafitau's 1724 publication was notable for having drawn parallels between the style of life of the Iroquois and that of the ancient Greeks, and so "revealed to the world the simple truth that even the Greeks had once been savages."<sup>32</sup> Smith was probably also influenced by Machiavelli, whom he admired as an historian,<sup>33</sup> and his followers. They imposed a kind of cyclical pattern of rise and decay on the major periods of European history.

Smith never considered man in an isolated state. In the earliest type of society, that of hunters, a nation consists of a number of independent families; there is very little in the way of government or law, there is almost no private property, and theft is unimportant. Matters which concern only the members of a family are dealt with within the family.

Disputes betwixt others can in this state but rarely occur, but if they do, and are of such a nature as would be apt to disturb the community, the whole community then interferes to make up the difference; which is ordinarily all the length they go, never

<sup>28</sup> See generally Stein, *Law and Society in Eighteenth Century Scottish Thought*, in SCOTLAND IN THE AGE OF IMPROVEMENT 148-68 (N. Phillipson & R. Mitchison eds. 1970).

<sup>29</sup> See Stein, *Adam Smith's Theory of Law and Society*, in CLASSICAL INFLUENCES ON WESTERN THOUGHT 1650-1870, 263-73 (R. Bolgar ed. 1979).

<sup>30</sup> J. LAFITAU, MOEURS DES SAUVAGES AMÉRIQUAINS, COMPARÉES AUX MOEURS DES PREMIERS TEMPS (W. Fenton & E. Moore eds. & trans. 1974).

<sup>31</sup> P. DE CHARLEVOIX, HISTOIRE ET DESCRIPTION GÉNÉRALE DE LA NOUVELLE FRANCE (Paris 1744).

<sup>32</sup> A. MOMIGLIANO, STUDIES IN HISTORIOGRAPHY 141 (1966).

<sup>33</sup> Smith commended Machiavelli as the only contemporary historian "who has contented himself with that which is the chief purpose of history, to relate events and connect them with their causes, without becoming a party on either side." A. SMITH, LECTURES ON RHETORIC AND BELLES LETTRES 110-11 (J. Lothian ed. 1963).

daring to inflict what is properly called punishment. The design of their intermeddling is to preserve the public quiet, and the safety of the individuals; they therefore endeavour to bring about a reconciliation betwixt the parties at variance.<sup>34</sup>

The American Indians exemplified this state.

The second stage, that of shepherds, cannot co-exist with the first. "The appropriation of flocks and herds renders subsistence by hunting very uncertain and precarious."<sup>35</sup> The people are more numerous than at the hunting stage, and live a nomadic life, following the best grazing. Animals are now regarded as the property of particular individuals, with the result that "distinctions of rich and poor then arise."<sup>36</sup> Government proper begins at this stage, because when

some have great wealth and others nothing, it is necessary that the arm of authority should be continually stretched forth, and permanent laws or regulations made which may ascertain [*i.e.*, secure] the property of the rich from the inroads of the poor . . . . Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence. The government and laws hinder the poor from ever acquiring the wealth by violence which they would otherwise exert on the rich; they tell them they must either continue poor or acquire wealth in the same manner as they have done.<sup>37</sup>

At this stage, offences against the community are dealt with by expulsion. Smith likened society at this pastoral stage to a club: "The members of any club have it in their power to turn out any member, and so also have the members of such a community."<sup>38</sup> Laws are, of course, no more than conventions or settled practices. "The legislative is never met with amongst people in this state of society. [It is] the product of more refined manners and improved government. . . ." <sup>39</sup> Certain peoples described by Homer, whom Smith treats not as a poet but as a writer on social

<sup>34</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 201.

<sup>35</sup> *Id.* at 202.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 208-09 (footnotes omitted).

<sup>38</sup> *Id.* at 204.

<sup>39</sup> *Id.* at 205.

anthropology, the Jews in the period of Genesis, the Germans described by Tacitus—all these exemplify the pastoral stage.

