

**PROFESSOR ADAM SMITH: HUMAN  
SENTIMENTS, MORAL IMAGINATION, AND  
JURISPRUDENCE**

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PROLOGUE

Here is a scene that happens more often than I care to admit:

1. Me, contracts professor turned Adam Smith enthusiast, speaking to a colleague, friend, or any willing listener: “Wow, Adam Smith is really cool. Did you know he taught Jurisprudence?”
2. Colleague/friend/willing listener: “Adam Smith? Isn’t he that ‘invisible hand’ guy?”
3. Me: “Well, yes, but ‘the invisible hand’ doesn’t mean what you think it means.” I explain, “it doesn’t mean selfishness. Instead, Smith’s invisible hand may represent unavoidable but unintended consequences, some of which are produced by self-interest, but Smith in no way endorsed greed. In fact, Smith believed that people aspire to be morally and ethically *worthy*, and that we sense moral and ethical guidance deep within our chests. In fact, one might paraphrase Bessel Van der Kolk here, and say that, for Smith, the heart ‘keeps the score.’”<sup>1</sup>
4. Colleague/friend/willing listener: “The human heart? Adam Smith? Wasn’t he an *economist*?<sup>2</sup> Hey, what’s for lunch?”

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1. BESSELVAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (2014).

2. Smith biographer and historian James Buchan observes that accounts of Smith’s life and legacy have been crabbed from the very start. James Buchan, *The Biography of Adam Smith*, in *ADAM SMITH: HIS LIFE, THOUGHT, AND LEGACY* 10–11 (Ryan Patrick Hanley ed., 2016). Buchan observes that Smith’s celebration of free trade in *THE WEALTH OF NATIONS* (WN), and of equality for all men in *THE THEORY OF MORAL SENTIMENT* (TMS), were a little too radical for contemporary ears following his death in the late 18th century. *Id.* Buchan asserts that because Smith had spent a good deal of time in France before the French Revolution, the earliest accounts of his work after his death (by Dugald Stewart, first published in 1795 and republished in 1811), were shaped by anxiety left over from the

## INTRODUCTION

How does one *know* justice? For a long time, philosophers looked to divinity for answers; during the Enlightenment, they turned to human reason. Adam Smith was one of those Enlightenment philosophers, asking: where does justice come from? How do we know it? What does justice require? He brought this concern with him into the classroom at the University of Glasgow, where he taught jurisprudence for twelve years.

Unlike his predecessors or anyone since, Adam Smith taught and wrote that justice resided in reason informed by the actual sensations people experience when they confront any question of right and wrong. Justice did not exist “out there;” instead, like any moral virtue, it arose directly out of human interaction and internal processing of those interactions.<sup>3</sup> Smith believed that we come to know what morality requires, including the moral requirement of justice, by sensation—we felt right and wrong “within the breast”—informed by reason.<sup>4</sup> This paper will show that Smith’s idea of justice, which I call a theory of moral imagination,<sup>5</sup> was not only unique at the time, but remains filled with promise even today.

For the uninitiated, Adam Smith was the Chair of Moral Philosophy at the University of Glasgow between 1752 and 1764.<sup>6</sup> His year-long moral philosophy course was divided into four parts, including religion, ethics, jurisprudence, and political economy.<sup>7</sup> He taught sentimentalist moral philosophy, a tradition likely unfamiliar to many readers today.<sup>8</sup> A sentimentalist believed that we felt—or

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Revolution. *Id.* Buchan writes: “For some time, little was added to Stewart’s [impooverished] account. The French Revolution cast a long shadow.” *Id.* at 11.

3. See ADAM SMITH, *THEORY OF MORAL SENTIMENTS* vii–viii (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759) (editor’s introduction) [hereinafter SMITH TMS].

4. See *id.* at 345.

5. I first learned the phrase “moral imagination” from Anthony Kronman, *The Socratic Method and the Development of the Moral Imagination*, 31 U. TOL. L. REV. 647, 650 (2000). So foundational is the (moral) imagination to Smith that it has received significant scholarly attention. For example, a thoughtful essay on Smith’s “theory of the imagination” is Charles L. Griswold, Jr., *Imagination: Morals, Science and Arts*, in *THE CAMBRIDGE COMPANION TO ADAM SMITH* 22–56 (Knud Haakonssen ed., 2006).

6. Buchan, *supra* note 2, at 48.

7. ADAM SMITH, *LECTURES ON JURISPRUDENCE* 3 (R.L. Meek, D.D. Rafael & P.G. Stein eds., Oxford Univ. Press 1978) (1763) (editors’ introduction) [hereinafter LOJ].

8. See, e.g., ANTTI KAUPPINEN, *MORAL SENTIMENTALISM*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2021) (§ 2 (Explanatory Sentimentalism), § 2.1

sensed—moral concepts before we processed them rationally.<sup>9</sup> Smith believed every person had this inner capacity<sup>10</sup> and that it developed in relationship with other social beings.<sup>11</sup> This is important to understand because Smith’s moral sentimentalism characterized not just his work on ethics but also his work on jurisprudence.<sup>12</sup>

Importantly, much of Smith’s published work tracks his lecture notes.<sup>13</sup> The first published volume—and, it turns out, the last, *The Theory of Moral Sentiments* (TMS)<sup>14</sup>—arose out of the ethics course. The second—or more accurately, the middle, *Wealth of Nations* (WN)<sup>15</sup>—arose out of both the jurisprudence and political economy

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(Moral Sense Theories, explaining Hutcheson), and § 2.2 Sympathy/Empathy-Based Theories (explaining Hume and Smith)); *see also* Stephen Darwall, *Sympathetic Liberalism: Recent Work on Adam Smith*, 28 PHIL. & PUB. AFFS. 139, 147 (1999).

9. *See, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 12 (D.D. Rafael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759) (Glasgow edition) [hereafter TMS-G] [hereinafter using TMS to refer to the pagination in the original version] (editors explaining that Smith “takes it for granted that moral rules are inductive generalizations and that moral concepts must arise in the first place from feeling”); *see also* JACK RUSSELL WEINSTEIN, ADAM SMITH’S PLURALISM: RATIONALITY, EDUCATION AND THE MORAL SENTIMENTS 12 (2013) (claiming that “[s]entiments, nature, imperfection, natural tendencies, and desires are all gateways to and modifications of rationality for Smith, and each of them is altered, cultivated, and identified through education and group identity, or so I argue in this book”).

10. *See, e.g.*, JAMES R. OTTESON, ADAM SMITH’S MARKETPLACE OF LIFE 199 (2002) (“Adam Smith thinks that human beings are born with a large package of instincts, abilities, desires, and propensities that are channeled or influenced, but not created, by their environment.”)

11. TMS-G, *supra* note 9, at 15 (editors’ introduction).

12. LOJ, *supra* note 7, at 4 (quoting Smith’s student John Millar) (for Smith, the term “[j]urisprudence” included both “that branch of morality which relates to justice” and “those political regulations which are founded, not upon the principle of justice, but that of political expediency.”) (emphasis in original); *see also* ROBIN PAUL MALLOY, LAW AND THE INVISIBLE HAND: A THEORY OF ADAM SMITH’S JURISPRUDENCE (2021) (providing a complete accounting or overarching theory of Smith’s work on law is outside the scope of this piece, but for a good and recent example of such an account).

13. *See* TMS-G, *supra* note 9, at 1 (introduction by the editors stating the original edition of TMS arose directly from Smith’s lecture notes); *see also* Gavin Kennedy, *Adam Smith and the Role of the Metaphor of an Invisible Hand*, 31 ECON. AFFS. 53, 54 (2011) (noting that “[i]n 1767, Smith was already re-writing his *Jurisprudence* lectures into what became WN nearly a decade later”); *see also* SMITH TMS, *supra* note 3, at x.

14. He first published TMS in 1759, but he revised it six times over his life, and with each revision published a new edition. SMITH TMS, *supra* note 3, at xxv. The sixth edition of TMS, published shortly before his death in 1790, was the last thing he published, making it the first and last of his published works. *Id.*

15. Smith published WN in 1776, in between the first and sixth editions of TMS. *Id.* at xxv–xxxvi.

courses. Smith had planned a third major work, on jurisprudence,<sup>16</sup> and there is every reason to believe that, like TMS and WN, this book would have tracked and elaborated on his lecture notes. But he did not complete it, and he ordered the manuscript burned before he died.<sup>17</sup> That said, student notes taken during the course have been published under Smith's name as *Lectures on Jurisprudence* (LOJ).<sup>18</sup> When LOJ is considered alongside TMS and WN, modern Smith scholars agree: contrary to outdated ideas, Smith's work fits together as a coherent though incomplete intellectual project.<sup>19</sup>

My interest is in one particular slice of that project: how Smith's teaching on jurisprudence arose directly out of his teaching of ethics and morality.<sup>20</sup> My core thesis is that, for Smith, as with social life and

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16. He "promised" this volume in the introduction (called an "advertisement") to the sixth and last edition of TMS (1790), though at the time, he recognized that his "advancing age" made it unlikely that he would deliver on that promise. *Id.* at 3–4. To see the full text of the "advertisement," *see id.* at 4.

17. *See* SMITH TMS, *supra* note 3, at xxiii.

18. *See generally* LOJ, *supra* note 7. Two other published texts bear Smith's name: one is a manuscript he expressly permitted to be published posthumously, ADAM SMITH, *ESSAYS ON PHILOSOPHICAL SUBJECTS* (W.D.P. Wightman & J. C. Bryce eds., 1980) (1795), and another set of lecture notes, ADAM SMITH, *LECTURES ON RHETORIC AND BELLES LETTRES* (J. C. Bryce & A. S. Skinner eds., 1983) (1783) which were not found and published until the mid-twentieth century. *See* Buchan, *supra* note 2, at 13.

19. In short, there is no "Adam Smith problem." *See, e.g.,* Nava Ashraf et al., *Adam Smith, Behavioral Economist*, 19 J. ECON. PERSPS. 131, 131 n.1 (2005) ("A long-standing dispute has raged over whether Adam Smith's view of human motivation as expressed in *The Theory of Moral Sentiments* complements or contradicts the view of human motivation expressed in *The Wealth of Nations*. Although much has been written about 'das Adam Smith problem' of reconciling these texts, most modern Smith scholarship asserts that there is no essential contradiction between the texts."); *see also* Peter Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, 64 CORNELL L. REV. 621, 622 (1979) ("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. *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.").

20. Other commentators have shown the overlap in Smith's thinking between the subjects of ethics, law, and government. *See, e.g.,* ATHOL FITZGIBBONS, *ADAM SMITH'S SYSTEM OF LIBERTY, WEALTH, AND VIRTUE* 14 (1995) (noting that, with respect to his work on law and jurisprudence, "Smith believed he could resolve the conflict between morals and material goods by discovering the scientific laws that regulated society and morals. *The Theory of Moral Sentiments* and the *Lectures on Jurisprudence* therefore analysed the cultural and political codes that would be required by a durable, but liberal, political state; and *The Wealth of Nations* was originally a part of *Lectures on Jurisprudence*. Smith would argue that there only

ethics, so too with legal life and justice: all involved the working of the moral imagination. Understanding this is important: it helps clear up common misunderstandings about Smith himself, and it introduces a new way of thinking about contemporary questions of jurisprudence.

One of Smith's most famous metaphors, the impartial spectator, helps illustrate the workings of the moral imagination. As will be fully explained *infra*, the impartial spectator is the internalized moral judge of self and others; she is the metaphorical embodiment of the moral imagination.<sup>21</sup> In the LOJ, Smith turned to the impartial spectator to identify both the origin and scope of contested private law rights in property and contract (examples of what Smith called "laws of justice"<sup>22</sup>). Smith thought about these rights in a way that transcended the then-current theories, such as contractarianism and utilitarianism, theories which still predominate today. As we will see, Smith's original thinking is as applicable to private law questions today as it was then.<sup>23</sup> For a taste of this relevance, and because contract law is my field, I will apply Smith's thinking to the objective theory of contract formation via the well-known case of *Lucy v. Zehmer*.<sup>24</sup>

Smith also taught public policy as a part of jurisprudence. That section of the course was expansive, covering not just the roles of government and regulation, but also commercial society (loosely called "laws of police"<sup>25</sup>). While Smith did not explicitly invoke the impartial spectator in that part of the course, the influence of the moral imagination is unmistakable. Over three consecutive days of lectures, Smith set out a veritable hit parade of economic and public policy ideas which would later come to define his legacy, including the division of labor, the disposition to "truck, barter, and exchange," and

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appeared to be a conflict between morals and wealth, and that it was possible to synthesize the seeming contraries within a better system of jurisprudence.").

21. See *infra* Part II.

22. That category included various laws of property, contract, and some tort law; criminal and family law; and procedural and jurisdictional rules. Knud Haakonssen includes a survey of Smith's treatment of all of the laws of justice in the chapter called "Analytical Jurisprudence". KNUD HAAKONSSSEN, THE SCIENCE OF A LEGISLATOR 99–134 (1981).

23. See *infra* Part III.

24. *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

25. See LOJ, *supra* note 7, at 4. Laws of police were one of three divisions of what Smith's student John Millar called "laws of expediency." *Id.* "Laws of expediency" included law and policy related to Defense, Police and International Trade. *Id.* In this paper my argument will concern the "laws of police," which to Smith meant "promoting the opulence of the state. . . . Whatever regulations are made with respect to trade, commerce, agriculture manufactures of the country are considered as belonging to the police." *Id.* at 5.

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Professor Adam Smith

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the consumer's appeal to the "butcher, brewer and the baker."<sup>26</sup> What is new here is seeing how the moral imagination influenced these ideas.<sup>27</sup> Seeing this influence is important today because it shows, contrary to popular misunderstandings, that Smith did not believe in the division of labor and commercial society for purely instrumental purposes, like efficiency or wealth maximization. Instead, he believed in them because they best facilitated the uniquely human moral sentiment of justice. Make no mistake: instrumental benefits of law and policy were highly desirable to Smith, but they were not the reason for his ideas. This is both a critical correction of Smith's legacy and a new way of thinking about current questions of law, regulation, and public policy.

Before I begin, a note about my own process: I spend a good deal of time quoting Smith's original text, and, as much as I can, I keep to the order in which Smith wrote it. I do this to avoid some of the misunderstandings of Smith that come from overly summarizing and cherry-picking his work. I also hope to show how his points built on each other, one after the other, which helps illuminate new connections between the various pieces of his life-long intellectual project.

Thus, the paper will proceed as follows. In Part II, I start with Smith the ethics professor who, as part of his account of human conscience, introduced the morally imaginative impartial spectator.<sup>28</sup> In Part III, I introduce Smith the law professor, and show that his thoughts about justice, including the origin of contestable private law rights in property and contract, are determined by the moral imagination. In Part IV, I stay with the law professor but turn to his lectures on public policy and show how Smith's moral imagination shaped his thinking about the purpose of government and the promise of individuals and of markets. In Part V, I offer some concluding thoughts, including observations about the challenges and relevance of Smith's thought today.

