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Robin Paul Malloy
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Introduction

Law's Invisible Hand

Fundamentally, law is to society as gravity is to the solar system; it is the invisible force that holds society together and keeps it operating smoothly and productively.[1] Law enhances social cooperation, facilitates trade, and extends the market. In these ways, law functions like Adams Smith's invisible hand, guiding and facilitating the progress of humankind.

For much of the past 250 years, the *invisible hand* of Adam Smith has cast a long shadow over our thinking about commerce, capitalism, and markets.[2] Smith believed that individuals pursuing their own self-interest could make good decisions – decisions that were not only beneficial to themselves but also to the public. In this regard, he challenged the elitist idea that common people could not act for themselves. His idea was simple. Everyday people could make progress on their own without the excessive interference and control of a monarch, the church, the Pope, or any other special order of people. In addition, contrary to popular belief, Smith did not believe that progress came from the relentless pursuit of self-interest. Smith believed that progress evolved from individuals merging their own self-interest in sympathy with others so that the common interest of society could be advanced. This is an important point because many people today misunderstand Smith's observations about self-interest and characterize his work as promoting selfish behavior. They simplify this understanding by thinking that Smith's work supports the idea that "greed is good." However, Smith did not believe that greed was good.

[1] Jerry Evensky, Adam Smith's Wealth of Nations: A Reader's Guide 13 (2015) (Paraphrasing Evensky). In practice, law is also a visible force.

[2] Adam Smith was born in 1723 and died in 1790. See Ian Simpson Ross, The Life of Adam Smith 1–17 (1995); John Rae, Life of Adam Smith 1 (1895); E. G. West, Adam Smith – The Man and His Works (1976); Maria Pia Paganelli, The Routledge Guidebook to Adam Smith's Wealth of Nations 1–12 (2020) (This book provides an excellent and brief introduction to Smith and his life); Emma Rothschild, Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment, 52–71 (2002). (Rothschild provides an interesting account of Smith.)

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Smith did not believe that progress emerged from a self-interested and competitive struggle for the survival of the fittest. Smith believed that progress came from cooperation and from the ability of individuals and societies to limit and constrain self-interested pursuits in favor of identifying and enforcing rules promoting the common interest.

In his day, Smith was a well-respected philosopher and thinker whose ideas corresponded with many of the ideals of the American founders.[3] His writings were known to and read by political leaders and helped reshape the global economic consensus away from mercantilism and toward more open markets.[4] He also advanced our understanding of self-directed individual agency and influenced our belief in the power of people to shape their world. Today, Smith is associated with the rise of capitalism and with the push toward free and generally less regulated markets. While these are seen as positive forces by some people, others have formed mixed views about capitalism and Smith's support for pursuing self-interest. In some contemporary thinking, capitalism and self-interest are thought of negatively and are blamed for serious disparities in wealth, health, and housing.

Likewise, contemporary thinking in legal theory has evolved. Whereas Smith understood that justice under law was the primary pillar supporting civil society, contemporary legal theorists are more likely to consider justice under law as subsidiary to economics or politics. For example, contemporary legal economists are likely to view law as a subject of economic investigation.[5] They generally believe that legal rulemaking and legal reform should be guided by appeal to an economic calculus. They examine law as a subject of economic investigation and evaluate it according to economic criteria.[6] This makes law a subject of economics. At the same time, critical legal theorists use Marxist political economy to position law as a tool of class conflict.[7] In the contemporary context of critical theory, class conflict has evolved

[3] Nicholas Phillipson, Adam Smith: An Enlightened Life (2010); Heao Tanaka, *The Scottish Enlightenment and Its Influence on the American Enlightenment*, 79(1) Kyoto Econ. Rev. 16–39; Iain McLean & Scot M. Peterson, *Adam Smith at the Constitutional Convention*, 56 Loy. L. Rev. 95, 95–133 (2010).

[4] All sources cited in note 3, *supra*.