The third stage, that of agriculture, is marked by the appearance of private property in land. At first, property in land continued only so long as the land was actually being cultivated, and did not persist once the crop was out of the ground. Smith cited the practice of the country folk in Scotland of letting their cattle wander wherever they wanted as soon as the crop was harvested. This practice was in fact contrary to the Winter Herding Act of 1686, which ordered farmers to keep their cattle herded, in winter as well as in summer, under penalty of half a mark for each beast found on a neighbor's land. The ordinary people ignored the statute and its penalties, Smith said, for they were "so wedded to the notion that property in land continues no longer than the crop is on the ground that there is no possibility of getting them to observe it."<sup>40</sup> It is at this stage that regular courts are established and legislation begins.

The possibility of advancement beyond the agricultural stage depends on the ability of the society to produce a surplus of produce beyond its own immediate needs and on the opportunity to export that surplus to other societies. A people who were

settled in a country where they lived in pretty great ease and security and in a soil capable of yielding them good returns for cultivation, would not only improve the earth but also make considerable advances in the severall arts and sciences and manufactures, providing they had the opportunity of exporting their [surplus] produce and fruits of their labour.<sup>41</sup>

The Tartars and Arabs lacked these conditions, and so did not advance; the Greeks, on the other hand, possessed both and could enter the stage of commerce. A further extension and complication of laws is needed for this fourth stage.

In general, the principle of development is that "[t]he more improved any society is and the greater length the severall means of supporting the inhabitants are carried, the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of property."<sup>42</sup> Locke

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<sup>40</sup> *Id.* at 23 (footnote omitted).

<sup>41</sup> *Id.* at 223.

<sup>42</sup> *Id.* at 16.

had expressed something of this idea,<sup>43</sup> but Smith made it the basis of his whole treatment of rights. Moreover, changes in the concept of ownership of property and changes in the form of government go hand in hand. Smith envisaged a kind of cyclical evolution of types of government, each of which "seems to have a certain and fixed end which concludes it."<sup>44</sup>

Property means something quite different according to the state of progress a society has reached. It is no good talking in general terms about property; we must look to the nature of the society we are discussing and to its current ideas about private property. In defining injury to the property rights recognized by a given society. Smith turned again to the hard-worked impartial spectator. A man could be said to have suffered an injury only "when an impartial spectator would be of opinion he was injured, would join with him in his concern, and go along with him" if he defended his property against attack.<sup>45</sup> To find the views of the impartial spectator in any society it was thus necessary to look into the popular psychology of that society. For example, Homer was Smith's guide to the attitudes of the warrior society existing at the time of the Trojan war. Odysseus, when asked whether he was a merchant or a pirate, said he was a pirate.

[T]his was a much more honourable character than that of a merchant, which was allways looked on with great contempt by them. A pirate is a military man who acquires his livelyhood by warlike exploits, whereas a merchant is a peaceable one who has no occasion for military skill and would not be much esteemed in a nation consisting of warriors chiefly.<sup>46</sup>

## 2. *Rights as a Family Member*

After man as an individual comes man as a member of a family. Under this head, Smith considered three relationships: husband-wife, father-son, and master-servant. His treatment of marriage drew heavily on the history of the marriage laws of Rome.<sup>47</sup> In the earliest times, the wife was absolutely in the

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<sup>43</sup> See J. Locke, *Essay Concerning the True Original, Extent and End of Civil Government*, in *TWO TREATISES ON CIVIL GOVERNMENT* ¶ 124, at 256 (1884).

<sup>44</sup> *LECTURES ON JURISPRUDENCE*, *supra* note 1, at 238.

<sup>45</sup> *Id.* at 17.

<sup>46</sup> *Id.* at 224.

<sup>47</sup> When tracing the development of particular legal institutions in detail, Smith was

power of her husband. The reason, Smith explains, was that at this period, the fortune a woman could bring to her husband on marriage was very small and insufficient to entitle her to bargain with him; her only option was to submit to his power. However, as the wealth of the society increased, rich heiresses became not uncommon and, in their favor, a new kind of marriage was introduced in which the wife remained independent of her husband's power. This sort of marriage was created by consent and could be dissolved by the will of either party. Yet "tho it had none of the old solemnities [it] was found by the lawyers to save the lady's honour and legitimate the children."<sup>48</sup> Since this form of marriage was found to be much more convenient and adapted to the licentiousness of the times, the old forms were abandoned.