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26. *Id.* at 348. Multiple commentators have observed how misunderstanding of this particular example in Smith leads to misunderstanding of his entire projects. See, e.g., WEINSTEIN, *supra* note 9, at 3; see also SAMUEL FLEISCHACKER, ON ADAM SMITH'S WEALTH OF NATIONS 91 (2004).

27. See *infra* Part IV.

28. See, e.g., FLEISCHACKER, *supra* note 26, at 46 ("[Smith] develops the notion of the impartial spectator in far more detail than either of his predecessors [Frances Hutcheson and David Hume], showing how the feelings that ought to motivate us and the feelings by which we judge others' sentiments intimately depend upon one another, and how both arise from an imaginative projection we make into the situation of other people.").

## I. FOUR PILLARS OF THE MORAL IMAGINATION

When teaching jurisprudence, Smith explicitly referred back to lessons he had already taught his students in the ethics portion of the course. Thus, Smith taught jurisprudence as if it depended on the ethics lectures he had previously given. Using TMS as our guide, then, this Part will highlight four foundational pillars of Smith's ethics, pillars which *also* directly support key points made in the lectures on jurisprudence.

In TMS, Smith set out a new account of the nature of moral judgment. It begins with the fact that we are social animals.<sup>29</sup> Because we are social, we are inherently motivated by a desire for social approval, which we are always both seeking and rendering through a psychological mechanism Smith called "sympathy" (Part A). Being approved of is one thing, but earning it is another. Smith knew earning approval was hard work, and that some of us would seek it for the wrong reasons, like vanity (Part B). But as we could all go astray, we were all equally capable of developing an inner moral conscience, called the "impartial spectator," which we felt in the chest,<sup>30</sup> to keep us on track (Part C). Of course sometimes we deceive ourselves and need an externally-sourced backstop: hence the emergence of general rules of conduct (Part D). Each of these four pillars supports the foundation of Smith's jurisprudence.

*A. The Start: We Are Inherently Other-Regarding*

To Smith, the moral imagination begins where we do: as interconnected members of society.<sup>31</sup> In society, Smith observed, we can be selfish, but we can also be selfless, and even downright other-regarding.<sup>32</sup> In fact, he opened TMS by pointing out this double feature of human nature.

How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune

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29. That we are social animals undergirds his entire body of work. *See, e.g.*, MALLOY, *supra* note 12, at 3 (describing Smith as "a thoughtful scholar with an integrated theory of social organization").

30. TMS-G, *supra* note 9, at 130–31 (TMS III.ii.32–33) ("But though man has, in this manner, been rendered the immediate judge of mankind, he has been rendered so only in the first instance; and an appeal lies from his sentence to a much higher tribunal, to the tribunal of their own consciences, to that of the supposed impartial and well-informed spectator, to that of the man within the breast, the great judge and arbiter of their conduct.").

31. *See* OTTESON, *supra* note 10, at 16.

32. FLEISCHACKER, *supra* note 26, at 91.



of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. . . . The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.<sup>33</sup>

Thus, Smith observed that sometimes we are made happy by others' happiness.<sup>34</sup> But what accounts for the "sometimes"—why sometimes, and not others? The answer turns on whether the other's happiness seems appropriate to the circumstances, and that assessment is one Smith called "propriety." Propriety is a judgment, though a social one.<sup>35</sup> As such, it is a foundational building block for ethical judgment, and as we'll see later, for legal judgment as well.

Here's how it works. First, we imagine ourselves in another's shoes: "[a]s we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation."<sup>36</sup> Because we are imagining in order to make a judgment—*should* I feel happy because of what this person is feeling?—this process is not just empathy; instead, it is an exercise of the moral imagination. It is moral because it involves an assessment about propriety, and it requires imagination to place ourselves in someone else's shoes.

The immediate result of this imagining is a sensation of either pleasure or displeasure. Smith said we take great pleasure if, when we imagine ourselves in their shoes, we find we feel what they are feeling.<sup>37</sup> Smith labeled this correspondence of emotions as

33. TMS-G, *supra* note 9, at 9 (TMS I.i.1.1).

34. TMS-G, *supra* note 9, at 11 (TMS I.i.1.6). Interestingly to anyone who practices mindfulness, the concept Smith identifies here at the opening of TMS, that we are made happy simply by watching another experience joy—even though there is nothing else in it for us—is one of the four "brahma viharas," or "divine abodes," in Buddhism: it is sympathetic joy, or "mudita." Barbara O'Brien, *Mudita: The Buddhist Practice of Sympathetic Joy*, LEARN RELIGIONS (Aug. 25, 2018), <https://www.learnreligions.com/mudita-sympathetic-joy-449704>.

35. See GLORIA VIVENZA, ADAM SMITH AND THE CLASSICS: THE CLASSICAL HERITAGE IN ADAM SMITH'S THOUGHT 42–43 (Clive Cheesman & Nicola Gelder trans., 2001) (stating that Smith's entire notion of moral judgment is not based on some substantive value, like autonomy or utility, but instead, on the [Aristotelian] concept of *propriety*: praise or blameworthiness depends on what is "proper or fitting in the circumstances") ("[A]ction and the passion that gives rise to the action.").

36. TMS-G, *supra* note 9, at 9 (TMS I.i.1.2) This includes having knowledge of the situation the other person is in, so we are not just taking in their reaction, we also know why they are having the reaction; "[s]ympathy . . . does not arise so much from the view of the passion as from that of the situation which excites it." *Id.* at 12 (TMS I.i.1.10).

37. *Id.* at 13 (TMS I.i.1.13).

“sympathy” or “fellow-feeling.”<sup>38</sup> He said it means that we think the other’s response is *appropriate* to the situation, and that we necessarily *approve* of their reaction; by contrast, when we imagine ourselves in another’s shoes and we do not feel what they do, then we find their response not appropriate to the situation, and consequently, we disapprove of their reaction.<sup>39</sup> As such, for Smith, judgment is an exercise *of* the moral imagination.

Ultimately, emotional concordance is what we desire.<sup>40</sup> Smith observed: “nothing pleases us more than to observe in other men a fellow-feeling with all the emotions of our own breast; nor are we ever so much shocked as by the appearance of the contrary.”<sup>41</sup> We desire this concordance so much—precisely because we are social animals—that we are shocked when we realize others do not feel the same thing. In that situation, we feel alienated: “we can no longer converse upon these subjects. We become intolerable to one another. I can neither support your company, nor you mine. You are confounded at my violence and passion, and I am enraged at your cold insensibility and want of feeling.”<sup>42</sup>

Smith observed that the ever-present potential for this conflict causes us to constantly imagine what a third party—a “spectator”—might think, and to try to conform our reactions and behavior to what the spectator would expect and approve.<sup>43</sup> To meet that standard, we must “restrain our selfish, and . . . indulge our benevolent

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38. *Id.* at 10 (TMS I.i.1.5).

39. *See id.* at 16–17 (TMS I.i.3.1–2) (noting that our judgment of appropriateness is a conclusion about the propriety of other’s reaction); *see, e.g.*, TMS-G, *supra* note 9, at 9–66 (Part I, Of the Propriety of Action).

40. Smith scholar, Knud Haakonssen, refers to the process by which we adjust our behavior to meet the moral expectations of the impartial spectator as a “selection of behavior through mutual sympathy.” HAAKONSSSEN, *supra* note 22, at 60. Haakonssen also observed that, to Smith, people “in *general* search for ‘the natural propriety of action,’” which is distinguished from the “social” propriety, and that this search is what leads to general rules of morality that transcend social customs. *Id.*

41. TMS-G, *supra* note 9, at 13 (TMS I.i.2.1); *see generally* L. Lynne Kiesling, *Mirror Neuron Research and Adam Smith’s Concept of Sympathy: Three Points of Correspondence*, REV. OF AUSTRAL. ECON. (2012) (today we might call this “being mirrored”); *see generally* Darwall, *supra* note 8, at 144–47 (the physicality in this passage shows the physical aspect of “sentimentalism”); *see also* D. D. RAPHAEL, THE IMPARTIAL SPECTATOR: ADAM SMITH’S MORAL PHILOSOPHY 27, 31 (2007); *see also* MALLOY, *supra* note 12, at 82 (Smith scholar, Robin Paul Malloy, labels the correspondence of feeling as a critical ingredient of what he calls the “common interest.”)

42. TMS-G, *supra* note 9, at 21 (TMS I.i.4.5).

43. *Id.* at 22 (TMS I.i.4.8).

affections.”<sup>44</sup> If we get that right, we feel a “harmony of sentiments,” which Smith called propriety.<sup>45</sup>

In modern day terms: we are social animals, and as such, we are inherently other-regarding. We are motivated to avoid conflict and win approval by adjusting our actions to what a neutral but fully informed third party would find appropriate. So we work on ourselves to make ourselves pleasing to others. That work begins with imagining whether a Smithean “spectator” would sympathize with—i.e., share—our feelings. If not, some adjustment is in order.

*B. Where We Go Wrong: Wanting Approval for the Wrong Reasons*

About human nature, Smith was clear-eyed. He observed that it is much more comfortable, and so easier, to sympathize with another’s joy than with another’s sorrow.<sup>46</sup> He said think about how happy you are at a friend’s wedding, and how uncomfortable you are at that same friend’s father’s funeral.<sup>47</sup> In fact, almost predicting the psychology of modern social media, Smith said: “[i]t is because mankind are disposed to sympathize more entirely with our joy than with our sorrow, that we make a parade of our riches, and conceal our poverty.”<sup>48</sup> In other words, because it will make us easier to like, we would like to look rich, because that suggests that we are joyful. We would rather not look like we are in poverty, because that will suggest that we are miserable, which will in turn make others want to keep their distance.<sup>49</sup>

Critically, Smith named this desire as “ambition,” and, in what may sound shocking, identified an element of self-delusion in it, asking: what is all that ambition for?<sup>50</sup> He observed that in fact we do not need a lot of money to be happy and comfortable.<sup>51</sup> We do need some money, of course, and that need is an important driver of both individual motivation and thus social progress, but it has its limits.<sup>52</sup>

44. *Id.* at 25 (TMS I.i.5.5).

45. *Id.*

46. *Id.* at 45–46 (TMS I.iii.1.9) (“It is agreeable to sympathize with joy; and wherever envy does not oppose it, our heart abandons itself with satisfaction to the highest transports of that delightful sentiment. But it is painful to go along with grief, and we always enter into it with reluctance.”).

47. TMS-G, *supra* note 9, at 47 (TMS I.iii.1.11–12).

48. *Id.* at 50 (TMS I.iii.2.1).

49. See FLEISCHACKER, *supra* note 26, at 115 (making a similar observation).

50. See TMS-G, *supra* note 9, at 50 (TMS I.iii.2.1).

51. *See id.*

52. See Fleischacker points out that the problem Smith identified was not striving to “better one’s condition” *per se* but instead delusional striving for a level

Importantly, the potential for self-delusion inherent in ambition will resurface later when Smith turns to the topic of limited government.

For now, it is worth quoting the passage at length, surprising to modern readers as it will likely be. Smith thought ambition was at least in part based on vanity, and vanity is inherently delusional.

[I]t is chiefly from this regard to the sentiments of mankind, that we pursue riches and avoid poverty. For to what purpose is all the toil and bustle of this world? [W]hat is the end of avarice and ambition, of the pursuit of wealth, of power, and preheminance? Is it to supply the necessities of nature? The wages of the meanest labourer can supply them. We see that they afford him food and clothing, the comfort of a house, and of a family. . . . What then is the cause of our aversion to his situation, and why should those who have been educated in the higher ranks of life, regard it as worse than death, to be reduced to live, even without labour, upon the same simple fare with him, to dwell under the same lowly roof, and to be clothed in the same humble attire? Do they imagine that their stomach is better, or their sleep sounder in a palace than in a cottage? The contrary has been so often observed, and, indeed, is so very obvious, though it had never been observed, that there is nobody ignorant of it. From whence, then, arises that emulation which runs through all the different ranks of men, and what are the advantages which we propose by that great purpose of human life which we call bettering our condition? To be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation, are all the advantages which we can propose to derive from it. It is the vanity, not the ease, or the pleasure, which interests us. But vanity is always founded upon the belief of our being the object of attention and approbation.<sup>53</sup>

As much as he laments this aspect of ambition (call it ambition's dark side), he also knew that it is seductive.<sup>54</sup> Only the wisest among

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of wealth that was ostentatious, unattainable, and utterly superfluous. FLEISCHACKER, *supra* note 26, at 105–06 (describing the “fantastically ambitious boy,” the problem being “fantastically,” not “ambitious”).

53. TMS-G, *supra* note 9, at 50 (TMS I.iii.2.1).

54. *See id.* at 51–52 (TMS I.iii.2.2) (“When we consider the condition of the great, in those delusive colours in which the imagination is apt to paint it, it seems to be almost the abstract idea of a perfect and happy state. It is the very state which, in all our waking dreams and idle reveries, we had sketched to ourselves as the final object of all our desires. We feel, therefore, a peculiar sympathy with the satisfaction of those who are in it. We favor all their inclinations, and forward all their wishes.”).

us—and, perhaps paradoxically, the worst off—can resist the pull.<sup>55</sup> But he was clear: this delusional admiration of what appears to represent success and happiness—the desire for wealth and attention out of proportion to our needs—is the great and most universal cause of the corruption of our moral sentiments.”<sup>56</sup>

Importantly, note that the desire for approbation is not the problem, the desire for approbation *for the wrong reasons* is the problem.

We desire both to be respectable and to be respected. We dread both to be contemptible and to be condemned. But, upon coming into the world, we soon find that wisdom and virtue are by no means the sole objects of respect; nor vice and folly, of contempt. . . . To deserve, to acquire, and to enjoy the respect and admiration of mankind, are the great objects of ambition and emulation. Two different roads are presented to us, equally leading to the attainment of this so much desired object; the one, by the study of wisdom and the practice of virtue; the other, by the acquisition of wealth and greatness. Two different characters are presented to our emulation; the one, of proud ambition and ostentatious avidity; the other, of humble modesty and equitable justice. . . . They are the wise and the virtuous chiefly, a select, though, I am afraid, but a small party, who are the real and steady admirers of wisdom and virtue. The great mob of mankind are the admirers and worshippers . . . of wealth and greatness.<sup>57</sup>

That so many of us go astray is important because, as will be shown *infra*, Smith worried that lawmakers were susceptible to “ambition” and “avidity,” and he worried, therefore, about their motives, expertise, and loyalty to the public interest. This, we will see, undergirds one of Smith’s greatest concerns about government.