[5] David M. Driesen & Robin Paul Malloy, *Critiques of Law and Economics*, *in* Oxford Handbook on Law and Economics 300–17 (Francesco Parisi ed., 2016). For examples of economic analysis applied to law, *see* Richard A. Posner, Economic Analysis of Law (7th ed., 2007); Richard A. Posner, The Economics of Justice (1981); Robert Cooter & Thomas Ulen, Law and Economics (6th ed., 2011); Nicholas L. Georgakopoulos, Principles and Methods of Law and Economics: Basic Tools for Normative Reasoning (2005).

[6] See *supra* note 5 sources. For a broader and richer approach to law and economics, see Francesco Parisi & Vernon Smith, The Law and Economics of Irrational Behavior: Introduction (2005); Cass Sunstein, Behavioral Law and Economics (2012); Cass Sunstein, Nudge: Improving Decisions about Health, Wealth, and Happiness (2008).

[7] See, e.g., Costas Douzinas & Adam Geary, Critical Jurisprudence: The Political Philosophy of Justice (2005); Critical Legal Studies (Alan Hutchinson ed., 1989); Mark Kelman, A Guide to Critical Legal Studies (1987); Guyora Binder, *On Critical*

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into identity politics.[8] This approach makes law a subject of politics. In both cases, legal economists and critical theorists make law subservient to the forces of either economics or politics. This shift in the positioning of justice alters the balance envisioned by Smith in his theory of jurisprudence. Smith did not see law as the subject of either economics or politics. Smith gave primacy to justice in his system of social organization and understood law as a mediating institution in the tension between the economic and political realms.[9]

Consequently, the passing of time has changed public perception about Smith and his work. The contemporary questioning of the merits of capitalism and the corresponding shifts in legal theory have cast an ambiguous, if not negative, light on Smith's place in American legal thinking. Unfortunately, those who champion Smith and those who vilify him, each tend to do so on the basis of a one-dimensional caricature of a man committed to a world driven by a selfish desire for profit, and led by an amoral, disembodied, and invisible hand.

This book challenges the caricature of Adam Smith as a one-dimensional and uncaring man of profit. It presents the case for Smith as a complex thinker with a concern for both self-interest and the public interest. It demonstrates that Smith valued private arrangements and organizations, and at the same time understood the importance of civic institutions. By going beyond the metaphor of the invisible hand in exploring Smith's approach to law and jurisprudence, this book presents Smith as a thoughtful scholar with an integrated theory of social organization. It explains that Smith's theories of jurisprudence and of social organization both centered on promoting the common interest. Moreover, the book explains that the common interest included a concern for the plight of the poor. Smith was focused on improving the overall well-being of everyone in society. He was not simply interested in promoting and protecting self-interest, nor was he primarily committed to advancing economic efficiency and wealth maximization. In fact, Smith subordinated concerns for self-interest to the requirements of justice because he understood that justice was the most important pillar on which civil society rested.[10]

In seeking to understand Smith, we must appreciate him as being more of a man of the market than a capitalist. In general, unlike Marx, Smith did not base his theory on the primacy of capital. Smith focused on land, capital, and labor.[11] All

Legal Studies as Guerrilla Warfare, 76 Georgetown L.J. 1 (1987); J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 Ottawa L.R. 1 (1986); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harvard L.R. 1685 (1976).

8 See, e.g., Khalila L. Brown-Dean, Identity Politics in the United States (2019). How America's identity politics went from inclusion to division: https://www.theguardian.com/society/2018/mar/01/how-americas-identity-politics-went-from-inclusion-to-division.

9 TMS 167 [TMS-G 86] (justice is the primary pillar).

10 *Id.*

11 TWN (In TWN Smith devotes significant time to the role and importance of each of capital, labor, and land). See generally Evensky, Guide (2015), *supra* note 1; Paganelli, Guide (2020) *supra* note 2.