After the fall of the Roman Empire, however, the barbarian successor societies were in an earlier stage of development than that of the Romans, and the wife was still under the subjection of her husband. Furthermore as a result of the influence of the Christian clergy, marriage came to be almost indissoluble.<sup>49</sup> In short, the relationship of husband and wife varied with the economic development of society and the degree of progress it had attained.

largely restricted to two systems for his illustrations: Roman law and English law. The Roman legal sources documented the development of the system for over a thousand years of antiquity—from the Twelve Tables in the fifth century B.C. to the legislation of the sixth century A.D., to say nothing of developments after the medieval revival of legal studies. Furthermore, nonlegal Latin literature provided the social background against which the law evolved. Only English law provided a similarly detailed set of written sources for tracing its development. It had borrowed less from Roman law than any other system, and for that reason, Smith felt it was closer to nature. It is "more deserving of the attention of a speculative man than any other, as being more formed on the naturall sentiments of mankind." LECTURES ON JURISPRUDENCE, *supra* note 1, at 98. The Scots lawyers of Kames' circle, with their interest in unification of law in Britain, were more conscious than their contemporaries in England of legal systems other than their own. Smith showed himself at home in both Roman law and English law, as well as Scots law, and could draw parallels from their respective histories.

<sup>48</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 144.

<sup>49</sup> Smith took the opportunity in this context to make some curious comments on the change which he considers this indissolubility of marriage produced in the character of "the passion of love."

This passion was formerly esteemed to be a very silly and ridiculous . . . one . . . [T]here is no poems (sic) of a serious nature grounded on that subject either amongst the Greeks or Romans. There is no ancient tragedy, except Phaedra, the plot of which turns on a love story, tho there are many on all other passions, as anger, hatred, revenge, ambition, etc. . . . The reason why this passion made so little a figure then in comparison of what it now does is plainly this. The passion itself is as I said of nature rather ludicrous; the frequency and easiness of divorce made the gratification of it of no great mo-

The development of Roman law also provided a model for the second family relationship, that of father and son. Although the power of the father was at first altogether absolute, it gradually acquired limits. In the early Republic, the father had the legal power to sell his son to work for another man although, Smith argued, this power probably extended only to unmarried sons. It would be difficult for the father to sell a married son, since the son would have assumed obligations to his wife and children. In practice, moreover, the father's power would be curbed by pressure from other members of the family and by public opinion. When we observe the original concentration of all property in the father and the gradual recognition of the son's right to have property of his own, independently of his father, we see that "the power of the fathers, tho very considerable, does not appear to have been so unbounded as we are apt to imagine."<sup>50</sup>

In the case of the relationship of master and servant, Smith shows a deep understanding of how slavery operated in antiquity and draws important parallels with its working in his own time. He insisted that slavery was the norm in the world and that its abolition in one small corner of the world, namely western Europe, was exceptional. He showed in detail that slavery was inferior to free labour on economic grounds but he recognized that the condition of the slave, though legally the same in all societies which tolerate it, was "a much more tollerable one in a . . . poor and barbarous people than in a rich and polished one."<sup>51</sup>

In a poor country, where the number of slaves in relation to the number of freemen is small, slaves are a valuable asset and represent no threat. In a rich country, where their numbers are great, they considerably outnumber the freemen and so constitute a formidable body who must be repressed. Horace observed that no one who aspired to be a gentleman in the Rome of Augustus would have less than ten slaves,<sup>52</sup> and there are many illustrations

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ment . . . {T}he union might be dissolved at any time. This was the case both amongst the Greeks and Romans. But when marriage became indissoluble, the matter was greatly altered. The choice of the object of this passion, which is commonly the forerunner of marriage, became a matter of the greatest importance. The union was perpetuall and consequently the choice of the person was a matter which would have a great influence on the future happiness of the parties. From that time therefore we find that love makes the subject of all our tragedies and romances . . .

*Id.* at 149-50 (footnotes omitted). Smith himself never married.

<sup>50</sup> *Id.* at 175.

<sup>51</sup> *Id.* at 182.