But of course some do choose the path of wisdom and virtue. What do they do differently? How do any of us check ourselves, keep ourselves on the better path? To see ourselves clearly, Smith thought

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55. *Id.* at 57 (TMS I.iii.2.8) (Smith says, again invoking the psychology of modern social media: “But rank, distinction pre-eminence, no man despises, unless he is either raised very much above, or sunk very much below, the ordinary standard of human nature; unless he is either so confirmed in wisdom and real philosophy, as to be satisfied that, while the propriety of his conduct renders him the just object of approbation, it is of little consequence though he be neither attended to, no approved of; or so habituated to the idea of his own meanness, so sunk in slothful and sottish indifference, as entirely to have forgot the desire, and almost the very wish, for superiority.”).

56. *Id.* at 61–62 (TMS I.iii.3.1).

57. *Id.* at 62 (TMS I.iii.3.2).

that we have to imagine ourselves from the perspective of not just another person, of any old spectator—and not an uninformed but “objective” one, such as “behind a veil of ignorance”—but of a special one: an impartial, fully informed, *idealized* other.<sup>58</sup> This is the impartial spectator.

*C. Our Defense Against Corruption: Development of the Moral Conscience*

Thus we have seen that in the search for social approval we can go wrong. To what then do we appeal for guidance? Is there any higher authority? Smith thought there was, in fact, and it was the job of the impartial spectator to reveal it to us.<sup>59</sup>

Smith began his account leading to the introduction of the impartial spectator by observing that it is hard to see ourselves clearly. We are too close to see ourselves as the spectator, who usefully assists us in judging *others*, would see us. So, we need distance.

We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. . . . We endeavour to examine our own conduct as we imagine any other fair and impartial spectator would examine it. If, upon placing ourselves in his situation, we thoroughly enter into all the passions and motives which influenced it, we approve of it, by sympathy with the approbation of this supposed equitable judge. If otherwise, we enter into his disapprobation, and condemn it.<sup>60</sup>

We need some help; we need a mirror. Smith refers to this as a “looking-glass” through which we can, “as much as possible . . . view

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58. See, e.g., MALLOY, *supra* note 12, at 30–35 (discussing the impartial spectator).

59. See, e.g., RAPHAEL, *supra* note 41, at 31 (Smith added the “impartial” to the pre-existing idea of a third party observer in order to explain the process by which, to judge *oneself*, one had to assume the point of view of a spectator regarding one’s own actions (hence, the “impartial spectator”); Smith also extended the idea of sympathy with the reaction of a person who had been affected by an agent’s action to *sympathy with the motives of the agent herself*.); see also CHRISTEL FRICKE, *Adam Smith: The Sympathetic Process*, in THE OXFORD HANDBOOK OF ADAM SMITH 176, 185–86 (Christopher J. Berry et al. eds., 2013) (The impartial spectator allows us to apply the process of sympathetic imagination to ourselves, essentially, to, as ourselves, step outside of ourselves and look back at ourselves to determine what is the right thing to do.).

60. TMS-G, *supra* note 9, at 110 (TMS III.1.2).

ourselves at the distance and with the eyes of other people.”<sup>61</sup> This is the “man in the mirror.”<sup>62</sup> To achieve this distance we divide ourselves into two.

When I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined into and judged of.<sup>63</sup>

We thus become our own judge, internally, who is hard (though not impossible) for the external part of ourselves to deceive. What are we judging in ourselves? This turns out to be critical, not just to Smith’s ethics, but to his thinking about law and public policy as well: Smith thought we are assessing how much we *deserve* any social approbation we receive. As we will see in Part IV of the paper, Smith believed an important part of the state’s responsibility to its citizens was to create the conditions where we could each “earn our keep.”<sup>64</sup> Why? Because we needed to know that we deserve what we have; that we have earned it ourselves. That is just human nature, Smith thought.

In fact, Smith thought, like the ancient Greeks,<sup>65</sup> that we could not be truly happy unless we were confident in our own worth: “Man naturally desires, not only to be loved, but to be lovely; or to be that thing which is the natural and proper object of love . . . [h]e desires, not only praise, but praiseworthiness; or to be . . . the natural and proper object of praise.”<sup>66</sup> We do not want just to be loved, we want to be *lovely*; we do not desire just praise, we desire *praiseworthiness*.

61. *Id.* at 112 (TMS III.I.4).

62. MALLOY, *supra* note 12, at 27–29.

63. TMS-G, *supra* note 9, at 113 (TMS III.i.6).

64. *Infra* Part IV.

65. According to Hanley, Smith advocated for a “consciously ‘classical’ approach” to virtue ethics. RYAN PATRICK HANLEY, ADAM SMITH AND THE CHARACTER OF VIRTUE 78 (2009); *see also* Deirdre McCloskey, *Adam Smith, The Last of the Former Virtue Ethicists*, 40 HIST. POL. ECON. 43, 52 (2008) (“Smith’s main contribution to ethical theory in his own estimation was the notion of the impartial spectator. . . . Though well expressed, it was a routine piece of virtue ethics.”).

66. TMS-G, *supra* note 9, at 113–14 (TMS III.2.1). To make it very clear, he spells out what it means to desire praiseworthiness, and how that differs from desiring praise: “[t]he love of praise is the desire of obtaining the favourable sentiments of our brethren. The love of praiseworthiness is the desire of rendering ourselves the proper objects of those sentiments.” *Id.* at 126 (TMS III.2.25); *see also id.* at 41 (TMS I.ii.5.1) (“If the chief part of human happiness arises from the consciousness of being beloved, as I believe it does.”).

Importantly, to “be lovely,” we have to answer that inner judge who will tell us how we are doing. Whatever we do in life—work, play, exchange, pursue attention, approbation, or wealth—we cannot escape the desire to know we have earned what good we attain.<sup>67</sup> And that inner judge, the one “within,” knows.

The jurisdiction of the man within, is founded altogether in the desire of praise-worthiness, and in the aversion to blame-worthiness; in the desire of possessing those qualities, and performing those actions, which we love and admire in other people; and in the dread of possessing those qualities, and performing those actions, which we hate and despise in other people.<sup>68</sup>

Because the impartial spectator is a part of us, not some external authority or incentive, it is a stronger motivation than any external one.<sup>69</sup>

It is not the soft power of humanity, it is not that feeble spark of benevolence which Nature has lighted up in the human heart, that is thus capable of counteracting the strongest impulse of self-love. It is a stronger power, a more forcible motive, which exerts itself upon such occasions. It is reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct.<sup>70</sup>

Note that in this passage Smith brought up self-love, which is related to self-interest. Self-interest is an often-misunderstood concept in Smith’s writing. Self-love is not inherently bad or good, it just *is*, and like anything else, it can be misused. About its misuse, Smith is clear: he knew that it was easier to do the “right thing” when we could get out of our own way.<sup>71</sup> To this point, Smith thought that the impartial spectator teaches us not to think so highly of ourselves—shows us that we are not so different from anyone else. This is critical because it introduces Smith’s egalitarianism, which will be important to his thinking about jurisprudence.

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67. See PATRICIA HOGUE WERTHANE, ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM (1991); Christel Fricke, *Adam Smith: The Sympathetic Process and The Origin and Function of Conscience*, in THE OXFORD HANDBOOK OF ADAM SMITH 177, 193 (Christopher J. Berry, et al. eds. 2013) (“By acquiring conscience people finally understand what virtue would consist in, and they are motivated to become virtuous—even though human vanity and pride represent common weaknesses that can discourage people from taking the path to virtue.”)

68. TMS-G, *supra* note 9, at 131 (TMS III.2.32).

69. See RAPHAEL, *supra* note 41, at 35–36.

70. TMS-G, *supra* note 9, at 137 (TMS III.3.4).

71. See *id.*



It is from him [the impartial spectator] only that we learn the real littleness of ourselves, and of whatever relates to ourselves, and the natural misrepresentations of self-love can be corrected only by the eye of this impartial spectator. . . . It is not the love of our neighbour, it is not the love of mankind, which upon many occasions prompts us to the practice of those divine virtues. It is a stronger love, a more powerful affection, which generally places place upon such occasions; the love of what is honourable and noble, of the grandeur, and dignity, and superiority of our own characters.<sup>72</sup>

Thus, at this point in the course on ethics, Smith had shown his students the following: moral judgment is first sensed and then considered rationally from the perspective of a neutral third party, a fully-informed “spectator.” Moral judgment differs from social judgment because it is a higher authority; it comes from the inner impartial spectator, or the “man in the mirror.”<sup>73</sup> He had also taught that happiness<sup>74</sup> does not come from material wealth, but from moral and ethical worth, and he had undertaken to show that people are inherently—not externally—motivated to earn this sense of worthiness. Finally, he showed that “worthiness” includes understanding our basic equality with all others. These themes in Smith’s teaching on ethics will resurface in his teaching on jurisprudence.

#### *D. The Last Step: From Moral Conscience to General Rules*

We saw earlier that to Smith, self-interest was neither good nor bad; it was a natural force of human nature that could lead us to do well or poorly. When self-interest caused us to take care of ourselves, we did well. But it could also lead us astray, by causing us to get overly focused on ourselves. Smith thought too much time alone could have that effect: alone, we tend to over-privilege ourselves. Then we need to be “woken up” by something outside of ourselves entirely.

In solitude, we are apt to feel too strongly whatever relates to ourselves: we are apt to over-rate the good offices we may have done, and the injuries we may have suffered: we are apt to be

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72. *Id.* The notion of our own “littleness” here caused Smith scholar Samuel Fleischacker’s remark that in this passage, Smith linked impartiality with equality, a connection I am grateful to have been shown. FLEISCHACKER, *supra* note 26, at 73.

73. I am grateful to Professor Malloy for reminding me of this distinction.

74. A good discussion of Smith and happiness is Dennis C. Rasmussen, *Does “Bettering Our Condition” Really Make Us Better Off? Adam Smith on Progress and Happiness*, 100 AM. POL. SCI. REV. 309, 309 (2006).

too much elated by our own good, and too much dejected by our own bad fortune. The conversation of a friend brings us to a better, that of a stranger to a still better temper. The man within the breast, the abstract and ideal spectator of our sentiments and conduct, requires often to be awakened and put in mind of his duty, by presence of the real spectator: and it is always from that spectator, from whom we can expect the least sympathy and indulgence, that we are likely to learn the most complete lesson of [the virtue of] self-command.<sup>75</sup>

Smith took very seriously the problem of being too close to oneself to see and judge clearly. He thought it led to “self-deceit,” which was a socially threatening phenomenon.

This self-deceit, this fatal weakness of mankind, is the source of half the disorders of human life. If we saw ourselves in the light in which others see us, or in which they would see us if they knew all, a reformation would generally be unavoidable. We could not otherwise endure the sight.<sup>76</sup>

Thus, because we are human and fallible, and thus subject to self-deceit, we need a back-up. That back up is our natural and inherent desire to avoid, at the very least, being seen like the worst among us. Even if we cannot see ourselves clearly, we can watch what others do, and we pay attention to how others respond.

Nature, however, has not left this weakness, which is of so much importance, altogether without a remedy; nor has she abandoned us entirely to the delusions 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 to be done or to be avoided.<sup>77</sup>

So, when someone behaves shockingly badly, and everyone around that person condemns them for it, we “naturally lay down to ourselves a general rule, that all such actions are to be avoided, as tending to render us odious, contemptible, or punishable.”<sup>78</sup>

Over time, the aggregation of these individual general rules creates more universal general rules.

It is thus that the general rules of morality are formed. They are ultimately formed upon experience of what, in particular instances, our moral faculties, our natural sense of merit and

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75. TMS-G, *supra* note 9, at 153–4 (TMS III.3.38).

76. *Id.* at 158–59 (TMS III.4.6).

77. *Id.* at 159 (TMS III.4.7).

78. *Id.* (TMS III.4.7).

propriety, approve, or disapprove of. We do not originally approve or condemn particular actions; because, upon examination, they appear to be agreeable or inconsistent with a certain general rule. The general rule, on the contrary, is formed, by finding from experience, that all actions of a certain kind, or circumstanced in a certain manner, are approved or disapproved of. To the man who first saw an inhuman murder . . . [h]is detestation of this crime, it is evident, would arise instantaneously . . . [t]he general rule . . . which he might afterwards form, would be founded on a detestation which he felt necessarily arise in his own breast, at the thought of this, and every other particular action of the same kind.<sup>79</sup>

Thus, Smith observed that general rules are derived naturally from an accumulated experience of particulars.<sup>80</sup> These general rules become somewhat objective standards.<sup>81</sup> This is important because as he previewed here (referencing murder), Smith thought legal rules arose the same way. It is also important because Smith believed that general rules were both teachable and learnable, and that such an education was critical to the social fabric of the community.<sup>82</sup> Later, Smith would argue strongly in favor of the state providing universal public education.<sup>83</sup>

The rest of this paper will now also turn toward the law, justice and the state, and show how the same moral imagination that undergirded Smith's ideas about social and ethical life permeated his teaching about law and political life.

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79. *Id.* at 159–60 (TMS III.4.8); *see also id.* at 160 (TMS III.4.12) (general rules are good at correcting misrepresentations of self-love).

80. *See* HAAKONSSON, *supra* note 22, at 62; *see also* FLEISCHACKER, *supra* note 26, at 28–29 (observing that “universal” to Smith doesn’t require absolute universality; instead, because of his social-scientific method, the “universal” can co-exist with some exceptions and still retain its quality of being universal, or “natural”).

81. *See* OTTESON, *supra* note 10, at 199.

82. TMS-G, *supra* note 9, at 161–63 (TMS III.5.1-2) (observing the difference in behavior between those “virtuously educated” and not, and stating that everyone can be so educated: “[t]here is scarce any man, however, who by discipline, education, and example, may not be so impressed with a regard to general rules, as to act upon almost every occasion with tolerable decency, and through the whole of his life to avoid any considerable degree of blame. Without this sacred regard to general rules, there is no man whose conduct can much be depended upon.”).

83. *See, e.g.,* WEINSTEIN, *supra* note 9, at 69.

### III. MORAL IMAGINATION IN LAW: THE VIRTUE OF JUSTICE

Recall that Smith taught a year-long course in moral philosophy, including sections on ethics, jurisprudence, and political economy. To Smith justice was critical: without justice, a state could not survive.<sup>84</sup> Perhaps for this reason, Smith did not wait until his lectures on jurisprudence to begin to talk about it. Instead, he introduced justice—which in his day was considered a virtue, like benevolence, self-command, and prudence<sup>85</sup>—during the course on ethics. Thus, the paper will next show how, still in the ethics portion of his course, Smith located the authority for natural justice in the human conscience, as a moral sentiment (Section A). Then the paper will show how, in the jurisprudence portion of the course, Smith “operationalized” this sentiment (Section B).

#### A. A Sentimentalist Account of Justice

Smith developed a sentimentalist account of the nature of justice: this had not been done before. That means he located the origin and authority of natural justice in the human sentiments, which, as established in Part II, *supra*, are processed through the moral imagination. Smith’s account explicitly rejected the then-dominant theories of justice, including social contract<sup>86</sup> and utilitarianism.<sup>87</sup> This section will explain his strikingly original account.