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were relevant, and none were as important as the dynamic of market relationships. He believed that markets could create opportunities for everyone. It was the potential of decentralized markets that empowered individuals and drove progress. Nonetheless, Smith knew that with markets, some people would be more successful than others at accumulating assets.[12] However, he did not believe that the inequality of asset accumulation was inherently bad, and in fact thought it could be beneficial. Smith believed that over the long arc of history, markets would raise the standard of well-being for people generally. At the same time, Smith recognized that disparity in wealth would leave some people in dire straits, and this was a problem in need of a response. For this reason, he believed that communities had an obligation to provide for the needs of those less fortunate.[13] Nonetheless, Smith tolerated unequal distributions because he was forward-looking, not backward-looking. He understood from history that some people had advantages that others did not, and that some people did wrongs to others at different points in time. He also understood that progress would be difficult if a community focused its attention on redistributing resources based on alleged wrongs from the past rather than moving forward with the continually evolving opportunities presented by the market.

In Smith's theory of jurisprudence, the pursuit of self-interest was limited and constrained by our ability to sympathize with other people, and by our ability to conform to socially acceptable norms of behavior.[14] When properly constrained and limited, self-interest can promote the common interest of the community. Moreover, as individual judgments regarding acceptable behavior come closer to public and institutional judgments regarding the proper relationship between private and public interest, we improve justice and advance overall well-being. These judgments are informed by many considerations. People are curious, exercise imagination, and understand their dependence on others and the need for cooperation.[15] They have an inherent bond with their fellow humans that elevates an aesthetic sense of justice above a concern for identity politics, efficiency, and wealth maximization. Consequently, in Smith's jurisprudence, justice informs the subjects of public policy and cost-conscious decision-making, rather than the other way around.

[12] LOJ 14–37 (progress and accumulation of assets in the four stages); TWN Vol. I, 53–54; TWN Vol. II, 231–44.

[13] People need to be provided with necessaries relative to the custom and standards of their time and place. TWN Vol. II, 399–400.

[14] See, e.g., TWN Vol. I, 344–45 (restraints on the pursuit of self-interest and regulations to limit liberty are sometimes proper). "Such regulations may, no doubt, be considered as in some respect a violation of natural liberty. But those exertions of natural liberty of a few individuals, which might endanger the security of the whole society, are and ought to be, restrained by the laws of all governments"; *Id.*

[15] See TMS 48–50 [TMS-G 9–11] (citing imagination); EPS 39–50, 56, 67, 75, 78 (imagination), 40, 48 (being curious). See also Maria Pia Paganelli, *The Same Face of Two Smiths: Adam Smith and Vernon Smith*, 78 J. Econ. Behav. Organ. 246–55 (2011).

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Appreciating the aesthetics of justice in Smith's jurisprudence requires an understanding of justice in the context of Smith's broader theory of social organization. In developing this understanding, we must examine Smith's thinking with respect to the dynamic relationship between an inner and an outer realm. The inner realm was mediated by an *inner impartial spectator* and involved informal rules, norms, and cultural practices.[16] The outer realm was mediated by an *outer impartial spectator* and involved formal civic institutions, including those of law.[17]

In developing a generalizable approach to Smith's theory of jurisprudence, we must understand how the inner and outer realms worked. In exploring the inner and outer workings of Smith's theory of social organization this book proceeds in several steps. First, it presents a chapter designed to set the stage for understanding Smith's overall project regarding jurisprudence and social organization. This involves offering a quick and short explanation of Smith's basic model so that the reader might have the "big picture" in mind before we move into more detailed chapters. This is followed by clarifying chapters on Smith's approach to informal and formal social organization. In the chapter on informal social organization, coverage centers on exploring Smith's three major metaphors of the *invisible hand*,[18] *the man in the mirror*,[19] and the *impartial spectator*.[20] These metaphors represent three natural and underlying forces or characteristics of humans. The invisible hand was related to our motivation to pursue self-interest; the man in the mirror to our ability to sympathize with others; and the impartial spectator to our continuous judging of ourselves and one another.[21] The chapter on formal social organization addresses the development of public institutions that mirror and interact with the underlying informal characteristics. The discussion of the formal realm involves exploration of Smith's three pillars of civil society: *authority*, *utility*, and *justice*.[22] These three pillars are related to the three major metaphors used by Smith in describing the operation of the informal realm. Moreover, the three pillars are central to Smith's rejection of social contract theory. Instead of society being held together by a social contract, Smith believed we were held together by the forces of "authority" and "utility," and that these forces were guided by "justice."[23] At the end of this chapter, discussion turns to integrating the informal and formal realms of Smith's theory.

