

**ADAM SMITH’S MARKET JURISPRUDENCE:
AN INTRODUCTION TO -
LAW AND THE INVISIBLE HAND:
A THEORY OF ADAM SMITH’S JURISPRUDENCE**

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Law always takes *a point of view*.¹ This point of view influences the production and interpretation of legal meaning and has implications for economics and politics. The question explored in *Law and the Invisible Hand* is one of determining Adam Smith’s point of view and its role in understanding Smith’s theory of jurisprudence. To be clear, expressing a point of view means that law is not purely amoral, not even for an economist with the stature of Adam Smith.²

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1. ROBIN PAUL MALLOY, *LAW AND THE INVISIBLE HAND: A THEORY OF ADAM SMITH’S JURISPRUDENCE* 88, 91–92 (2021) [hereinafter *LAW AND THE INVISIBLE HAND*]. This idea of law having a point of view was first made popular in CATHERINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* (1989).

2. Smith is credited with being the founder of economics, as can be gleaned from most foundational books in economics and from any of the numerous webpages available online. Generally, economics is presented as a morally neutral field and its inquiries and theories considered objective. In this book I argue that

This is important because it relates to a major point of conflict in legal theory. This point of conflict involves the tension—competition—for controlling the authoritative point of view to be adopted by the law. Smith offers one point of view but there are other points of view competing for recognition as the authoritative lens through which we interpret legal problems and render legal decisions. As I shall explain, Smith’s point of view is that of an “impartial spectator” endowed with certain core values and moral sentiments. These values and moral sentiments are the foundation for advancing opportunity, progress, and equality in society. These are the values and moral sentiments that underscore much of the formative jurisprudence of the United States and of countries with successful market economies around the world. In terms of overall social progress and enhanced human wellbeing, Smith’s spectator point of view seems to facilitate better results than those of competing views. The veracity of this observation continues to be relevant to contemporary discussions of legal theory.

To be sure, Adam Smith is best known as the founder of economics and as the author of *The Wealth of Nations* (TWN), a masterful work first published in 1776, the same year as the American Colonies declared independence from Great Britain.³ Even prior to authoring TWN, Smith had made his name in the world as a moral philosopher and as the author of the book, *The Theory of Moral Sentiments* (TMS).⁴ Less well remembered about Adam Smith is that he held a Doctor of Legal Letters degree and was a lecturer on jurisprudence at Glasgow University in Scotland. We have notes from his lectures (*Lectures on Jurisprudence*, ‘LOJ’), but he never completed a third book that he promised to write on the subject of

Smith’s jurisprudence is expressed from a value-based point of view that is therefore not completely amoral, neutral, or unbiased. *See generally* LAW AND THE INVISIBLE HAND, *supra* note 1.

3. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannon ed., 1976) (the edition holds both volumes that are cited as Vol. I, Vol. II, this article makes reference to the page number in the respective volume) (first published by Adam Smith in 1776) [hereinafter cited as TWN].

4. *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (E.G. West ed., 1969, 1976) (replication of the edition published by Arlington Press, 1969) (following the text of the Henry G. Bohn edition, London, 1853) (first published by Adam Smith in 1759) [hereinafter TMS]. In my book I also include parallel references to ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A.L. Macfie eds., 1976) [hereinafter TMS-G]. (Note: E.G. West is my primary source for references to TMS. Cross references to the TMS-G edition are provided for those who use this edition, as the TMS West edition has become less readily available in recent years.)

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jurisprudence.⁵ From what Smith wrote about justice and law in TWN and TMS, as well as what we can discover in the student notes from his LOJ, it is possible to construct a reasonable and generalizable theory of Adam Smith's jurisprudence.

TWN and TMS were well known to the leaders of Europe and of the American Colonies during Smith's lifetime. To this day, some 250 years later, they continue to be cited in books on economics, moral philosophy, and law.⁶ In addition, Smith is referenced in numerous law review articles, magazine and newspaper stories, and his work is cited in opinions issued by the federal courts of the United States even though nothing Smith wrote has precedential value in a U.S. court of law.⁷ Smith's ideas on liberty, trade, property, and limited government were well known to the American founders and are consistent with many of the ideas embedded into the American Constitution. It is surprising therefore that legal academics have written very little about Smith's theory of jurisprudence. In my book I bring new light and attention to Smith's work in jurisprudence, and I invite others to dig deeper into Smith's contributions to law and legal theory.