84. See TMS-G, *supra* note 9, at 86 (TMS II.iii.3.3).

85. See, e.g., OTTESON, *supra* note 10, at 137–39 (Smith was interested in four virtues: in addition to propriety, which we have already discussed, he taught and wrote about prudence, benevolence, and justice. Prudence is the virtue that directs us to be interested in ourselves while benevolence (sometimes he calls it beneficence) and justice are other-regarding. Prudence allows us to weigh short vs. longer term interests “to accord with the impartial spectator’s judgments.”).

86. See LOJ, *supra* note 7, at 207 (iv.19); see also *id.* at 316–17 (LJA v.115-18) [Hereinafter using “LJA” to represent the first and earlier of two sets of lecture notes, whereas “LJB” will represent the later set, dated 1766. He began the later course similarly]; David Lieberman, *Adam Smith on Justice, Rights, and Law*, in THE CAMBRIDGE COMPANION TO ADAM SMITH 223 (Knud Haakonssen ed., 2006) (observing that Smith rejects “state of nature”/social contract theories of law).

87. See e.g., TMS-G, *supra* note 9, at 88–90 (TMS II.ii.3.7,10) (rejecting the idea that justice is traceable to any prudential consideration, such as “preservation of society” and concluding “[t]he concern which we take in the fortune and happiness of individuals does not, in common cases, arise from that which we take in the fortune and happiness of society. . . . [I]n both cases is our regard for the multitude compounded and made up of the particular regards which we feel for the different individuals of which it is composed. . . . The concern we which is requisite for this, is no more than the general fellow-feeling which we have with every man merely because he is our fellow-creature.”); see also FITZGIBBONS, *supra* note 20, at 54 (“The opening sentence of [THE THEORY OF MORAL SENTIMENTS] can be

*1. Precursor to Justice: Resentment as a Moral Sentiment*

Returning to Smith the professor-in-progress: to move from the topic of ethical judgment toward the topic of legal judgment, Smith had to distinguish the two. To do this Smith introduced the concepts of “merit” and “demerit,” and the moral sentiment of resentment, upon which injustice is based.<sup>88</sup>

For Smith, the process of determining merit and demerit was more complex than the process of determining mere approval and disapproval, in part because it involved two judgments, one indirect and one direct.<sup>89</sup> The first was the foundational assessment of approval and disapproval, which is direct a judgment about social and ethical propriety: is a person’s emotional response or conduct appropriate to the situation that excited it?<sup>90</sup> The second was a new layer: whenever a person’s actions directly impacted another, an assessment of merit and demerit was warranted.<sup>91</sup>

Smith believed that beneficial effects would evoke an indirect experience of gratitude in the impartial spectator; hurtful effects would evoke an indirect experience of resentment in the impartial spectator.<sup>92</sup> The former resulted in a judgment of merit, and warranted a “reward,” while the latter resulted in judgment of demerit, and warranted a “punishment” (punishment being Smith’s link to justice):

Actions of a beneficent tendency, which proceed from proper motives, seem alone to require reward; because such alone are the approved objects of gratitude, or excite the sympathetic gratitude of the spectator. Actions of a hurtful tendency, which proceed from improper motives, seem alone to deserve punishment; because such alone are the approved objects of

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interpreted as a rebuke to [David] Hume’s moral theory: ‘How selfish man may be supposed, there are evidently some principles in his nature, which interest him in the fortunes of others . . . though he derives nothing from it.’”).

88. For simplicity’s sake and to isolate a point, I have tried to simply Smith’s argument about how merit and demerit, gratitude and resentment, reward and punishment, arise. I hope I have not oversimplified it.

89. HAAKONSSSEN, *supra* note 22, at 64 (identifying the “two sympathetic moves, with two consequent moral sentiments of approval or disapproval, one for the original action and one for the reaction, which would consist of gratitude or resentment—or, as Smith says, ‘a direct sympathy with the sentiments of the agent, and an indirect sympathy with the gratitude of those who receive the benefit of his actions,’” and vice versa for demerit and resentment).

90. *See* TMS-G, *supra* note 9, at 67 (TMS II.i.2).

91. *See id.* Whenever one’s actions either “proposes or tends to produce” either “beneficial or hurtful effects” on another. *Id.*

92. *See id.* at 74–75 (TMS II.i.5.1–5).

resentment, or excite the sympathetic resentment of the spectator.<sup>93</sup>

Importantly, note that Smith did not mean that all garden variety socially-experienced disapproval (or even resentment) warranted a judgment of “demerit.” Just the opposite. Someone who is insufficiently grateful to a benefactor may be a disappointment, he said, but that deficiency “cannot, however, provoke any resentment which mankind can go along with.”<sup>94</sup> Instead, Smith was talking about a special kind of resentment: “resentment deserving punishment” could only arise from an impartial spectator’s sympathy with the entire situation.<sup>95</sup> In this way, he demarcated the two kinds of judgment, ethical and legal. Legal judgment was built on top of the foundation of ethical judgment.

This is important because resentment, so narrowly defined, becomes the mark of a violation of the virtue of justice. As we will see, justice was the only virtue a breach of which is compensable by law.

### *2. Injustice: Injury Causing Resentment*

With merit and demerit introduced, Smith turned to the virtue of justice. Smith compared justice to benevolence and distinguished the two. Drawing on his discussion of merit and demerit, he said we have no right to compel benevolence from another, but we do have a right to compel justice, and that makes all the difference.<sup>96</sup> Thus Smith linked the virtue of justice with the concept of legally enforceable rights (here, “punishment”).

There is, however, another virtue, of which the observance is not left to the freedom of our wills, which may be extorted by force, and of which the violation exposes to resentment, and consequently to punishment. This virtue is justice: the violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is a natural consequence of resentment . . . [a]nd upon this is founded that remarkable distinction between justice and all the other social virtues.<sup>97</sup>

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93. *Id.* at 78 (TMS II.ii.1.1–2).

94. TMS-G, *supra* note 9, at 78 (TMS II.ii.1.3).

95. *See id.* at 76–78 (TMS II.i.1.7–11).

96. *Id.* at 79 (TMS II.ii.1.4).

97. *Id.* at 79–80 (TMS II.ii.1.5).

Smith warned that we must be very careful to distinguish what is merely subject to disapproval, a social and ethical judgment, from “what force may be employed either to punish or prevent.”<sup>98</sup> Smith said this distinction is one of the most critical functions of the lawmaker.

The civil magistrate is entrusted with the power of not only preserving the public peace by restraining injustice, but of promoting the prosperity of the commonwealth, by establishing good discipline, and by discouraging every sort of vice and impropriety; he may prescribe rules, therefore, which not only prohibit mutual injuries among fellow-citizens, but common mutual good offices to a certain degree. . . . Of all the duties of a law-giver, however, this, perhaps, is that which it requires the greatest delicacy and reserve to execute with propriety and judgment. To neglect it altogether exposes the commonwealth to many gross disorders and shocking enormities, and to push it too far is destructive of all liberty, security and justice.<sup>99</sup>

Note two things here. First, Smith saw a role for the state that was affirmative, not just negative, despite characterizing justice as a “negative virtue”<sup>100</sup> that could “often [be] fulfill[ed] . . . by sitting still and doing nothing.”<sup>101</sup> Second, Smith made quite plain that the impartial spectator will never sympathize with injuries done to another out of pure self-interest.

To disturb his happiness merely because it stands in the way of our own, to take from him what is of real use to him merely because it may be of equal or of more use to us, or to indulge, in this manner, at the expence of other people, the natural

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98. TMS-G, *supra* note 9, at 80 (TMSII.ii.1.6).

99. *Id.* at 81 (TMS II.ii.1.8).

100. *Id.* at 82 (TMS II.ii.1.9) (“Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour.”).

101. *Id.* at 81–82 (TMS II.ii.1.8–9) (presuming he meant that individuals could act justly by “often . . . sitting still and doing nothing,” but not the civil magistrate.). There are other examples of civic institutions or specific regulations he proposed, but which are outside the scope of this paper. For an example of a civic institution, public education, *see generally* WEINSTEIN, *supra* note 9, at 69 (“He also insists that general moral rules are after-the-fact constructs developed from social interaction (TMS III.4.7–8) and that the most basic of these are enabled by education (TMS III.5.1). He argues that the state should foster both secular and religious education (WN V.i.i.5).”). *See* JERRY EVENSKY, ADAM SMITH’S WEALTH OF NATIONS: A READER’S GUIDE 147–48 (2015) (for an example of regulation).

preference man has for his own happiness above that of other people, is what no impartial spectator can go along with.<sup>102</sup>

On this point Smith was also clear: we naturally prefer our own interests to others but hurting another to promote oneself is injustice.

In the race for wealth, and honours, and preferments, he may run as hard as he can, and strain every nerve and every muscle, in order to outstrip all his competitors. But if he should jostle, or thrown down any of them, the indulgence of the spectators is entirely at an end. It is a violation of fair play, which they cannot admit of. . . . They readily . . . sympathize with the natural resentment of the injured, and the offender becomes the object of their hatred and indignation.<sup>103</sup>

Note the equality inherent in Smith's view of freedom: liberty that hurts another—liberty beyond the bounds of equality—is injustice. One is free to pursue one's own interests as long as one does not hurt anyone else. In other words, one cannot pursue liberty at the expense of equality. Today, freedom and equality are often taken to be at odds with each other, but this passage in TMS, which is repeated in LOJ, suggests that to Smith, they were flip sides of the same coin.<sup>104</sup> Anyone who looks to Smith's work as establishing a paradigm of liberty should understand and respect the relationship that Smith saw between the two: the boundary of liberty was, to Smith, equality.

Summing up the teaching so far on the virtue of justice: injustice is compensable in law, and we know injustice because of the impartial spectator's sympathy with the resentment experienced at having been injured in a particular way. How do we know that the injury was caused in that particular way? By the same process of morally imaginative judgment that Smith taught in the ethics course. By that same process, we experience resentment at "real and positive hurt."<sup>105</sup>

102. TMS-G, *supra* note 9, at 82 (TMS II.ii.2.1).

103. *Id.* at 83 (TMS II.ii.2.1).

104. Exploring the ramifications of just these six lines of text alone could fill an entire article.

105. TMS-G, *supra* note 9, at 79 (TMS II.ii.1.3). Smith says again that, "[T]he violation of justice is injury: it does real and positive hurt to some particular persons, from motives which are naturally disapproved of. It is, therefore, the proper object of . . . punishment, which is the natural consequence of resentment." *Id.* (TMS II.ii.1.5). See FLEISCHACKER, *supra* note 26, at 152–53 (doubting that Smith's account is helpful in terms of telling us anything about the content of law, because Smith does not specify more precisely those actions that "do real and positive harms"); see also HAAKONSSSEN, *supra* note 22, at 136 (saying that specification of content of law was not Smith's goal, but instead, his goal was identifying "principles for discussion within that [moral] life."); see also MALLOY, *supra* note 12, at 4, 144–45 (occupying a middle ground; he attributes to Smith a theory of jurisprudence



Smith did not specify a catalogue of actions that caused “real and positive hurt,” but he seemed to believe he did not need to: because general rules arise inductively by reasoning from a set of particulars, we must expect that, as is characteristic of the common law method, a catalogue of “real and positive hurts” would arise over time through a series of judgments made in particular situations.<sup>106</sup>

### 3. *The Innovation of Justice as a Moral Sentiment*

Smith’s sentimentalist account of justice was unprecedented at the time and entirely singular still today. Not only did Smith differentiate himself from social contract theorists, he also differentiated himself from fellow moral sentimentalist and friend David Hume, who believed that justice arose out of the value of utility.<sup>107</sup> Instead, for Smith justice is “natural” and, to some extent, can be felt, like all the other human sentiments.<sup>108</sup>

A consequence of justice being natural is that, although social factors play a role in the impartial spectator’s process of judgment, because the impartial spectator is a function of the human moral conscience, any judgment the impartial spectator makes about justice is a moral, not merely social, judgment. Thus justice is ultimately removed from the realm of social construct and subject to that highest of tribunals, the conscience.<sup>109</sup>

Perhaps because Smith’s claim was so novel, he spent an entire chapter explaining how *useful* it is that justice is a natural human sentiment and not a product of an external authority or of rational deliberation of what is best for society (such as a cost-benefit analysis).<sup>110</sup> Smith began that chapter by reminding us that justice is

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whereby the impartial spectator’s role is to draw on culturally and socially situated, yet still morally bounded, reasonable expectations, aligning, over time and as closely as possible, the expectations common people have as to the balance between private and public interests with the expectations that the institutions of law and government have about the same critical balance).

106. See TMS-G, *supra* note 9, at 12 (editors); see *supra* Part II.D.

107. See FLEISCHACKER, *supra* note 26, at 151; see also HAAKONSSSEN, *supra* note 22, at 87.

108. See TMS-G, *supra* note 9, at 79 (TMS II.ii.1.4) (“Resentment seems to have been given [to] us by nature for defence, and for defence only. It is the safeguard of justice and the security of innocence.”).

109. See, e.g., HAAKONSSSEN, *supra* note 22, at 62 (“[T]he standpoint of the impartial spectator implies a universal rule and it is by seeking this that we can gain independence from the given social morality.”).

110. See TMS-G, *supra* note 9, at 85–91 (TMS II.iii.1.1–12) (other parts of TMS spend more time differentiating his sentimentalist account of moral rules from

drawn from human nature and interaction, not external authority: “[i]t is thus that man, who can subsist only in society, was fitted by nature to that situation by which he was made.”<sup>111</sup> And so: “[n]ature has implanted in the human breast that consciousness of ill-desert, those terrors of merited punishment which attend upon its violation, as the great safe-guards of the association of mankind, to protect the weak, to curb the violent, and to chastise the guilty.”<sup>112</sup>

Although over the course of the chapter Smith did, consistent with his rhetorical style, concede that some of the *effects* of a sentimental account of justice would look similar to the effects of an external account of justice, such one based in utility or social contract theory.<sup>113</sup> However, Smith distinguished cause and effect: he pointed out that correlation of effects with the tenets of another theory did not mean causation according to that theory.<sup>114</sup>

After conceding the correlation of certain effects and considering all the alternative arguments, Smith reasserted his conclusion: when the impartial spectator sympathizes with the resentment of one who has been injured by another, that sympathy is due to our natural regard for the other’s humanity: “[t]he concern which is requisite for this, is no more than the general fellow-feeling which we have with every man merely because he is our fellow-creature.”<sup>115</sup>

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other theories popular in the day, like ethical rationalism, but here I mean to focus only on his sentimentalist account of justice).

111. *Id.* at 85 (TMS II.iii.3.1).

112. *Id.* at 86 (TMS II.iii.3.4).