<sup>52</sup> See Horace, *Satires* 1.2.3ff; 1.3.11ff.

of the barbarity with which Romans of that period treated their slaves. In contrast, Tacitus noted that the Germans of the same period treated their slaves with great humanity.<sup>53</sup>

Smith then drew a similar contrast between the contemporary treatment of slaves in the colonies of continental North America and that in the West Indian sugar islands. In the former their masters could not afford to keep a great number and they were "treated with great humanity and used in a very gentle manner."<sup>54</sup> On the other hand, in the sugar islands the planters could afford to keep a multitude of slaves. Faced with the constant threat of insurrection, the planters treated the slaves with "the greatest rigour and severity."<sup>55</sup>

### B. *Legal Institutions*

The significance of Smith's evolutionary approach for jurisprudence is that it enabled him to explain the basis of legal institutions in a different way from that of the writers in the natural law tradition. They had stressed the will of the individuals involved in a transaction, and set it against the good of the community as a whole. Smith substituted an analysis of society's economic needs and popular psychology.

A vital institution in private law is contract, and Smith differed from Grotius and Pufendorf in explaining the nature of contractual obligation. The traditional explanation was that what made a contract binding was the promisor's declaration of his will which bound him to keep his word.<sup>56</sup> Smith argued that it was rather the expectation which the promisor's declaration created in the promisee. An impartial spectator would not always consider that every declaration of intent should be relied on by the promisee. Primitive societies make light of breaches of contract and do not always hold contracts binding. It is only with the advance of commerce that contracts become frequent. Only then is there a need for credit to be given and only then does an informal promise reasonably create in the promisee a ground of expectation, which would be disappointed if the promise were not fulfilled. The extent of the obligation is measured by the disappointment the breach of it would occasion.<sup>57</sup>

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<sup>53</sup> See Tacitus, *Germania* 25.

<sup>54</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 183.

<sup>55</sup> *Id.* at 183.

<sup>56</sup> See 2 H. GROTIUS, *supra* note 18, at 2.11.2; 3 S. PUFENDORF, *supra* note 18, at 3.5.5.

<sup>57</sup> See LECTURES ON JURISPRUDENCE, *supra* note 1, at 86-102.

Again, when dealing with acquisition of property by succession on death, Smith differs from Grotius and Pufendorf. They explained intestate succession as based on the supposed will of the deceased.<sup>58</sup> The deceased normally expresses his intentions in his will, but if he fails to make a will, the law distributes his estate as he is presumed to have intended. This kind of explanation, argued Smith, is quite unhistorical because it implies that testamentary succession preceded intestate succession. In all societies, ancient and modern, the reverse is the case. The right to dispose of one's property after death by will "is one of the greatest extensions of property we can conceive, and consequently would not be early introduced into society."<sup>59</sup> In the age of hunters, there was no succession at all, a man's personal belongings, his weapons, being buried with him. In later stages, property was regarded as family property "which as it was maintained and procured by the labour of the whole family, was also the common support of the whole."<sup>60</sup> The head of the family alone could alienate family property in his lifetime, but not at his death. His descendants' claim to share in his property after his death was not based originally on his will, express or implied, but on the fact that they had themselves helped to procure and maintain the property.

Once more, Smith's historical approach led him to an explanation of the nature of criminal law different from that of the natural law writers. They had argued that the basis of punishment for crime was consideration of the public good.<sup>61</sup> The real source, said Smith, must be the resentment of the injured party. The measure of punishment is the degree of revenge the impartial spectator would find acceptable.<sup>62</sup> In early societies it was left to the victim to get his own satisfaction for crimes.

In the description of the shield of Achilles, in one of the compartments the story represented is the friends of a slain man receiving presents from the slayer. The government did not then intermeddle in those affairs; and we find that the stranger who comes on board the ship of Telemachus tells us he fled from the friends of a man whom he had slain, and not from the officers of justice.<sup>63</sup>

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<sup>58</sup> See 2 H. GROTIUS, *supra* note 18, at 2.7.3; 4 S. PUFENDORF, *supra* note 18, at 4.11.1.

<sup>59</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 38.

<sup>60</sup> *Id.* at 39.

<sup>61</sup> See 2 H. GROTIUS, *supra* note 18, at 2.20.7; 8 S. PUFENDORF, *supra* note 18, at 8.3.9.

<sup>62</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 104.

<sup>63</sup> *Id.* at 108.



Only later does the state concern itself with the prosecution of crimes.