Adam Smith's jurisprudence is not so much a philosophy of law as it is the search for the appropriate relationship among law, economics, and politics. This makes Smith's work relevant to those interested in contemporary legal theory because these relationships are of continuing interest and importance.

As with any such inquiry, Smith had to interpret the world around him, and he did this through the mind's eye of an *impartial spectator*. Smith endowed his impartial spectator with certain core values and moral sentiments. Thus, Smith gave his theory of jurisprudence a particular *point of view*, a point of view that can be said to be rational, reasonable, and fair.⁸ Moreover, we can evaluate Smith's theory of jurisprudence in relation to social and economic progress over time.⁹ As to this point, one of the conclusions I make is that, in general,

5. TMS, *supra* note 4, at 537; TMS-G, *supra* note 4, at 341–42. Smith discusses his plan to write a book on jurisprudence. He never published this book, but we do have student notes that comprise his Lectures on Jurisprudence. *See generally* ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek, D.D. Raphael, P.G. Stein eds., 1978) (Includes student reports from years 1762-63, Report A; and 1766, Report B) [hereinafter LOJ].

6. *See* LAW AND THE INVISIBLE HAND, *supra* note 1, at 119–42. The cites to Smith are significant. Detailed discussion in my book is centered on the ways that the Courts of the United States cite to Adam Smith.

7. *Id.*

8. *Id.* at 65, 101–03.

9. *Id.* at 75–76, 150–54.

societies that embrace the key elements of Smith's jurisprudence, in contrast to those that do not, tend to enjoy a higher standard of living and a greater degree of liberty. This is because a robust system of justice, grounded in due process and the securing of person and property, promotes stability, predictability, and planning. This in turn supports investment, innovation, and progress.

With this in mind, in *Law and the Invisible Hand*, I target a general audience of readers with the hope of making Adam Smith accessible and relevant to the contemporary study and practice of law. In writing the book I have remained true to the spirit of Adam Smith's work, but I am interested in doing more than merely recounting what Adam Smith said about law. Instead, I am interested in making Smith relevant to contemporary discussions concerning jurisprudence.

This is a law book, even though it addresses economics and market theory. In general, I have four overarching goals for the book.

1. To explain that Smith was not the one-dimensional, selfish, and laissez faire capitalist that the legal literature makes him out to be.
2. To show that Smith offers us a cost-conscious and market-based theory of jurisprudence that recognizes that law is about more than economic efficiency and political expediency. Law builds on our shared experiences, core values, and moral sentiments.
3. To explain that Smith understood that the wealth of a nation is intrinsically linked to a robust system of justice. Moreover, the perfection of justice simultaneously enhances human wellbeing and liberty.
4. To reclaim the relevance of Smith's jurisprudence by explaining its connection to cooperation, collaboration, and progress. The issues explored by Smith are issues relevant to contemporary debates about law, justice, and jurisprudence.

In the book I cover all these points. In this article, I do not intend to cover each of the above stated points, but I do hope to provide an overview of the book and of Smith's theory of jurisprudence. I start with a discussion of Smith's understanding and use of language. This includes his use of metaphor to explain the invisible forces at work in social organization and progress. Next, I provide examples of Smith's *pragmatic turn* in the law. I then discuss Smith's dynamic and evolutionary theory of jurisprudences as it related to the four stages of progress identified by Smith. Finally, I set out a general theory of

Smith's jurisprudence to illustrate how all of Smith's ideas come together in a dynamic process.

SMITH, LANGUAGE, AND METAPHOR

Adam Smith made four fundamental claims about human nature. First, all people are self-interested. Second, all people sympathize with their fellow human beings. Third, all people have a natural desire to truck, barter, and exchange (to engage in social and economic interaction). Fourth, all people make judgments about their own conduct and the conduct of others. Functionally, to do these things, people need a theory of language and a theory of interpretation.

Smith was a master of interpretation and writing. We can glean this from his writings and from the ways in which he employed interpretation theory to develop his own theory of the way that the world worked.¹⁰ In examining his work, we can see that Smith employed interpretation theory for several purposes. This is an important point because law involves the continuous interpretation and production of meaning, and because we need an explicit theory of interpretation in order to develop a theory of Smith's jurisprudence.