113. Notably, Smith’s writing style is to state his point and then proceed to consider counterarguments to it. In so doing, he will regularly concede that some of the counterarguments have some merit in some instances, such as, while not showing cause, perhaps being *an effect*. Then he will reiterate his own point and show evidence, in terms of specific examples, to support it. He does this same thing with the argument against utility as the basis for justice, stating in numerous places that any instance in which one finds the utility of the enforcement of a particular right is only an effect of the enforcement of that right, and not the reason for enforcing it. *See, e.g., id.* at 87 (II.ii.3.5) (pointing out the confusion around arguments in favor of utility as being arguments that confuse cause with effect); *see* FLEISCHACKER, *supra* note 26, at 9 (making this point and suggesting that some misunderstandings might also be attributable to mistaking counterargument with conclusion). One modern take on Smith seems to expressly concede disagreement with Smith’s arguments (which are, I would say mischaracterized as “natural law” arguments), though seems to celebrate what he sees as synchronicity with Smith’s conclusions. *See* Paul G. Mahoney, *Adam Smith, Prophet of Law and Economics*, 46 J. LEGAL STUD. 207, 208 (2017) (referencing natural law); *id.* at 228 (observing that “the early law and economics movement . . . used Bentham’s methodology but often reached Smith’s conclusions.”).

114. *See* TMS-G, *supra* note 9, at 87–91 (TMS II.ii.3.6-12).

115. *Id.* at 90 (TMS II.ii.3.10).

So what does this mean for the analysis of laws of justice? One consequence is that the justice system's participants have serious responsibilities to reason well; because of our regard of each other's humanity, and not in service of some other goal, we must stay on guard for the influence of vanity and self-deceit in the process of legal reasoning. In a sentimentalist justice system, no external value like utilitarianism drives the content of law, so the legal reasoner cannot count on a formulaic (i.e., "objective") check, such as cost-benefit analysis, to determine if a law is a good or bad one.<sup>116</sup> Thus reasoning well—ethically—is critical. No system of justice could survive if the people charged with implementing it fail ethically, and Smith's is no different. In Smith's system, however, there is, so to speak, no place for the legal reasoner to hide.

It also means that some aspects of justice are universal and unchangeable—the right to be free of injury, especially by another's pursuit of their own freedom—is a part of human nature. However, what will count as injury will vary over time and place.<sup>117</sup> Thus Smith establishes a fixed moral boundary for justice, while allowing that the particulars within that boundary will evolve over time.<sup>118</sup>

So what does that process of legal reasoning look like? In LOJ Smith explicitly invoked the impartial spectator to resolve questions of contested rights in property and contract.<sup>119</sup> There, we will see how Smith called on the impartial spectator, concrete situation by concrete situation, to delineate these boundaries.<sup>120</sup> Through hypotheticals, Smith showed his students that the spectator device could also be used to predict the extension of rights: just like in modern analogical legal reasoning, one could learn from the situations previously considered

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116. Although I would say that this "check" is more illusory than real because no cost-benefit analysis is self-executing. The formula itself depends on human reason to shape it, and human reason is always susceptible to the influence of vanity and self-deceit.

117. *See, e.g., SMITH TMS, supra* note 3, at vii–ix (explaining both the universality of Smith's justice and its evolving nature across time and place).

118. *See, e.g., MALLOY, supra* note 12, at 104–18.

119. Though the laws of justice include more than property and contract, I am limiting the discussion here to those topics because Smith directly invoked the impartial spectator in teaching them.

120. Robin Paul Malloy calls the sum total of these teachings "the spectator view." MALLOY, *supra* note 12, at 65–76. Other scholars have their own takes on the impartial spectator. For example, Jack Russell Weinstein calls the impartial spectator our "moral alter ego." WEINSTEIN, *supra* note 9, at 2. Griswold sees the spectator as a synthesis of virtue ethics and moral psychology. Griswold, *supra* note 5, at 181 ("Smith takes himself as a propriety theorist with respect to the virtue question and a sentiments theorist with respect to the moral psychology question.").

what questions the spectator should “ask” in the next situation. Call these “morally relevant questions.” From these questions particulars evolve into general rules.

*B. Justice Operationalized: The Impartial Spectator in Lectures on Jurisprudence*

Smith began the jurisprudence lectures declaring: “[j]urisprudence is the theory of the rules by which civil governments ought to be directed.”<sup>121</sup> Thus, Smith characterized the study ahead as a normative one: a study of what the rules “ought” to be.<sup>122</sup> Smith must have considered his job to include not just a description of existing law, but normative analysis and criticism of that law, too.<sup>123</sup>

Smith said before government can do anything else, justice must be preserved.<sup>124</sup> By then he only had to remind students what he had already taught in the ethics lectures: “[j]ustice is vio(l)ated whenever one is deprived of what he had a right to and could justly demand from others, or rather, when we do him or any injury or hurt without a cause.”<sup>125</sup> Smith then said that some cases of “injury or hurt without a cause” are not close: we just know, in these cases, that an enforceable right has been injured.<sup>126</sup> In other words, we do not need to analyze these rights. Instead, he wanted to discuss close cases to analyze the nature and boundaries of contestable rights: how and when we are to identify “injury or hurt without a cause”? Where do rights begin, and what is the source of their status as rights?

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121. LOJ, *supra* note 7, at 5 (LJA i.1). “Jurisprudence is that science which inquires into the general principles which ought to be the foundation of the laws of all nations.” *Id.* at 397 (LJB i.1).

122. *Id.* at 397 (LJB i.I).

123. *See, e.g.,* SMITH TMS, *supra* note 3, at viii–x (editor’s introduction noting that Smith’s jurisprudential normativity is “indirect,” meaning that while the universal normative commitment of jurisprudence is protecting against injury, “what counts as injury” varies from place to place and time to time).

124. LOJ, *supra* note 7, at 7 (LJA i.10) (“The first and chief design of all civill governments, is, as I observed, to preserve justice amongst the members of the state and prevent all incroachments on the individuals in it, from others of the same society.”).

125. *Id.*

126. He says that most of man’s “natural rights (or those which are competent to a man merely as a man) need not be explained,” and lists personal injuries, reputational injuries, and some tortious conduct (misprision), or “when his liberty is in any way restrain[e]d,” that “any one will at first perceive that there is an injury done in this case” or that “needs not be proved by any great discussion.” *Id.* at 13 (LJA i.24).

As to the source of rights, interestingly, Smith observed that the origin of property rights was not obvious.<sup>127</sup> He said there is a moral conundrum inherent in the very notion of property: anything that is useful to me is likely also useful to another. He asked: why should I have it, and not another?<sup>128</sup> But before he could answer, he had groundwork to lay, groundwork that sheds light on the dynamic and evolving nature of law.

### *1. Stages Methodology and Growth of Law*

Before getting into any particulars of property rights, Smith addressed the universality of justice. While justice—freedom from injury—is universal, the content of rights must naturally vary with time and circumstance. He said: “[b]efore we consider exactly this or any of the other methods by which property is acquired it will be proper to observe that the regulations concerning them must vary considerably according to the state or age society is in at that time.”<sup>129</sup> He then introduced his now-famous theory of the stages of societal progress, of which he identified four: first, hunters; second, shepherds; third, agriculture; and fourth, commerce.<sup>130</sup> After an overview of the four stages, Smith made it explicit that “the laws and regulations with regard to property must be very different” both from age to age and in different societies in the same age.<sup>131</sup>

He used the stages methodology to show that legal rights progress as society does. He said that once society progressed to the agricultural age, when people began to settle down and claim ownership of property, law was needed to protect people and their property from encroachment by another.<sup>132</sup> Commentators sometimes point to this passage to provide evidence that Smith believed law was necessary to

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127. *See id.* (LJA 1.25) (“The only case where the origin of naturall rights is not altogether plain, is in that of property.”).

128. *See id.*

129. LOJ, *supra* note 7, at 14 (LJA i.27).

130. *Id.*

131. *Id.* at 16 (LJA i.33). He gave the example of theft: in the age of shepherds, theft in “Tartary” was punishable by death, while in North America (where, he says, “the age of hunters subsists”), theft is “not much regarded.” *Id.* He explained the different attitudes as naturally arising out of the circumstances of the way of life in each place. *See id.*

132. *See* LOJ, *supra* note 7, at 16 (LJA i.34–35). He said, “there are many opportunities of injuring one another and such injuries are extremely pernicious to the sufferer.” *Id.*

keep people secure once they had something to lose,<sup>133</sup> which is accurate but incomplete. Others point to it to suggest that Smith believed the need for law began and ended with protecting property,<sup>134</sup> which is not accurate. Instead, Smith said explicitly that more advanced societies require a greater number of, and more complex, laws.<sup>135</sup>

In the age of commerce, as the subjects of property are greatly increased the laws must be proportionally multiplied. The 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>136</sup>

Thus, the better off and more advanced a society is, the greater the number and complexity of the laws required to maintain that society.

Putting everything together that Smith taught so far, his students would have understood that people have certain normative goals inherent to our nature and which stay consistent over time, including the desire for social, ethical, and economic progress, which requires freedom from injury from others. But how we actually progress, or how we meet those goals, will of course change. Within the context of law specifically, we would need to continually ask whether a particular law (or political institution) was functioning as a means to achieving our goal (the end of justice). Smith did not think, as Knud Haakonssen said, that those questions had singular, substantive answers:

Smith's theory is not a set of basic moral doctrines, nor a prescription for how to construct such a set. On the contrary, it presupposes the existence of a moral life; but it specifies the principles for discussion within that life. By supplying such principles Smith's science of morals becomes more than a science; it becomes a critical tool.<sup>137</sup>

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133. See, e.g., Douglas A. Irwin, *Adam Smith's "Tolerable Administration of Justice" and the Wealth of Nations*, 67 SCOT. J. POL. ECON. 231, 235 (2019).

134. See *id.*

135. See JERRY EVENSKY, ADAM SMITH'S MORAL PHILOSOPHY: A HISTORICAL AND TEMPORARY PERSPECTIVE ON MARKETS, LAW, ETHICS AND CULTURE 65–66 (2005).

136. LOJ, *supra* note 7, at 16 (LJA i.34–35).

137. HAAKONSSSEN, *supra* note 22, at 136.

Smith did, however, specify that the principles of the discussion were to be morally relevant, and, as we will see when we examine his lectures on property and contract, he gave consistent suggestions about how to direct the conversation about fitting means to ends. To those lectures we now go.

## 2. Property

Recall that Smith introduced the topic of property by characterizing it as a moral problem: why, if we both need one thing, am I entitled to keep it as my property, and you are not?<sup>138</sup> Smith asked: “[h]ow is it that a man by pulling an apple should be imagined to have a right to that apple and a power of excluding all others from it—and that an injury should be conceived to be done when such a subject is taken [from] the possessor[?]”<sup>139</sup> He turned to the impartial spectator for analysis. Using her moral imagination, the impartial spectator would consider both the reaction of the first person (resentment—is it proper or not?) and the motives of the second, trying to take the apple away (are those motives worthy of merit or not?).<sup>140</sup> The second person simply wanting the apple for herself could never be a worthy motive for taking it away from someone who already held it in her own hands; that would be pure self-interest, which Smith had already taught was a motive the impartial spectator could not go along with:

From the system I have already explain’d, you will remember that I told you we may conceive an injury was done one when an impartial spectator would be of the opinion he was injured, would join with him in his concern and go along with him when he defended the subject in his possession against any violent attack, or used force to recover what had been thus wrongfully wrested out of his hands.<sup>141</sup>

Here Smith explicitly referred back to the ethics course, strongly suggesting that LOJ cannot be understood without understanding TMS. And analytically, Smith used language—familiar to modern common law ears—of reasonable expectations.

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138. See LOJ, *supra* note 7, at 13 (LJA i.25).

139. *Id.* at 16–17 (LJA i.35). For what it is worth, the case used to illustrate possession on my first day of law school was *Pierson v. Post*, 3 Cai. R. 175 (NY. Sup. Ct. 1805).

140. LOJ, *supra* note 7, at 17 (LJA i.36–37).

141. *Id.* at 17 (LJA i.36).

The cause of this sympathy or concurrence betwixt the spectator and the possessor is, that he enters into his thoughts and concurs in his opinion that he may form a reasonable expectation of using the fruit or whatever it is in what manner he pleases. This expectation justifies in the mind of the spectator, the possessor both when he defends himself against one who would deprive him of what he has thus acquired and when he endeavors to recover it by force.—The spectator goes along with him in his expectation, but he cannot enter into the designs of him who would take the goods from the 1<sup>st</sup> possessor. The reasonable expectation therefore which the first possessor furnishes is the ground on which the right of property is acquired by occupation.<sup>142</sup>

There are two takeaways from this initial analysis. First, note the steps in the *analysis* itself: through the moral imagination, the legal reasoner determines the presence or absence of mutual sympathy in the context of law. Second, Smith named mutual sympathy in this context *reasonable expectations*.<sup>143</sup> Thus Smith’s impartial spectator’s reasoning has been analogized to familiar “practical reasoning” that we recognize in legal analysis today.<sup>144</sup>

Having established the moral foundation of possession, Smith turned to the process of establishing possession. For that he evoked a classic hypothetical: chasing a wild animal.<sup>145</sup> When is possession established? To answer, he turned to the impartial spectator.

A hare started does not appear to be altogether in our power; we may have an expectation of obtaining it but still it may happen that it shall escape us. The spectator does not go along with us so far as to conceive we could be justified in demanding satisfaction for the injury done us in taking such a booty out of our power.<sup>146</sup>

Note that again Smith framed the analysis in terms of expectations. But do expectations change over time and place? Of course: Smith reminded students that the analysis did not state an

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142. LOJ, *supra* note 7, at 17 (LJA i.36–37).

143. Robin Paul Malloy observes that keying natural justice to reasonable expectations serves a due process purpose, too: it gives people an idea of what “of what the law expect[s] of them” and makes law both predictability and stability. MALLOY, *supra* note 12, at 54.

144. *See, e.g., id.* at 54–55.

145. LOJ, *supra* note 7, at 17–18 (LJA i.38).

146. *Id.* at 17–18 (LJA i.38). The spectator’s conclusion is, by the way, the same as the Supreme Court of New York’s conclusion in *Pierson*. *See Pierson v. Post*, 3 Cai. R. 175, 178–80 (NY. Sup. Ct. 1805).



unending rule for all time.<sup>147</sup> He was not trying, as Haakonssen observed, to develop a fixed and permanent set of rules. Instead, law evolves over time, with reasonable expectations. What does not vary is the human desire to, as Smith scholar, Robin Paul Malloy, put it, “find[] happiness with themselves and others.”<sup>148</sup> What does not change is the inherent human concern we have for ourselves—to better ourselves and know we are morally worthy of what we attain—a concern bounded by a moral requirement to not injure others. Smith understood that these human needs, desires, and concerns were “facilitated by . . . a legal system that provided everyone with security in their person, respect for their property, and protection of their freedom to make self-directed decisions,”<sup>149</sup> which is the legal system he thought “ought” to exist.