If the injury is so great that the spectator can go along with the injured person in revenging himself by the death of the offender, that is the proper punishment, which is to be exacted by the victim or the magistrate acting the role of the impartial spectator. If the impartial spectator will only go along with a pecuniary penalty, then that is the punishment which ought to be inflicted. In support of this point, Smith cited a contemporary example. The British people conceived the "whimsical" notion that their prosperity depended on the woolen goods trade and therefore made the exportation of wool a felony punishable by death. But since, in natural equity, this exportation was no crime at all, it was found impossible to get informers or jurors who would convict. So the punishment had to be reduced to what was acceptable.<sup>64</sup>

#### CONCLUSION

Smith's jurisprudence is clearly of historical interest. Does it have lessons for us today? We may summarize its main aspects. First, unlike earlier writers who favoured armchair speculation, based on reason alone, about what law ought ideally to be, Smith thought that a legal theory should start from what is known about actual systems in different kinds of society. His account was based on a comprehensive knowledge of the available data from antiquity to his own times. He understood the complexity of these data and realized that sometimes the evidence of antiquity confirmed contemporary experience, as in the effects of slavery on society, and sometimes it illustrated a stage through which contemporary society had passed, as in the case of marriage.

Secondly, such a theory must account for legal change, and legal change is part of social change. Smith accepted that human society was progressing from barbarism to civilization; being a Deist, he believed that the general course of this progress was laid down by the invisible hand of an all-wise Author of Nature. Legal theory must therefore be historical in that it must view the development of law as part of the general progress of society.

Thirdly, and more particularly, Smith established the link between the form of the economy and the kind of law within a soci-

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<sup>64</sup> *Id.* at 104-05.

ety. His contemporaries learned this lesson very quickly; as William Robertson, the leading orthodox historian of the period, put it: "In every enquiry concerning the operations of men who are united together in society, the first object of attention should be their mode of subsistence. According as that varies, their laws and policy must be different."<sup>65</sup>

Smith wanted to offer a systematic theory which would account for legal change in the light of the progress of society and the form of the economy. But he was well aware of the dangers of determinism in the social sciences. Human action could and did prevent societies from following the natural course of development. So, fourthly, Smith stressed also the psychological aspects of legal change. By constantly keeping in mind the views of the impartial spectator, he never lost sight of the need to take account of popular attitudes toward law. Some laws are enacted in the interest of particular groups or they are kept alive when the need for them has long passed. This may be irksome to the theorist but he cannot overlook the influence of factional interests or of popular prejudices.

The man of system . . . is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. . . . He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it. If these two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder.<sup>66</sup>

Smith is saying that we must never overlook the fact that the individual members of society are free agents, responsible for their actions. The legislator must therefore "accommodate, as well as he

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<sup>65</sup> 5 W. ROBERTSON, WORKS 111, 128 (1808) (cited in Skinner, *Adam Smith: An Economic Interpretation of History*, in *ESSAYS ON ADAM SMITH*, *supra* note 2, at 175).

<sup>66</sup> THEORY OF MORAL SENTIMENTS, *supra* note 1, at 233-34 (footnotes omitted).

can, his public arrangements to the confirmed habits and prejudices of the people . . . [H]e will endeavour to establish the best that the people can bear.”<sup>67</sup>

Fifthly and finally, Smith was a realist and this realism led him to prefer down-to-earth explanations to subtle ones. He never lost the common sense approach characteristic of the Scottish philosophy of his time. For example, the rule found in many systems, which allows a husband to divorce his wife for adultery without granting her a corresponding right to divorce him, is not designed, as was usually claimed, to prevent spurious offspring being imposed on the husband. “The real reason is that it is men who make the laws with respect to this; they generally will be inclined to curb the women as much as possible and give themselves the more indulgence.”<sup>68</sup>

Smith’s jurisprudence is complex rather than simple, but so is the law that it seeks to explain. Starting from a desire to distinguish what a man can be compelled to do from what he ought to do, he was led to the position that what a man can be compelled to do depends on the economic state of the society in which he lives. Smith understood that the law of a society sits, a little uneasily perhaps, between its morality and its economics.

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<sup>67</sup> *Id.* at 233.

<sup>68</sup> LECTURES ON JURISPRUDENCE, *supra* note 1, at 147 (footnote omitted).