Adam Smith understood that the practice of law required more than a deep knowledge of legal rules and norms, it required an understanding of law in its economic and political context. This, in turn, required a theory of interpretation. Smith needed a theory of interpretation to accomplish several goals.

First, Smith needed to interpret the world around him in order to create meaning from the phenomena that he observed. Smith was trying to explain the process of social organization. He was looking to develop a theory of how people come together in communities and make progress over time. Similar to Sir Isaac Newton and his theory of gravity and motion, Smith was looking for the invisible forces that hold communities together and keep them operating smoothly and productively. He not only had to interpret the history of humankind, he had to develop a reasonably understandable narrative to explain his theory to others.

Second, Smith needed a theory of language, communication, and interpretation for purposes of explaining the way that we successfully pursue what he referred to as our natural desire to *truck, barter, and exchange* with one another. Exchange requires communication and

10. See e.g., ADAM SMITH, LECTURES ON RHETORIC AND BELLES LETTRES (J.C. Bryce ed., 1983) [hereinafter LRBL]; ADAM SMITH, ESSAYS ON PHILOSOPHICAL SUBJECTS (W.P.D. Wightam, J.C. Bryce eds., 1980) [hereinafter EPS].

communication requires a shared approach to the production and interpretation of meaning.

Third, Smith needed a theory of interpretation to support his view that people are naturally able to enter into “sympathy” with one another. To sympathize with another person, one must be able to interpret the other person’s situation.

Fourth, Smith needed a theory of interpretation for explaining the process of people making judgments about their own conduct and about the conduct of others. For Smith, justice required judgment, which itself required an understanding of the situation in question, including a way of evaluating and communicating a decision.

In developing his theory of jurisprudence Smith made many interpretive moves that can now be usefully understood in relationship to the later work of the well-known American philosopher and co-founder of American Pragmatism, Charles Sanders Peirce.¹¹ Peirce should be known to legal readers based on his connection with the early development of legal pragmatism, and to philosophers and linguists based on his work in semiotics.¹² I will give one example of how Smith and Peirce share a similar method of interpretation in their work. In Smith’s discussion of the development of language he provides an example of how early people might have developed words for things that were important to them, such as a cave used for shelter.¹³ They developed these words, signs, and ideas so that they could communicate. Smith explains how at first the word ‘cave’ referred to one particular cave but eventually became a generic sign for all things of similar quality that were discovered as the humans moved around and explored their world. Central to Smith’s explanation is that the signifier ‘cave’, and the signified physical cave, are brought together by a third (an interpretive reference), being what Peirce later referred to as the *interpretant* and I call the referent (short for interpretive reference and interpretive referent).¹⁴ In other words, the ability to interpret the presence of a new ‘cave’ involved recalling an interpretive reference—referent—that was in the mind as a result of experiencing an earlier cave. It is the reference (the interpretant) that connects the physical ‘cave’ with the word ‘cave’. One way to think of this is that we have a signifier and a signified but that is not

11. LAW AND THE INVISIBLE HAND, *supra* note 1, at 70–72, 77–78, 80, 87–90.

12. *Id.* at 78 n.5.

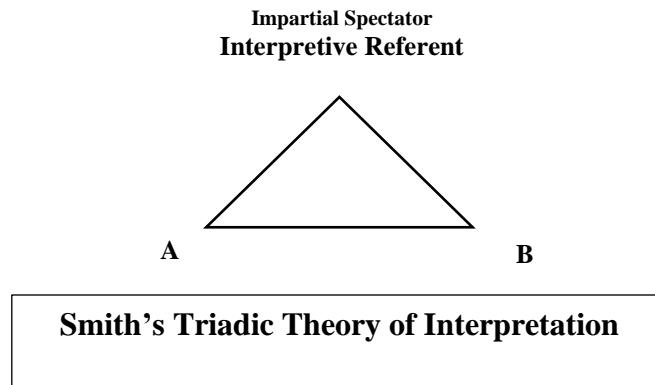
13. *Id.* at 68–71.

14. *Id.* at 69–72 (I am informed by Peirce’s pragmatism, but I have my own approach and occasionally employ different terminology).

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enough, we need to connect these two by reference to things in our ‘memory banks’ so that with the connection in mind, we can link them together and form a coherent meaning.