With both foundation and reminder in place, Smith turned to the question of, once established, how long does possession last?<sup>150</sup> This time he used the apple hypothetical to illustrate the difference between ethical/social and moral/legal judgment, which is a critical distinction in a liberal system of justice.

If I was desirous of pulling an apple and had stretched out my hand towards it, but an other who was more nimble comes and pulls it before me, an impartial spectator would conceive this was a very great breach of good manners and civility but would not suppose it an encroachment on property.—If after I had got the apple into my hand I should happen to let it fall, and another should snatch it up, this would be still more uncivil and a very heinous affront, bordering very near on a breach of the right of property. But if one should attempt to snatch it out of my hand when I had the actual possession of it, the bystander would immediately agree that my property had been encroached on, and would go along with me in recovering it or preventing the injury before hand, even suppose I should use violence for the accomplishing of my design.<sup>151</sup>

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147. LOJ, *supra* note 9, at 18 (LJA i.39). At one time, possession arose with the wounding of the animal; at another, it was “actual possession.” At still another time, possession depended on the “manner in which the wound was given,” i.e., with “a missile weapon” or “a weapon held in one’s hand.” *Id.*

148. MALLOY, *supra* note 12, at 86.

149. *Id.*

150. LOJ, *supra* note 7, at 18 (LJA i.40) (“The next thing in order which comes to be treated of is how long and in what circumstances property continues and at what time it is supposed to be at an end.”).

151. *Id.* at 18–19 (LJA i.41–42).

In this example Smith showed that the line between ethics and law is precisely delineated: up until legal possession is established, all other encroachments are merely breaches of ethics.

Like a good modern law professor, with the general principle of maintaining possession established, he applied it in another specific situation: “[l]et us now apply this to the case of the hunters,”<sup>152</sup> and Smith used a hypothetical still given on the first day of property courses today, evincing the timelessness of Smith’s method of analysis.

When I start a hare, I have only a probability of catching it on my side. It may possibly escape me; the bystander does not go along with me altogether in an expectation that I must catch it; many accidents may happen that may prevent my catching it.<sup>153</sup>

Note that here Smith has derived a rule from particulars. Possession depends on control; the pursuit of possession is not the same as possession.<sup>154</sup>

If after I had taken the hare or other wild beast it should chance to escape, if I continued to pursue it and kept in in my view, the spectator would more easily go along with my expectations; one who should prevent me in this pursuit would appear to have trespassed very heinously against the rules of fair hunting and to have approached very near to an infringement of the right of property. . . . But if he had violently or theftuously taken from me what I had actually in my possession, this would evidently be an atrocious transgression of the right of property such as might justify, in the eyes of the beholder, my endeavours to recover what I had been so wrongfully deprived of.<sup>155</sup>

Note here too that Smith asked what I have called morally relevant questions to determine how far the right of possession extends. Embedded in his explanation are questions such as: did the first hunter follow the hare after it slipped out of her control? Did

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152. *Id.* at 19 (LJA i.42–43).

153. *Id.* (LJA i.43–44); *see also* *Pierson v. Post*, 3 Cai. R. 175, 178 (NY. Sup. Ct. 1805).

154. Note that this is the same conclusion reached by the New York Supreme Court in *Pierson*. *Pierson*, 3 Cai. R. at 178. Further, like Smith, that court said that what Pierson did might have been very bad manners, but it did not violate any right of Pierson’s: “[h]owever uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet this act was productive of no injury or damage for which a legal remedy can be applied.” *Id.* at 179–80.

155. LOJ, *supra* note 7, at 19 (LJA i.43–44).

someone else forcibly block her from that effort? Or, like with the apple, did someone else try to wrest the apple away from the one who had it first? In each situation the question was whether the impartial spectator would sympathize with the first possessor's resentment at having been "bested." Thus, Smith's lectures on possession show the moral imagination at work.

### 3. *Selfishness, Equity, and "Come-at-it-able-ness"*

Recall that in Part II, one foundational pillar of the moral imagination was human fallibility: despite our best intentions (we want to be lovely, not just loved) we sometimes go astray.<sup>156</sup> Smith paused at this point in the property lecture to show that lawmakers, and judges too, sometimes go off course. And recall, too, that this human fallibility made Smith wary of people who seek power for the wrong reasons. He said: observe that there are certain things which no-one should "by the rules of equity"<sup>157</sup> have a right to possess: wild animals, fish in the sea, river water, and air.<sup>158</sup> And yet he noted that at some stages in history, some people in power did claim such rights for themselves.

His observation set up a bigger point: while correct answers to questions of rights do in fact exist (in being free from injury caused by another), sometimes the people in charge either made mistakes or ignored what was right out of their own self-interest. Smith had warned his students about human ethical fallibility, so this would not have come as a surprise.<sup>159</sup> And, it is an important point because it shows that Smith understands how excessive self-interest can impact law. We go there next.

Smith told his students that since Roman times, wild animals had not belonged to anyone.<sup>160</sup> This changed in feudal England: "the king and his nobles appropriated to themselves everything they could."<sup>161</sup> But, he said, this was unfair: "[t]here can be no reason in equity given for this constitution."<sup>162</sup> Smith considered and rejected the policy reasons offered to explain such rules, finding them to be insincere, and

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156. *See supra* Part II.C.

157. LOJ, *supra* note 7, at 23 (LJA i.53).

158. *Id.* at 23–25 (LJA i.53–60).

159. *See supra* Part II.C.

160. *See* LOJ, *supra* note 7, at 23 (LJA i.53).

161. *Id.* (LJA i.54–55).

162. *Id.* at 24 (LJA i.55).

then said the real reason was excessive self-interest or a power grab.<sup>163</sup> Smith here seemed to be reminding his students that one can use their best efforts to secure their own interests, but what they may not do, at least not consistently with the moral virtue of justice, is injure others in the process<sup>164</sup> (recall as well Smith's teaching about equality<sup>165</sup>).

When Smith turned to the rules of succession ("the transference of property from the dead to the living"<sup>166</sup>), he was similarly critical. He criticized "primogeniture" as "contrary to nature, to reason, and to justice"<sup>167</sup> and the "custom of entails" as "the most absurd thing in the world."<sup>168</sup> Smith also criticized exclusive privileges and monopolies. He observed that "[s]ome [exclusive privileges] indeed are harmless enough," describing something that looks like the modern patent system.<sup>169</sup> But, he said, "few are so harmless. All monopolies in particular are extremely detrimental."<sup>170</sup>

What he said next is very important, because he introduced the normative goal of the state, which was to create conditions by which everyone could take care of their own needs, and then declared that the wealth of the nation is measured by this ability.

The wealth of a state consists in the cheapness of provisions and all other necessaries and conveniences of life; that is, the small proportion they bear to the money payd, considering the quantity of money which is in the state; or in other words that they should be easily come at.<sup>171</sup>

Note the reference to whether provisions "should be easily come at." And again, just in case we think the student note-taker did not hear

163. *See id.* at 24 (LJA i.56) ("[B]ut the real reason is . . . the great inclination they have to screw all they can out of [lower peoples'] hands."); *see also id.* at 25 (LJA i.59) ("The reason why the nobles and those of power established these [rules] was that the people could more easily be brought to bear . . . in this way than any other.").

164. *See* LOJ, *supra* note 7 at 25–26 (LJA i.60–61).

165. *See* TMS-G, *supra* note 9, at 137 (TMS III.3.4); *see also* FLEISCHACKER, *supra* note 26, at 72–73.

166. LOJ, *supra* note 7, at 37 (LJA i.91).

167. *Id.* at 49 (LJA i.116).

168. *Id.* at 69 (LJA i.164). He also said that the practices of primogeniture and entail are terrible ideas, as well as contrary to reason, because they lead to bad stewardship of land. *Id.* at 70 (LJA i.166).

169. *Id.* at 83 (LJA ii.30–33). I am grateful to Paul Mahoney for pointing this out. *See* Mahoney, *supra* note 113, at 207.

170. LOJ, *supra* note 7, at 83 (LJA ii.33).

171. *Id.*

him correctly, he repeated that the wealth of the nation was determined by how well people had access to goods they need:

Its [the state's] poverty again consists in the uncomeatibleness or difficulty with which the severall necessary[ies] of life are procured. Now all monopolies evidently tend to promote the poverty or, which comes to the same thing, the uncomeatibleness of the thing so monopolized.<sup>172</sup>

He extrapolated: “[t]he establishment of corporations and other societies who have an exclusive right is equally detrimental” because, as restraints on trade, they “make[] all sorts of necessarys so much the more uncomeatable.”<sup>173</sup>

So, the state's goal is “comeatibleness” of provisions, but Smith knew that policy makers, as well as judges, could make mistakes.<sup>174</sup> Smith was well-aware that selfishness was a risk inherent in any system of law: since people make and enforce law, law may be inadvertently subverted to the selfish instincts of a lawmaker, perhaps one who has fallen under the spell of a “system” ideology, or someone with too much power (like in feudal times). In such a situation, bad law can undermine, rather than promote, justice. While not condoning these perversions, Smith never lost sight of human nature.

#### 4. Contract

In the lectures, Smith moved from the discussion of privileges to contracts.<sup>175</sup> Smith wondered: why are some promises enforceable in law? As with property rights, he didn't think it was obvious that promises *should* be legally enforceable. Morally, why are they? As this part will show, Smith rejected one of the prevailing theories of the time, will theory, and in its place, suggested a theory of obligation based on the promisee's expectations.

Smith observed, “[n]ow it appears evident that a bare declaration of will to do such or such a thing can not [sic] produce an obligation.”<sup>176</sup> His thought will theory failed because “will” represented nothing other than a statement of a promisor's “present

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172. *Id.*

173. *Id.* at 84 (LJA ii.34–35). He then argued that not only were such restraints (i.e., “privileges”) bad for the people, they were bad for the corporations, too. *Id.* at 84–85 (LJA ii.36–39).

174. He thought law's nature as “precise” would serve as a check on judges, and that judges would serve as a check on the lawmakers/executive. *See* LOJ, *supra* note 7, at 271–72, 287 (LJA v.5–6, 44).

175. *See id.* at 86 (LJA ii.42).

176. *Id.* at 87 (LJA ii.42).

design,” which anyone understood could change at any moment.<sup>177</sup> Smith said, in essence, such statements are too easily come by to be justifiably relied upon as binding commitments.

[A]ll that is required of him to make such a declaration lawful is sincerity, that is, that it be really his intention at that time to do as he said. If he should afterwards be induced by circumstances to alter his intention, we could not say that he had violated an obligation; we might indeed if he did so on slight grounds accuse him of levity, and being easily turned and altered in his designs.<sup>178</sup>

By contrast, Smith thought, for an obligation to be binding, the promisor had to make a firmer commitment.

The only thing that can make an obligation in this manner is an open and plain declaration that he desires the person to whom he makes the declaration to have a dependence on what he promises. The words in which we commonly make such a declaration are I promise to do so and so, you may depend upon it.<sup>179</sup>

If he does this, then the impartial spectator can sympathize with his expectations.

The expectation and dependance of the promisee that he shall obtain what was promised is hear altogether reasonable, and such as an impartial spectator would readily go along with, whereas in the former case the spectator could not go along with him if he formed any great expectation.<sup>180</sup>

But then Smith said, though the impartial spectator recognizes the disappointed expectation as an injury, it “is the slightest possible” injury,<sup>181</sup> which prompted Smith to review periods in history when contracts were not thought binding. He did this explicitly to shed light on “the causes which gradually introduced their validity.”<sup>182</sup> He traced the reason to the expansion of trade and commerce, as well as development of language.<sup>183</sup>

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177. *See id.* at 87 (LJA ii.42–43).

178. *Id.* at 87 (LJA ii.43).

179. LOJ, *supra* note 7, at 87 (LJA ii.43).

180. *Id.* at 87 (LJA ii.43–44).

181. *Id.* at 87 (LJA ii.44–45).

182. *Id.* at 89 (LJA ii.48).

183. *See id.* at 89–92 (LJA ii.48–56); *see also* LOJ, *supra* note 7, at 96 (LJA ii.69).

Smith revisited the moral basis of contract (as opposed to the social or ethical basis of promise keeping) when he added that not only must the promisee's expectation be justified by the strength and clarity of the promisor's commitment, but the subject matter of the promise must also be serious.<sup>184</sup> He said, "the importance of the thing promised," also plays a factor.<sup>185</sup> Here he gave the example of a promise to drink tea with another; and as such, he seemed to be reinforcing the distinction between that which we have a right to compel due to an injury to justice, and that which we do not, such as an injury to civility or manners (such as a promise to drink tea).<sup>186</sup>

What does this tell us about modern contract law? It gives us another way—one informed by the moral imagination—to evaluate the law. For example, consider the objective theory of contract formation, usually taught via the first-year case of *Lucy v. Zehmer*.<sup>187</sup> The issue was whether a disappointed real estate buyer, Lucy, was entitled to specific performance after the seller, Zehmer, refused to perform, claiming he had only been joking about selling.<sup>188</sup> The catch, of course, is that the seller told the buyer immediately that he (the seller) had been joking all along.<sup>189</sup> But under the objective theory of contraction formation, it was too late: once the seller appeared to accept the buyer's offer, the deal was done, and buyer's rights were fully vested.<sup>190</sup> Objective theory is an all or nothing test, one largely based on an abstraction: one is responsible for what one "objectively" manifests.

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184. *See id.* at 92 (LJA ii.56–57).

185. *Id.* at 92 (LJA ii.57).

186. With the theory of obligation established, Smith moved into the stages analysis and showed how different rules varied with the times and technologies, such as rules on writing and language, the use of the seal, and even good faith and substantial performance. *See id.* at 92–100 (LJA ii.57–78).

187. *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

188. *Id.* at 521–22.

189. *Id.* at 520.

190. Recall that the entire deal between Lucy and Zehmer took place in a restaurant/bar on the Saturday night before Christmas; Lucy was trying to goad Zehmer into selling his family farm, which Zehmer had previously told Lucy he would not do. *Id.* at 518–19. Undeterred, Lucy did not let up, including offering Zehmer alcohol in Zehmer's own bar that night. *Id.* at 519. In short, Zehmer found himself caught in a bluff gone bad: Zehmer "played along" with Lucy because Zehmer was sure Lucy didn't have the money he claimed to have. *Lucy*, 84 S.E.2d at 519. Zehmer pretended to accept Lucy's offer, including scribbling a memorial of three quick terms of the "deal," on the back of a restaurant check. *Id.* at 518. As soon as Zehmer handed over the check to Lucy, Zehmer told Lucy he was joking. *Id.* at 520. Lucy, however, said it was too late: "Zehmer, you have sold your farm." Zehmer refused to perform, and Lucy sued. *Id.* at 517, 520.