16 TMS 227–30 [TMS-G 128–33].
17 *Id.*
18 TMS 304–05 [TMS-G 184–85]; TWN 477–78; EPS 48–51 (Jupiter).
19 TMS 203–07 [TMS-G 109–13].
20 TMS 58–59, 203–07, 227–30, 246–47, 261–67, 396–98 [TMS-G 16–17, 109–13, 128–33, 146–47, 156–61, 243–46; I.i.3.1–3.3].
21 See generally, Eric Schiesser, Adam Smith: Systematic Philosopher and Public Thinker 140–44 (2017).
22 TMS at 36, 167 [TMS-G 86] (justice is the main pillar of society), LOJ 314–22, 434 (there is no social contract; society is held together by authority and utility).
23 TMS at 36, 167, 169–72 [TMS-G 86, 87–90] (We seek to preserve society and cooperation and to do this we need to support justice. Every person's own interest is linked to the prosperity of society. Every individual understands that injustice destroys social tranquility and prosperity);

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With these informal and formal characteristics in mind, the book then focuses several chapters on a more detailed understanding of the impartial spectator and of the "spectator view." Both are important to understanding Smith's theory of justice. The spectator view of Smith's impartial spectator differs from the metaphor of a decision-maker operating from behind a *veil of ignorance*, as referenced in some contemporary liberal thought.[24] Unlike the person operating behind a veil of ignorance, Smith's spectator is well-informed and makes judgments about real people and real situations. In making judgments, the spectator is not behind a veil of ignorance. The spectator understands who the parties are and the nature of their dispute. Acting with this knowledge, the spectator makes rational decisions and provides people with due process of law.

Culminating the discussion of the impartial spectator, the spectator is compared and contrasted with two other rhetorical devices used in contemporary legal discourse. In this chapter, the impartial spectator is considered in relation to *Homo economicus*, or economic man – the figurative human being of modern approaches to economics[25] – and *Homo identicus*, or identity person – the figurative representation of the practitioner of identity politics.[26] This is done to provide a clearer understanding of a way to think about the spectator in a contemporary legal context.

Moving beyond the impartial spectator, this discussion is then followed by a chapter elaborating on Smith's notion of progress. In it, progress is related to Smith's identification of a natural human desire to *truck*, *barter*, and *exchange*.[27] It is this desire that drives trade and leads to opportunities for discovery and innovation. This in turn facilitates the division of labor and an expansion of the market.[28] As part of the discussion, consideration is given to exploring Smith's views in relation to contemporary views on "market process theory."[29] This comparison helps fill in some of the gaps in Smith's own theory.

TMS 289–91 [TMS-G 175–77] (The rules of justice hinder us from causing harm to others and we must follow them carefully and mutually).

24 Smith's position contrasted with that of John Rawls. See D. D. Raphael, The Impartial Spectator: Adam Smith's Moral Philosophy 45 (2007). For Rawls's position, see John Rawls, A Theory of Justice, 183–85 (1971).

25 The neoclassical economists' *Homo economicus* has several characteristics, the most important of which are (1) maximizing (optimizing) behavior; (2) the cognitive ability to exercise rational choice; and (3) individualistic behavior and independent tastes and preferences. Chris, Doucouliagos, A *Note on the Evolution of Homo Economicus*, 28.3 J. Econ. Issues (1994) (877+). For additional sources, see *infra* Chapter 9, note 5.