This is important in Smith’s theory because he places the impartial spectator in the position of an interpretive referent for interpreting ‘law’ and ‘justice’. In other words, Smith has us make meaning out of the world by looking through the ‘mind’s eye’ of an impartial spectator. He uses the impartial spectator as the mediator of meaning by connecting the signified and signifier in what we are interpreting. In this relationship, the interpretive referent is important because it influences the outcome. For example, should law use the interpretive referent of a ‘reasonable man’, ‘reasonable woman’, or a ‘reasonable person’? Does it make a difference? Should the interpretive referent be that of a progressive Democratic Socialist or of a conservative Constitutionalist Republican? Does it make a difference? This triadic relationship in the process of interpretation is illustrated in the diagram below.



As shown in the diagram, the impartial spectator, endowed with certain core values and moral sentiments, mediates the understanding and the production of legal meaning by serving as an interpretive referent between ‘A’ and ‘B’. In this way, the impartial spectator functions as a filtering *point of view* for understanding the relationship between the qualities/facts of a given situation and our ultimate decisions and judgments about them. To appreciate why this is important, consider the following two examples set out below. In doing so, think about the way in which alternative interpretive referents—points of view—may affect a person’s understanding and judgment about each situation. Consider for example, how people from different political and economic perspectives might interpret the situations below. The ‘facts’ in each example will remain the same but

are likely to be subject to varying interpretations depending on the political, economic, and value-based perspective of the person asked to render a judgment about what she is observing. Examples:

First, consider a street marketplace or bazaar with dozens of merchants selling similar products on similar terms and at similar prices. Is the similarity of selling price and terms evidence of a non-competitive market in which sellers take advantage of powerless consumers? This might be the case if sellers have market power and engage in such things as price fixing. On the other hand, the similarity of prices and terms may be the result of intense competition forcing all sellers to converge on a similar market price and similar terms of exchange. An observer's interpretation of this situation may be influenced by the observer's understanding of economics, markets, and competition.

Second, consider a black woman driving on the highway in a small ninety-eight percent white suburban community. She drives past an elderly white police officer who has pulled over a vehicle with out-of-state license plates being driven by a teenage black male wearing a hoodie. Is she observing a routine stop for a traffic violation, or is she observing evidence of systemic racism—the so-called driving while black phenomenon? Is judgment in this situation likely to be influenced by the observer's race, income level, or political point of view?

In these simple examples, it should be easy to appreciate that the lens through which we view and interpret each situation informs our judgment and conclusion regarding what we observe. This in turn frames the legal problem and implicates particular legal consequences. People looking at the same situation from different points of view may draw very different conclusions; conclusions informed not so much by different facts as by differences in deeply held values that direct their point of view in different ways. As I explain in the book, the point of view of the impartial spectator is value-based. Smith believed that the values of the impartial spectator, even with their flaws, are better at advancing justice and promoting the common interest of humankind than are other points of view. This is, of course, a matter that can be evaluated by studying history. A study from which people will draw their own rational conclusions and submit them to ongoing debate.

The broader point here is that the interpretive referent is relevant not only to specific cases but also to legal policy more generally. An interpretive referent can consist of a specific reference point, such as Smith's example of a 'cave', or to an entire perspective, such as that of an economic analysis of law or critical race theory. The interpretive

referent is the lens through which we interpret and produce legal meanings. Marxists, capitalists, and libertarians might all look at the same situation and draw very different conclusions. Likewise, justices on the United States Supreme Court may employ different methods of interpretation—originalism, strict construction, and contextualism, for example—and these different methods can lead to different results when applied to the same dispute.

The choice among competing referents has implications for how we access, distribute, and control scarce resources and political authority in society because it influences the decisions that we make. Therefore, the primary contention in contemporary legal theory involves a struggle over who gets to determine the authoritative point of view that will be used for the interpretation and production of legal meaning. Quite simply, it is a question of determining whose point of view controls the governance of society. In this regard, we might ask if this legal point of view should be that of critical race theory, feminist theory, economic theory, market theory, some other theory, or a combination of theories? Similarly, the study of law involves the immersion of students into a particular point of view presented by those instructing students in the law. The instructor's point of view may be disclosed or not, but instructors seldom simply teach legal rules devoid of a jurisprudential point of view.