A morally relevant question that Professor Smith might ask in this situation is: how serious, or how slight, was the injury caused by the objective manifestation?<sup>191</sup> There is no room under the current test for a question like this: it is all or nothing. But given that Zehmer immediately made it plain to Lucy that the two were not on the same page, it is hard to imagine an injury more slight. At that point, only Lucy's pride had been hurt: he had invested nothing, made no arrangements to secure financing, nor enlisted other contract partners.

In this situation, would the impartial spectator sympathize with any resentment Lucy felt? That is hard to imagine. What about Zehmer's motives—are they worthy of demerit, and so punishable in law, or a simple breach of ethics and civility? Again, it is hard to imagine anything other than the latter: Zehmer might have been being a jerk by joking with Lucy and letting Lucy believe he was serious, but he did not cause any “real and positive hurt.” Smith's theory reveals something important here that traditional objective theory completely obscures: Lucy in fact did not suffer any “real and positive hurt.” Only an external test—an abstraction, really, that of “objective theory”—said he was injured. But he himself could not possibly have felt any injury other than to his pride. This is human nature, which Smith's theory not only includes, but centers.

The difference in approach matters. Here, Lucy sued for specific performance, so when the court determined that objectively, Zehmer breached, Zehmer had to go through with selling and vacating his home and farm. It is hard to think of a more unjust use of contract law than this. But with no moral tether to objective theory, courts do not ask morally relevant questions. Under the “spectator view,” they would, such as: did Lucy suffer any “real and positive hurt?”

And note again Smith's methodology: he preferred analysis of particular situations to generalizations, and so only drew general rules from a series of particulars. He eschewed beginning with a general rule, and tied to make particular situations serve as evidence of that general rule.

When a philosopher goes to examine why humanity is approved of, or cruelty condemned, he does not always form to himself, in a very clear and distinct manner, the conception of any one particular action either of cruelty or of humanity, but is commonly contented with the vague and indeterminate idea which the general names of those qualities suggest to him.

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191. See LOJ, *supra* note 7, at 87 (LJA ii.44) (contract injury can be “the slightest possible”).



But it is in particular instances only that the propriety or impropriety, the merit or demerit of actions is very obvious and discernible. It is only when particular examples are given that we perceive distinctly either the concord or disagreement between our own affections and those of the agent, or feel a social gratitude arise towards him in the one case, or a sympathetic resentment in the other.<sup>192</sup>

His methodology is important because, as a legal reasoner, forcing oneself to deal with specifics makes a difference. Again, the *Lucy v. Zehmer* case illustrates this perfectly: in the abstract, it is easy to conclude, “well, Zehmer took his chances by joking with Lucy . . .” but in the particulars (such as the fact that it was the Saturday night before Christmas), things look very different. When one puts oneself in Zehmer’s shoes and imagines that the consequence of this bluff-gone-bad is having to show up with a deed and keys in hand at a real estate closing that he never actually intended—all because of some joshing in a bar with a gadfly on a holiday weekend that was clarified immediately—things look different. Hence the benefit of using the moral imagination, rather than appealing to an abstract value or principle, like objectivity, to analyze rights claims. And this is only one small example.

In sum, when Smith’s methodology is considered alongside all the other aspects of impartial spectator reasoning illustrated above, Smith’s impartial spectator sounds a lot like the ideal judge of today:

Adam Smith’s theory of jurisprudence revolved around the use of his metaphorical device of the impartial spectator. The impartial spectator represented a naturally occurring force within human beings—a force of reasoning, judgment, and justice. The impartial spectator was not a decision-maker acting behind a hypothetical veil of ignorance; the spectator was a disinterested third-party observer capable of sympathizing with people in a given situation. In Smith’s theory, the impartial spectator was positioned as a real person who made judgments by drawing on experience and referencing this experience to the core shared values and moral sentiments of the community. The goal of these judgments was to make fair, reasonable, and rational decisions that would be understood as just.<sup>193</sup>

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192. HANLEY, *supra* note 65, at 79 (quoting TMS-G, *supra* note 9, at 187–89 (TMS iv.2.2)).

193. MALLOY, *supra* note 12, at 65.

## IV. MORAL IMAGINATION IN GOVERNMENT: “COME-AT-IT-ABLE-NESS”

Anyone who has heard of Adam Smith is likely already aware that Smith was in favor of limited government, commerce and exchange, and the division of labor. That said, I suspect that many people do not appreciate *why* he took those positions, yet his reasons matter. In fact, Smith told his students that reasons matter, because means serve ends, and ends arise out of a normative vision: “[i]n order to consider the means proper to produce opulence it will be proper to consider what opulence and plenty consist in, or what are those things which *ought* to abound in a nation.”<sup>194</sup>

To determine what “ought” to abound in a nation, Smith again turned to human nature, not external authorities, ideals or abstractions: “[t]o this it will also be . . . necessary to consider what are the naturall wants and demands of mankind.”<sup>195</sup> We have already seen that for Smith, because of our social nature, we want and need moral and ethical worth: not just to be praised, but to be *praiseworthy*. As we will see here, similarly, because of our human vulnerabilities and our desire to be happy, Smith thought we wanted and needed *to be able* to take care of ourselves, to “earn our keep.” Thus, Smith’s normative political orientation was that the state should create the conditions where all individuals could get their own needs met, and in the process realize their own worth.<sup>196</sup> Which in turn would increase the worth, or wealth, of the nation. Thus, the instrumental benefit follows from the normative goal.

Before I begin, a note about scope: this Part is not intended to trace all the law and policy that appears in WN back to LOJ. Instead, my aim is much more modest, which is simply to say that some of Smith’s best-known commitments, well-known from WN, arose out of the same moral imagination he brought to his work on ethics and justice, which we know because that is what he taught his students when he lectured on jurisprudence.<sup>197</sup>

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194. LOJ, *supra* note 7, at 333 (LJA vi.8) (emphasis added).

195. *Id.* at 333–34 (LJA vi.8) (observing that unlike animals, humans cannot live in the wild, so we need to create the conditions for living in civilized society).

196. Smith believed that if everyone were wise and virtuous, we would not need government! TMS-G, *supra* note 9, at 187 (TMS iv.2.1) (“What institution of government could tend so much to promote the happiness of mankind as the general prevalence of wisdom and virtue? All government is but an imperfect remedy for the deficiency of these.”).

197. And, as I have already noted to the extent that Fleischacker contains arguments for the same policies I identify here that suggests reasons other than his

*A. What Goal for the State?*

Given how Smith is cited in many articles and even in some judicial opinions of U.S. courts,<sup>198</sup> it appears that not a small number of people still think Smith was a utilitarian like his friend David Hume, and therefore favored limited government for reasons of efficiency or wealth maximization. Modern Smith scholars agree: this view of Smith is wrong.<sup>199</sup> To Smith, limited government *was* wealth-maximizing, and maximizing the wealth of the nation *was* important, and all of that *was* critical to political liberalism. But it was not *the point* of political liberalism: it was the means to an even bigger goal. That goal was creating the conditions—consistent with human nature—in which people could best get their needs met, thus best preserving political liberalism and the social fabric of society.

This part will suggest that two of Smith’s key political commitments arose directly out of this part of his moral imagination. First, Smith thought that the wealth of the nation was tied to the fate of its common inhabitants: to increase the “comeatitableness” of the latter was to increase the wealth of the former (Section A). The economic policies Smith favored, such as division of labor and promotion of commerce, arose from this commitment, not from an abstract endorsement of the importance of wealth for its own sake (Subsections 1 & 2). Second, Smith was more egalitarian than he is commonly understood to be (Section B). That commitment manifest in a trust of individuals to know their own business, and a concomitant distrust of politicians, whom he worried were likely to be both vain and either misguided or otherwise ill-equipped (Subsections 1 & 2).

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commitment to his normative goals does not I think undermine my claim. See FLIESCHACKER, *supra* note 26. That he did not call attention to this aspect of his thought in WN does not mean he was not so motivated: he published to persuade his contemporaries to adopt his positions, and Smith perhaps may not have cared *why* anyone else agreed with him. Smith may have tailored his arguments in WN to his anticipated audience, and he knew his audience was inclined to think in terms of cost benefit analysis and utility. That does not mean Smith did, too. As the paper has already suggested, there is good reason to think Smith had underappreciated normative reasons for his more familiar policy commitments.

198. *See, e.g.*, MALLOY, *supra* note 12, at 119–42.

199. *See, e.g.*, FITZGIBBONS, *supra* note 20, at 14 (noting that, with respect to his work on law and jurisprudence, “Smith believed he could resolve the conflict between morals and material goods by discovering the scientific laws that regulated society and morals. [TMS] and the [LOJ] therefore analysed the cultural and political codes that would be required by a durable, but liberal, political state; and [WN] was originally a part of [LOJ]. Smith would argue that there only appeared to be conflict between morals and wealth, and that it was possible to synthesize the seeming contraries within a better system of jurisprudence.”).

### 1. “Opulence”

As we have already seen, Smith taught that political regulations regarding commodities should serve to increase people’s access to the basic goods of life, which he called, at least when lecturing students, “come-at-it-able-ness.” While in LOJ he called this goal both “comeatitableness” and “opulence,” in WN he used only the term “opulence.” “Comeatitableness” is a funny word that is repeated multiple times in the notes, and Smith seems to mean it quite literally: “[t]hat state is opulent where the necessaries and conveniences of life are easily come at, whatever otherwise be its condition, and nothing else can deserve the name of opulence but this comeatitableness.”<sup>200</sup> Moreover, Smith taught that this one thing was central in any state, and every part of society had a hand in developing it.

[I]n a certain view of things all the arts, the science(s), law and government, wisdom, and even virtue itself tend all to this one thing, the providing meat, drink, rayment, and lodging for men, which are commonly reckoned the meanest of employments and fit for the pursuit of none but the lowest and meanest of the people. All the severall arts and businesses in life tend to render the conveniences and necessaries of life more attainable.<sup>201</sup>

As if this is not plain enough, Smith was explicit that opulence is not (only) money: “[m]oney therefore can not be that in which the opulence of the state consist(s).”<sup>202</sup> Smith taught us that many laws serve the goal of opulence.

All most all laws and regulations tend to the encouragement of [acts and practices, from butcher to ship builder to mathematician and writer], which provide for those things which we [mistakenly, superficially] look upon as the objects of the labour of the vulgar alone, meat, drink, and cloathing. *Even law and government have these as their finall end and ultimate object.* They give the inhabitants of the country liberty and security in the cultivate the land which they possess in

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200. LOJ, *supra* note 7, at 343 (LJA vi.33) (“Nothing else can deserve the name of opulence but this comeatitableness.”).

201. *Id.* at 338 (LJA vi.20–21).

202. *Id.* at 384 (LJA vi.144). Contrary to Richard A. Posner’s argument in *Law and Economics Is Moral*, in ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS 167–77 (Robin Paul Malloy & Jerry Evensky, eds., 1994) Smith did not believe that the only goal of “opulence” was wealth maximization. In fact, he taught his students that “money . . . can not be that in which opulence of the state consist(s).” LOJ, *supra* note 7, at 384 (LJA vi.144).

safety, and their benign influence gives room and opportunity for the improvement of all the various arts and sciences.<sup>203</sup>

Thus, in Smith's words, "the final end and ultimate object" of a liberal state was "rendering the conveniences and necessities of life more attainable."<sup>204</sup> That goal would then determine the framework within which we could, in part by asking morally relevant questions, evaluate whether a particular institution in society, including law, properly served that end. Indeed, Smith's lecture notes suggest several such questions, including: whether a regulation promotes or hinders the "independence" of the people in the nation (which is primarily a question about employment opportunities).<sup>205</sup> Another is whether a regulation or policy promotes or hinders the "ease and leisure" of the nation (which is again about developing opportunities for independence of people in the nation).<sup>206</sup> Yet another is whether a regulation promotes or hinders the progress of arts and sciences, as such progress facilitates access to the "necessaries" of life (which Smith believed was a mark of a successful, moral state).<sup>207</sup>

As it turns out, some of Smith's more famous public policy ideas are, indeed, proposals to achieve "comeatitableness." To those we now turn.

## 2. *The Division of Labor, Exchange, and Mutual Assistance*

Once Smith defined the goal of opulence and established it as the most important priority of a state after security, he introduced the first means to this end, which is the well-known topic of division of labor.<sup>208</sup> The point here is again that division of labor was not about

203. LOJ, *supra* note 7, at 337–38 (LJA vi.18–19) (emphasis added).

204. In this sense I am persuaded by Ryan Patrick Hanley: to Smith, "commercial liberalism is predicated not on an attenuated vision of the self driven by self-interest, but rather on the conviction that the conditions of material security and freedom that commercial liberalism provides offer the optimal context for the cultivation of character to which an ethics of virtue aims." RYAN PATRICK HANLEY, ADAM SMITH AND THE CHARACTER OF VIRTUE, 57 (2005). That said, I do not mean to equate Smith's vision of the role of state with Aristotle's, since Aristotle had a much different conception of the "polis" than Smith's "commercial liberalism."

205. See LOJ, *supra* note 7, at 332 (LJA vi.3–5) (noting that security is not greater in Paris than in London, because while although Paris has more laws on the books than London, it also has many more dependents and servants); see also *id.* at 333 (LJA vi 5–6). ("[T]he most helpless set of men imaginable. . . . Nothing tends so much to corrupt and enervate and debase the mind as dependency, and nothing gives such noble and generous notions of probity as freedom and independency.").

206. *Id.* at 384 (LJA vi.145–46).

207. See *id.* at 338 (LJA vi.18–21); see also *id.* at 390 (LJA vi.161).

208. See LOJ, *supra* note 7, at 340 (LJA vi.24–25).

pure wealth maximization: instead it served the goal of creating conditions under which people could take care of their own needs.<sup>209</sup> In fact, Smith believed that the division of labor would both lead to workers being better paid *and* prices being more affordable (not one or the other, which he said is a mistake made “in the eyes of the vulgar”<sup>210</sup>). After discussing the pin-factory, later made famous in WN, Smith concluded:

In this manner . . . the improvement of arts renders things so much easier done that a great wage can be afforded to the artizan and the goods can still be at a low price. The state is opulent where the necessaries and conveniences of life are easily come at, whatever otherwise be its condition, and nothing else can deserve the name of opulence but this comeatitableness.<sup>211</sup>

Smith then again sourced the reason for division of labor to human nature, pointing to the (well-known line) regarding the uniquely human propensity to “truck, barter, and exchange”.

This division of work is not however the effect of any human policy, but is the necessary consequence of a naturall disposition altogether peculiar to men, viz the disposition to truck, barter, and exchange; and as this disposition is peculiar to man, so is the consequence of it, the division of work betwixt different persons acting in concert.<sup>212</sup>

Thus, the division of labor did not need to be the result of human policy because it was already the product of human nature. And Smith reminded his students that the propensity to “truck, barter, and exchange” arises out of our nature as social animals: “[m]an continually standing in need of the assistance and help of others, must fall upon some means to procure their help.”<sup>213</sup> This led Smith to the (again, now famous) idea.