26 See, e.g., Brown-Dean (2019), *supra* note 8. For additional sources, see *infra* Chapter 9, note 6.

27 LOJ 347, 351–52, 355, 521; TWN Vol. I, 17 (". . . the propensity to truck, barter, and exchange on thing for another. . . . It is common to all men, and to be found in no other race of animals . . .") *id*. 18–20; TWN Vol. II, 477–78.

28 LOJ 223; TWN Vol. I, 18–20; TWN Vol. II, 231–44.

29 Robin Paul Malloy, Law and Market Economy: Reinterpreting the Values of Law and Economics 78–90 (2000); Israel M. Kirzner, The Meaning of Market Process (1992).

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In the next to last chapter, the book explores the ways that Adam Smith has been cited in the judicial opinions of the federal courts of the United States.[30] This chapter is included because it provides some unusual evidence of Smith's indirect impact on American legal thinking. It also offers us an opportunity to examine how some American legal jurists have interpreted Smith. These interpretations are themselves important because such interpretations may indirectly and over time shape an understanding of Smith in the minds of many people. An interesting aspect of this chapter is the unusual nature of citations to Smith in the opinions of the courts of the United States. The citations to Smith are unusual because his writings have no authoritative value in American courts, and because Smith has no actual connection to the United States. Moreover, cites to him are almost exclusively to *The Wealth of Nations* and not to anything he directly wrote about law. There is really no substantive reason for finding any cites to Smith in American judicial opinions, and yet we have them. Consequently, these citations provide an interesting perspective on how Smith remains "present" in the American legal psyche, even if they shed little direct light on Smith's actual theory of jurisprudence.

After covering each of these topics, the book concludes with a chapter titled "Parting Thoughts." In it I comment on how Smith's theory of jurisprudence might inform contemporary thinking about law and the relationship among law, economics, and politics. I suggest that even though law, economics, and politics have evolved and become more complex over the past 250 years, Smith's theory of jurisprudence can still offer guidance to those engaged in the contemporary practice of law.

In developing this book, I have focused on trying to understand Adam Smith, the legal scholar. We know a lot about Adam Smith, the economist and moral philosopher. I wanted to get into the mind of Adam Smith, the man who delivered lectures on jurisprudence. I wanted to know more about the Adam Smith who had a grand theory of justice running through all of his works. In doing this, I wanted to know more than what Smith said about law; I wanted to understand his theory of law and the relationship between law and his other pillars of civic life. I wanted to write something more than a descriptive account of Smith's lectures on jurisprudence. Therefore, I set out to write a generalizable account of a theory of Adams Smith's jurisprudence, an account that can be used by contemporary lawyers, jurists, and law students in thinking about the appropriate limits to the pursuit of self-interest and for considering the relationship among law, economics, and politics. Understanding these relationships is important because many of society's legal disputes involve competing claims to scarce economic and political resources. Just as in Smith's time, law and legal institutions must deal with issues of access to resources, unequal accumulation of assets, and the problems of securing persons and their property. Consequently, contemporary lawyers need to

[30] Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 Loy. L. Rev. 33, 40, 44–45 (Loyola University, The Brendon Brown Lecture on Natural Law, 2010) (translated into Italian, *Adam Smith nelle Corti degli Stati Uniti*, 3 Mercato Concorrenza Regole, 463 [XIV no. 3, Dec. 2012] [translated by Dr. Luca Arnaudo]).

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appreciate the market context in which law functions and operates, and appreciate that the foundational principles in this area were set out by Adam Smith.

In seeking to learn from Smith's work, we must take a broad view. In the grand scheme of things, we can understand that Smith viewed his major works as interrelated. He planned to write three great books that collectively would explain his theory of social organization and progress. He completed two of these books, *The Theory of Moral Sentiments* and *The Wealth of Nations*. He never completed the third book, on jurisprudence. Nonetheless, we have a number of sources that assist us in understanding his approach to law. A few authors have written on specific elements of Smith's work in law, such as by analyzing Smith's views on particular aspects of contract, property, and criminal law. In contrast to these authors, I step back from the analysis of discrete and compartmentalized subject areas of law and address Smith's overarching theory of jurisprudence as it relates to social organization and progress.