A key point of my book, therefore, is to help explain that Smith offers us a compelling theory of a market-based jurisprudence that is balanced and humane. He also offers us a jurisprudence that is process oriented and dynamic. His thesis is that in the ebb and flow of history, communities with a value-based jurisprudence of the type Smith describes, will be more successful than those that express some other point of view. In other words, the core values and moral sentiments identified by Smith promote wealthier and more just societies than those of competing points of view.

In advancing his theory, Smith made references to various metaphors in addition to that of the impartial spectator. Smith used metaphor to offer a readily understandable narrative explaining how people make complex systems of interaction work without dependence on mysticism, “the men of system”,¹⁵ or divine intervention. He used metaphors to simplify and explain the ‘invisible’ forces at work in social organization and progress.

15. LAW AND THE INVISIBLE HAND, *supra* note 1, at 15, 107. This term is used to describe people who believe that they can anticipate and regulate everything better than allowing people to figure things out in a dynamic system.

Smith divided his analysis of social organization between the informal and formal realms. I discuss these realms in detail in the book. The informal realm is governed by experience, culture, and shared core values and moral sentiments.¹⁶ As explained in the book, the informal realm is governed by three forces; the invisible hand (self-interest), the man in the mirror (the interests of others), and the inner impartial spectator (our conscience).¹⁷ In the informal realm, judgment and justice are the functions of an *inner* impartial spectator. The formal realm is that of civic institutions consisting of those operating in the political, economic, and legal spheres.¹⁸ The formal realm is likewise governed by three forces. Smith describes these forces as the ‘pillars’ of civic society. These forces include authority (the sovereign in any one of several forms), utility (in a general sense—something that is beneficial), and justice (focusing on reasonableness, fairness, due process, and security of one’s person and property). The location of judgment and justice in the formal realm is with an *outer* impartial spectator as embodied in legal institutions. Thus, the impartial spectator, in its inner and outer forms, serves as a connecting metaphor that links the inner (informal) and outer (formal) realms of social organization.¹⁹ Smith envisions the inner and outer, the informal and formal, as dynamic, and interactive and the two realms are connected by the idea of the impartial spectator.

Smith writes that people, in addition to being self-interested are also able to sympathize with others. In Smith’s theory of jurisprudence, sympathy is important because it constrains the pursuit of self-interest (limits the invisible hand) while informing our ability to make judgments about our own conduct and the conduct of others.²⁰ Sympathy underlies reciprocity, mutuality, and due process of law. These informal and formal systems of social organization work dynamically to shape expectations so that people can more readily plan, invest, and cooperate, across extended and diverse networks of exchange.

Importantly, none of these metaphors stands alone. Consistent with the triadic approach to interpretation used by Smith and by Peirce, these metaphors (forces) are only comprehensible in reference

16. *Id.* at 21–39.

17. *Id.*

18. *Id.* at 40–58.

19. *Id.* 59–64.

20. LAW AND THE INVISIBLE HAND, *supra* note 1, at 83, 147 (explaining the concept of mutual sympathy).

to each other. Moreover, the impartial spectator functions as an interpretive referent in this relationship. Smith endows his impartial spectator with certain core values and moral sentiments. In contemporary law, there are many points of view vying for the role of interpretive referent. Thus, Smith's impartial spectator must compete with other points of view such as those described in my book as *homo economicus* (the hyper-rational economic person) and *homo-identicus* (the practitioner of identity politics).²¹ In one sense, Smith's impartial spectator is 'us', as individuals, and 'us' as in "We the People". In a broader sense, the impartial spectator transcends the idea of being some actual person, the impartial spectator is *a metaphorical point of view* that when adopted as law and internalized by the people subject to such laws, functions as an authoritative interpretive lens for making informal and formal legal judgments. It is a point of view. In this respect it is just like *homo economicus* and *homo identicus* in that it is a metaphorical device serving as a representation of a particular set of underlying values that one brings to making judgments. It is akin to saying that a person brings either a conservative or a progressive political perspective to interpreting a legal dispute. The impartial spectator is not a person, the impartial spectator is a value-laden point of view through which one engages in the interpretation and production of legal meaning. It is a metaphorical device that gives legal judgment a particular point of view and influences substantive outcomes. The idea of potentially having multiple points of view competing for the role of authoritative interpretive referent is consistent with Smith's approach, even as he advanced his own value-based device of the impartial spectator. In advancing his own device, Smith was hypothesizing that certain values could work to mediate competing forces better than others. He tested his hypothesis against the history of civilization as it was known to him at that time and used his tentative conclusions to inform his theory of jurisprudence.