When you apply to a brewer or butcher for beer or for beef, you do not explain to him how much you stand in need of these but how much it would be your interest to allow you to have

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209. *See id.* at 340 (LJA vi.24–25).

210. *Id.* at 343 (LJA vi.33).

211. *Id.* Note that Smith is in favor of paying the artisan well!

212. *Id.* at 347 (LJA vi.44).

213. LOJ, *supra* note 7, at 347 (LJA vi.45).

them for a certain price. You do not address yourself to his humanity, but his self-love.<sup>214</sup>

Smith then said that “[b]eggars are the only persons who depend on charity for their subsistence,” but Smith then said, “neither do they do so altogether”: even “beggars” will then barter and exchange with each other.<sup>215</sup> Because being social is as much a part of human nature as is wanting to get our own needs met.<sup>216</sup>

That said, the line about consumer’s appeal to the producer’s self-love has been offered as evidence that Smith viewed exchange as being driven by a zero-sum game of wealth-maximization. But the context of the discussion suggests something else entirely. The context shows instead that exchange is simply human nature, according to Smith, in part because we need things,<sup>217</sup> and in part because we are social animals primed to see cooperation as one way to take care of ourselves.

Note too that Smith’s egalitarian streak resurfaces in this discussion. After making his point about the butcher and the brewer, he took up the topic of specialization: some of us become butchers, some brewers, and some become philosophers. Why? Critically, he said that specialization was not a result of inherent differences in capabilities, but instead, a product of our confidence in the fact that we could, and do, exchange and trade.<sup>218</sup> Thus specialization was not, as others thought, evidence of any inherent difference in “natural parts and genius (which if there be any is but very small) as is generally supposed”.<sup>219</sup>

No two persons can be more different in their genius as a philosopher and a porter, but there does not seem to have been any original difference betwixt them. For the 5 or 6 years of their lives there was hardly any apparent difference; their

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214. *Id.* at 348 (LJA vi.45–46). This idea—that consumers do not beg for provisions, but instead appeal to the producer’s self-love (i.e., appeal to the pride producers have taken in their work, and the natural human desire to be recognized and compensated for that work), became well-known after its publication in WN. The nearly universal misunderstanding of this line—reading it as an endorsement of the producer’s selfishness or greed rather than an observation about how consumers engage in transactions with sellers—caused Smith scholar Samuel Fleischacker to exclaim, “*Of course* we address the butcher and baker in terms of what they can get from us!” FLEISCHACKER, *supra* note 26, at 90 (italics in original).

215. LOJ, *supra* note 7, at 348 (LJA vi.46).

216. See TMS-G, *supra* note 9, at 9 (TMS I.i.1.1).

217. See LOJ, *supra* note 7, at 334 (LJA vi.9).

218. *Id.* at 348 (LJA vi.47).

219. *Id.*

companions looked upon them as persons pretty much of the same stamp. No wisdom and ingenuity appeared in one superior to that of the other. From about that time a difference was thought to be perceived in them. Their manner of life began then to affect them, and without doubt had it not been for this they would have continued the same. The differences in employment occasions the differences of genius.<sup>220</sup>

Further, Smith said, even though we may take different paths, we are still social animals, and will still both want and need to cooperate:

But even the philosopher and the porter are mutually beneficial to each other. The porter assists the philosopher not only by carrying to him what he wants; but by assisting in packing, carrying, and unpacking the goods which fill the shops and warehouses of the merchants [who] make everything the philosopher buys come so much cheaper than if a less diligent workman had been employed. The philosopher again benefits the porter not only as being occasionally a customer, but by the improvements he makes in the different arts. Everyone who burns coals or eats bread is benefited by the philosopher who invented the fire engine or the corn mill.<sup>221</sup>

In sum, in the space of three days of lectures, Smith presented to his jurisprudence students many of the core ideas for which he would later become (in)famous, after their publication in *WN*. And with that publication Smith had his own ambitions: he hoped to persuade policy makers of the time that commercial society, if done properly, was both consistent with liberalism and a moral and ethical life for all.<sup>222</sup> Doing it right for Smith meant, in part, keeping it small, and that is where we go next.

### *B. Limited Government, Small Institutions*

So far, we have seen that Smith thought all people had a natural desire to be both happy and worthy<sup>223</sup> but he also knew that government could do little directly to bring those ends about. Instead, government could, and so should, set up the conditions for happiness and give people the freedom to attain that end, and so prove themselves worthy of it, on their own.

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220. *Id.* at 348 (LJA vi.47–48).

221. *Id.* at 349 (LJA vi.49).

222. *See, e.g.*, Posner, *supra* note 202, at 22; FITZGIBBONS, *supra* note 20, at 12, 14.

223. *See, e.g.*, TMS-G, *supra* note 9, at 168 (TMS III.5.9–10).



### 1. *Trust in Individuals*

As is probably evident by now, Smith was more humanist than he is credited for. In fact, Smith scholar Charles Griswold says that for Smith, “freedom—achievable by all rather than just by a chosen few—is the great moral and political ideal.”<sup>224</sup> Importantly, Smith meant liberty “for all,” because, again in Griswold’s words, “[m]uch of the moral thrust of Smith’s political economy lies in its claim to better the lot of the ordinary person.”<sup>225</sup>

As we saw in Smith’s teaching about the philosopher and the porter, Smith believed that all people had natural capacity for moral imagination and that no-one was inherently better than anyone else by virtue of birth. Those advantages came later, as a result of social upbringing and “the existential status quo,”<sup>226</sup> but they were not inherent to human nature. He was also a strong proponent of education, and he believed that was a role the government should take up and provide to everyone.<sup>227</sup> Indeed, Smith’s egalitarianism was radical at the time, breaking with the then-tradition of considering the poor inherently morally inferior.<sup>228</sup> Fleischacker goes so far as to say that no-one did more to change the prevailing attitudes about the moral worth of the poor than Smith.<sup>229</sup>

As such, and unlike other elites at the time, Smith trusted individuals to know their own needs, and he thought that human nature provided all the motivation we need to get them met: because unless we believe we are worthy, we will not be happy. So he believed the state need not (and ought not) tell us how to go about getting them

224. Griswold, *supra* note 5, at 12.

225. See *id.* at 13; see also Elizabeth Anderson, *Adam Smith on Equality*, in ADAM SMITH: HIS LIFE, THOUGHT, AND LEGACY 157–72 (Ryan H. Hanley ed., 2016).

226. MALLOY, *supra* note 12, at 84.

227. WEINSTEIN, *supra* note 9, at 69.

228. See FLEISCHACKER, *supra* note 26, at 74–77 (noting that this an area where Smith broke with Aristotle: while Aristotle believed only a certain class of people could be fully virtuous, Smith believed everyone had the same capacities, at least as a matter of human nature, irrespective of experience and nurture); *id.* at 206 (“But by far the most important contribution Smith made to the history of state welfare programs was to change the attitudes toward the poor that underwrote the restrictive, disdainful policies by which the poor were kept poor.”) (quoting GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY* 62, 46 (Alfred A. Knopf ed., 1984) (“[I]f the *Wealth of Nations* was less than novel in its theories of money, trade, or value, it was genuinely revolutionary in its view of poverty and its attitude toward the poor.”)).

229. FLEISCHACKER, *supra* note 26, at 206–07. Fleischacker’s account is truly eye-opening and I recommend that everyone remotely interested in Smith read it.

met, but rather, simply create conditions that would allow people to, in twenty-first century terms, self-actualize.<sup>230</sup>

Finally, Smith's ethical view of individuals squares with his methodological commitment to particulars, as we've seen all along. For Smith, Haakonssen wrote, the individual occupies a privileged place, ethically and methodologically:

[J]ustice can only be made up of individuals instances of regard for particular persons, since all moral judgment takes place through sympathy and sympathy can, of course, only be with concrete individuals. In human morality there is, therefore, a clear primacy of the individual over any kind of social whole... The moral primacy of individuals for which Smith argues here is a basic feature of his moral philosophy. . . .<sup>231</sup>

## 2. Cause for Concern in Public Life

Recall that Smith said "self-deceit" is the source of "half the disorders of mankind."<sup>232</sup> Vanity is one product of self-deceit, and Smith said, "is always founded upon the belief of our being the object of attention and approbation."<sup>233</sup> Inherent in this observation is that seeking to be the object of attention and seeking status carries with it the risk of vanity and self-deceit. Nothing good happens then. Smith said: "[t]o those who have been accustomed to the possession, or even to the hope of public admiration, all other pleasures sicken and decay."<sup>234</sup> And since politicians necessarily must seek public attention and approval, Smith worried that political leaders could be vulnerable to seeking attention for the wrong reasons, and so then diverted from the path of wisdom and virtue.<sup>235</sup>

Smith also doubted political actors' expertise. As for knowledge, he thought individuals knew their own situations best, certainly better than remote political actors, and as set out above, he thought all people were capable of taking care of themselves, morally, socially, and, with the division of labor, economically. He distrusted people who thought

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230. *See id.* at 236–42. Interestingly, Fleischaker concludes that Smith's distrust of big, systemic public policy plans extended to big, systemic private sector institutions as well, including corporations and churches, and perhaps even more so because the latter are in no way accountable to public oversight.

231. *See* HAAKONSSSEN, *supra* note 22, at 88–89 (and quoting TMS II.ii.3.10).

232. TMS-G, *supra* note 9, at 158 (TMS III.4.6).

233. *Id.* at 50 (TMS I.iii.2.1).

234. *Id.* at 57 (TMS I.iii.2.7).

235. *See, e.g.*, FLEISCHACKER, *supra* note 26, at 231.

vainly thought they “knew it all”—”men of system” who thought their own utopian vision of things was somehow best for everyone irrespective of who, what or where.<sup>236</sup>

The man of system, on the contrary, is apt to be very wise in his own conceit; and 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 goes on to establish it completely and in all its parts, without any regard either to the great interests, or to the strong prejudices, which may oppose 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 on a chess-board. He does not consider that . . . every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impress upon it.<sup>237</sup>

The worst combination, for Smith, was a lack of knowledge combined with too much ego.

Some general, and even systematical, idea of the perfection of policy and law, may no doubt be necessary for directing the views of the statesman. But to insist on establishing, and upon establishing all at once, and in spite all of the opposition, every thing which that idea may seem to require, must often be the highest degree of arrogance. It is to erect his own judgment into the supreme standard of right and wrong.<sup>238</sup>

That said, Smith did have an ideal public servant in mind, and it is there we will end. That vision takes us back to TMS, back to the human sentiments, and back to the human heart. It also gives us a positive, but pragmatic, vision for the future.<sup>239</sup> In a chapter on the virtue of prudence, Smith described the ideal civic leader as one who has “the best head joined to the best heart”.<sup>240</sup>

Wise and judicious conduct, when directed to greater and nobler purposes than the care of the health, the fortune, the rank of the individual, is frequently and very properly called prudence. We talk of the prudence of the great general, of the great statesman, of the great legislator . . . This superior prudence . . . necessarily supposes the utmost perfection of all

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236. See TMS-G, *supra* note 9, at 233–34 (TMS VI.ii.2.17).

237. *Id.*

238. *Id.* at 234 (TMS VI.ii.2.18).

239. On Smith’s pragmatism re civic leadership, despite all his concerns, see Posner, *supra* note 202, at 204–06 (quoting TMS-G, *supra* note 9, at 216).

240. See TMS-G, *supra* note 9, at 216 (TMS VI.i.15).

the intellectual and of all the moral virtues. It is the best head combined with the best heart. It is the most perfect wisdom combined with the most perfect virtue.<sup>241</sup>

#### V. CONCLUSION

Writing about Adam Smith and jurisprudence challenges the author; reading Smith on jurisprudence challenges the reader. The reasons are the same: to fully appreciate him, one must read a whole lot of him. Because he was such a systemic thinker, it is unwise to select pieces of his work and conclude they represent the whole. As this exploration of Smith's idea of justice and the moral imagination has shown, his thinking about law and public policy arose out of foundational principles he explained in TMS. Some of those principles were later "operationalized" in WN; others have been lost to history in the manuscript burned before his death. We are left to reconstruct what he might have envisioned if it had been completed and published. The reconstruction effort got a boost in the middle the twentieth century when a second set of student notes was discovered, leading eventually to publication of the full set.<sup>242</sup> Even though we do not have a complete record from Smith himself, we have enough to see that his thinking about law and public policy was systemic, woven as it was through the different subjects covered in the year-long moral philosophy course (ethics, jurisprudence, and political economy).

Investing in Smith is worth it. Intellectually, his thinking was innovative and singular even at the time: Smith thought justice was innate moral sentiment, experienced first through sensation, then subject to rational processing from the perspective of a fully-informed but impartial spectator. In terms of legal rights, Smith did not claim that one set of values should direct the impartial spectator's reasoning about justice, but instead specified the terms of the inquiry: would a fully informed, impartial neutral imaginatively sympathize with the "hurt" (i.e., resentment) of one who was adversely impacted by another's action? Smith had confidence that an ethical moral reasoner could identify the universal requirement of justice, that of compensating injury caused by "real and positive hurt," through a proper exercise of the moral imagination. I have shown how this inquiry could impact one particular area of modern contract law, the

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241. *Id.*

242. LOJ, *supra* note 7, at 9 (introduction by the editors).

objective theory of contract formation, but the possibilities for further application are countless.

In terms of public policy, Smith thought that the natural human desire to be worthy of approbation meant people were inherently motivated to take care of themselves. This in turn meant both that government could be limited and that government's goal was clearly defined: create the conditions for people to be able to take care of themselves, to be able to "come at" what they need on their own terms. Further, he believed that all people were born equally morally worthy, and that education, and the lack thereof, was a big part of what sowed division in society. He thus argued for a robust system of public education.<sup>243</sup> Conversely, Smith thought that the natural human desire to seek approbation for the wrong reasons—excessive attention, excessive wealth, vanity, self-deceit—was cause for concern, especially when it came to public life. In the end this concern suggests a heightened need for ethical honesty in all branches of government, and perhaps suggests that before any of us do anything at all, we should attend to our plan's ethical ramifications.

Finally, those looking to Smith for specific dictates of what rules, laws, or policies are "best" will not find them. This, I believe, is exactly as he intended. Smith did not specify the content of law; instead, he specified the universal parameters for justice, and reminded us that we are creatures of certain laws of human nature. He believed that *those* laws follow us from the social and ethical world to the commercial, political, and legal worlds. Keeping those laws in mind, he believed we could figure out the particulars on our own. Better to follow universal parameters than to turn to some external authority—even him—for answers.

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243. See generally WEINSTEIN, *supra* note 9.