In undertaking my work, I have approached it as a lawyer and as a legal academic educated and trained in the traditions and cultural practices of the common law. Consequently, I am not writing as a philosopher, a historian, an ethicist, or an economist. This is important to state, because every intellectual discipline has its own way of addressing its subject, and it should be clear to my readers that I am presenting a lawyer's case for a contemporary, coherent, and holistic theory of Adam Smith's jurisprudence. In doing this, I make extensive use of abductive logic to develop the general argument of the book.[31]

In examining Smith's work on jurisprudence, it is important to understand that as a lawyer, Smith wrote with reference to both the common law system of England, and the civil law system of Continental Europe.[32] This is important to know because Smith lectured on law and jurisprudence in Scotland, which includes a civil law

[31] Abductive logic is a form of speculative rhetoric and interpretation. It involves the use of inference and hypothetical reasoning to logically explain a set of facts and observations. To be persuasive, the conclusions must be rational, logical, and reasonable. Lawyers use this in developing a theory of the case and for developing persuasive arguments for particular conclusions. See C. S. Peirce, The Essential Peirce, Vol. II 106–07 (Peirce Edition Project ed., 1998) (discussing abduction, deduction, and induction); James Jakob Liska, A General Introduction to the Semeiotic of Charles Sanders Peirce 18, 64–68 (1996); Christopher Hookway, Peirce 30–32, 222–28 (1985).

[32] An important point here is one of not confusing the idea of a civil law system with the use of that term in distinguishing between civil and criminal law matters. The civil law tradition evolves directly out of Roman law and is organized in a way that differs from the common law that evolved in England. For a basic introduction to the common law, *see* Oliver Wendell Holmes, Jr., The Common Law (1991, originally published in 1881); Arthur R. Hogue, Origins of the Common Law (1966). For a basic introduction to the civil law, *see* John Henry Merryman & Rogelio Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America (4th ed., 2028); Alan Watson, The Making of the Civil Law (1981). As a general matter, common law legal systems operate in England and in her former colonies (e.g., United States, Canada, Australia); and civil law systems operate in the countries of continental Europe and the former colonies of the countries in this region (e.g., much of Spanish South America, and in places such as French-speaking parts of Africa). Examples of mixed legal systems include Louisiana in the United States, Quebec in Canada, and Scotland in the United Kingdom.

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tradition. Therefore, even though Smith was familiar with the common law system of England, he actually lectured in a mixed civil law jurisdiction. While the basic legal principles of property, contract, and justice are similar in both legal systems, it helps to have in mind that, structurally and theoretically, the common law tradition is different from that of the civil law. The civil law is generally more hierarchical with the legislative function and positive law having primacy, whereas the common law is much more decentralized and more focused on the activities of judges and lawyers. The civil law is also much more systematized than the common law. From a common law perspective, it is important to note that in his lectures on jurisprudence, some of Smith's classifications and categories of rights and obligations are organized and grounded in the civil rather than common law. Thus, reading Smith's lecture notes may be confusing if one is not familiar with the basic distinctions between the two systems and their respective terminologies. In writing this book, I have taken these distinctions into account in developing a generalizable theory of Smith's jurisprudence.

With this in mind, in the chapters that follow, I explain Adam Smith's theory of jurisprudence. It is my hope that this book will assist in bringing more attention to Smith's ideas about jurisprudence, and that it will facilitate renewed interest in discussing Smith's contributions to law.

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Setting the Stage

Adam Smith was a distinguished legal scholar and professor of jurisprudence.[1] He was a leading figure of the Scottish Enlightenment, a founding figure in the field that has come to be known as economics, and a significant contributor to the field of moral philosophy.[2] While many people have written about Smith's contributions to economics and to moral philosophy, few legal academics have undertaken a serious consideration of his work on law.[3] This may be because Smith never completed the book he planned to write on jurisprudence.[4] However, even without a completed book by Smith, there is certainly enough in Smith's writings to merit greater attention from legal scholars.

In the notes we have of Smith's *Lectures on Jurisprudence*, we know that Smith demonstrated mastery of a significant body of law, including elements of both the civil law and common law traditions.[5] Moreover, in his two major books, *The Theory*

[1] Discussing the Scottish Enlightenment goes beyond the scope of this book, but there are excellent materials that cover Smith in this context. *See* Charles L. Griswold, Jr., Adam Smith and the Virtues of Enlightenment (1995) (considered by many Smith scholars to be one of the best contemporary works on Smith and the Enlightenment). *See also* The Origins of the Scottish Enlightenment in Scotland (R. H. Campbell & Andrew S. Skinner eds., 1982); Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy (Neil MacCormick & Zenon Bankowski eds., 1989); Robin Paul Malloy, *Adam Smith's Conception of Individual Liberty*, *in* Law And Enlightenment in Britain 82 (Tom Campbell & Neil MacCormick eds., 1990); Phillipson (2010), *supra* ch. 1, note 3.

[2] See all sources in note 1. For an excellent book on Smith from the perspective of philosophy, see Schliesser (2017), *supra* ch. 1, note 21 (reviewed by Robin Paul Malloy in 27 European Journal of History of Economic Thought 467–68 (2020)).

[3] See Adam Smith and Law (Robin Paul Malloy ed., 2016) (this edited book includes some of the most important works addressing Adam Smith's views about law). Paganelli, Guide (2020) *supra* ch. 1, note 2.

[4] TMS 537 [TMS-G 341–42] (Smith discusses plans for a book on jurisprudence).

[5] *See* LOJ. This work actually consists of two sets of recovered student lecture notes taken by two separate students, each of whom attended Smith's lectures on jurisprudence in a different year, one in 1762–1763 and the other in 1766. *See also* Adam Smith and the Philosophy of Law

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of Moral Sentiments and *The Wealth of Nations*, Smith offered intermittent insights on a theory of jurisprudence and discussed the importance of justice to civil society. It is evident in Smith's available works that he understood that law co-evolved with economics, politics, and community values.[6] It is also clear that Smith believed justice was of critical importance to civil society and to the workings of an extensive, inclusive, and diverse market economy. Smith was working on a fully integrated theory of social organization, and his concern for the role of justice was evident in his life's work. Consequently, it seems important for understanding Smith the economist and moral philosopher that we also understand how Smith positioned law in his grand theory of social organization.

There is much to be considered when seeking to understand Smith's theory of jurisprudence. While Smith's writings provide significant guidance, there are also instances where the information we have is unclear or less than fully developed. In these situations, reasonable interpretive methods are used to connect more clearly the various elements of his work. Then, with a working theory of Adam Smith's jurisprudence, we can better understand his overall theory of social organization. Furthermore, we can draw some guidance for contemporary thinking about law and legal theory. In particular, a deeper understanding of Smith's views about jurisprudence can assist us in thinking about the central role of law in the development of a market economy.

First, however, we begin by setting the stage for our inquiry by providing a broad overview of Smith's integrated approach to understanding the forces of social organization and progress. This overview includes the positioning of law in Smith's generalizable theory. With the "big picture" in mind, we will then be better positioned to examine more closely the various elements of his theory.

To begin with, Adam Smith writes that law and government first arise to protect those with wealth from those with little or none.[7] Smith tells us that in the earliest stage of social development, when people were hunters and gatherers, there was little need for formal institutions of law and of government because there was very

AND ECONOMICS 31–61 (Robin Paul Malloy & Jerry Evensky eds., 1994). *See generally* John W. Cairns, *Adam Smith and the Role of the Courts in Securing Justice and Liberty*, *in* ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS 31, 31–61 (Robin Paul Malloy & Jerry Evensky eds., 1994); see also Ernest Metzger, *Adam Smith's Historical Jurisprudence and the Method of the Civilians*, 56 LOYOLA L. R. 1–31 (2010).

[6] LOJ 14, 129–32, 201–07, 209–70, 227–92, 404–20, 459–62; TWN Vol. I, 432–33; TWN, Vol. II, 231–44, 445. See also JERRY EVENSKY, ADAM SMITH'S MORAL PHILOSOPHY: A HISTORICAL AND CONTEMPORARY PERSPECTIVE ON MARKETS, LAW, ETHICS, AND CULTURE 59–84 (2005) (outlining the co-evolutionary progress explained by Smith in his various stages of progress).

[7] *See* Neil MacCormick, *Adam Smith on Law*, 15 VAL. U. L. REV. 243, 249–54 (1981); Peter Stein, *Adam Smith's Jurisprudence – Between Morality and Economics*, 64 CORNELL L. REV. 621, 627 (1979). Property rules are different from those related to person and reputation and are not natural rights because they are contextual in terms of time, place, culture, and the particular stage of development. *Id.*

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little opportunity for accumulation of wealth.[8] People were basically engaged in subsistence living. Moreover, the disputes that did arise at this stage of development could usually be handled within a small family or tribal group.[9] Gradually, however, people began to discover and create new ways of doing things and began to divide responsibility for basic chores among themselves. This allowed for increased productivity and created some opportunities for greater accumulation and some limited, yet useful, opportunities for exchange. When these gains were added to gains derived from plunder, the exercise of hierarchical power, and alike, some people were able to accumulate more wealth and resources than others.

The arising unequal accumulations and distribution of wealth within the community generated envy and an ongoing potential for civil unrest. The disparity in accumulated wealth became a source of increasing tension as society developed new resources and as communities became more extended in their relationships. There were always risks of losing one's accumulated assets to internal and external threats,[10] such as through theft or by plunder. This made a person's life prospects uncertain and risky. It was difficult to plan and invest in the future because the rewards for work were not secure.[11] It was under these circumstances that Smith said law and government first arose. They arose to maintain social order. In Smith's view, law and government evolved to protect, rationalize, and normalize unequal distributions of goods and resources; that is, to protect those with wealth from those with little or none.[12] In Smith's view, this function of law and of government was critical to the path of social progress through four stages of development that he identified as hunting, herding, agriculture, and commerce.[13]

Some contemporary legal theorists may react negatively to Smith's pragmatic assessment of the initial role and function of law and of government. They may think of his approach as unfair or unethical in its validation of social and economic hierarchy. Smith, however, constructed a narrative explaining that such concerns were unwarranted. He argued that unequal accumulations were the product of many factors, some of which reflected the differences in human abilities and preferences.[14] He also explained that the forces of progress worked to make life

[8] LOJ 14–37, 200–90, 401–37, 456–60; TWN, Vol. I, 231–44, 420–45; TWN, Vol. II, 231–44.
[9] *Surpa* same sources as note 8.
[10] Same sources as in note 8, *supra*. Law and justice are needed to protect property accumulation and trade. TWN, Vol. II, 231–44, 254–55, 445.
[11] LOJ 49–62 (uncertainty in enforcing contracts and trades), 89–92 (uncertainty in enforcing contracts), 521 (protecting the rewards of hard work).
[12] TWN, Vol. II, 231–44. *See* MacCormick (1981), Smith on Law, *supra* ch. 2, note 7; Stein (1979), *supra* note ch. 2, note 7.
[13] *See* TMS at 157–60, 166–72 [TMS-G 79-82, 85–90]; *see, e.g.*, Evensky (2005), *supra* ch. 2, note 6, at 20–23, 213–42 (2005). This is an excellent example of the contemporary approach to understanding Smith's work in light of a closer review of the history and the available literature. *See also* Adam Smith and Law (Robin Paul Malloy ed., 2017).
[14] LOJ 338, 489; TWN, Vol. I, 53–54.

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