In Smith's process-oriented approach to jurisprudence, there is no search for the right pronoun to address the impartial spectator because the impartial spectator is a metaphorical device that speaks to all of us. Moreover, the judgments of the impartial spectator, just like the judgments of any other authoritative point of view, are enforced by cultural norms, and by the legal system to the extent that they are incorporated into formal law.

21. *Id.* at 90–96, 97–101 (explaining the concept of *homo economicus* and *homo identicus* respectively).

Smith's metaphor placed judgment within the human experience therefore, the impartial spectator accounted for the human qualities of imperfection and bias.²² For this reason, the impartial spectator, like the common law judge, is not held to an imaginary standard of perfection but to a human standard of making rational decisions supported by substantial competent evidence on the record in accordance with due process.²³ We can evaluate these decisions with reference to Smith's core values and moral sentiments, just as we can evaluate them against some other set of criteria. My point about Smith's relevance to contemporary jurisprudence is not so much that Smith gives us specific answers to difficult contemporary problems, but that he gives us an approach to jurisprudence that advances the idea that certain core values and moral sentiments lead to better results for human progress and well-being than others, and we can test this proposition against the historical record.

In making my contribution to the scholarship on Smith's jurisprudence, I do several things. In TMS, Smith writes at length about the impartial spectator but only briefly speaks of an inner and outer impartial spectator.²⁴ Little has been done to develop the importance of this distinction between the role of an inner and outer spectator within the conception of a unified spectator. Similarly, little of any significance has been written about the man in the mirror. Those few people who mention the man in the mirror do so only in passing, and generally mention it without exploring its potential meaning for law. Where I made a breakthrough on Smith was getting beyond the standard academic focus directed at the relationship between the invisible hand and the impartial spectator. Most writers focus on this dyadic relationship as the key to understanding Smith's life work. As I was rereading the TMS, however, I was struck by the importance of the man in the mirror and of the idea of viewing ourselves and the world through a mirror. This mirror metaphor is discussed in multiple places in TMS, yet little attention has been paid to it. In noticing this, I was able to connect Smith's work with that of Charles S. Peirce. I could see that Smith's triadic approach to interpretation as discussed earlier, along with the example Smith gave about the 'cave', carried over to developing a better understanding of how Smith might have developed a generalizable theory of social progress and of jurisprudence. Smith's theory of social organization and progress was

22. *Id.* at 31.

23. *Id.* at 32–33, 53–54.

24. *Id.* at 40–41, 59–65, 76–86.

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not built on the dyadic relationship of the invisible hand and the impartial spectator. Instead, it was built on the triadic relationship of the invisible hand, the impartial spectator, and the man in the mirror.²⁵ Likewise, in the formal realm, Smith develops a triadic approach based on the pillars of civic society. Here, Smith specifically addresses justice as the primary pillar upon which society rests.²⁶ I argue that from Smith's work we can identify at least two other significant pillars, those of authority and utility. The three pillars of justice, utility, and authority are understandable in a triadic relationship, and they have a dynamic and interactive relationship with the three forces of the informal realm. When these two triadic relationships are considered, one begins to piece them together with Smith's idea of an inner and outer impartial spectator and see the relationships that make up Smith's theory of jurisprudence. All of these insights work together to open new possibilities for Smith scholarship.

Finally, I clarify an often under explored point concerning Smith's metaphor of the invisible hand. I do this by looking carefully at Smith's two most famous references to the invisible hand, one in TWN and one in TMS. The reference in TWN is most famous and it focuses on the idea that the people who provide us with goods, services, and amusements, do so out of their own self-interest and not out of love for others.²⁷ In other words, production is for consumption and producers are motivated by the prospect of receiving payment for their work. That is, they work to advance their own self-interest. In his other reference to the invisible hand, Smith takes a slightly different point of view. In TMS, Smith is focused on the wealthy; on people with excess accumulation and discretionary income to spend.²⁸ Smith explains that the wealthy cannot use all of their accumulation personally. For example, one can eat only so much food and enjoy so much drink during a meal or a day. Thus, when wealthy people have excess accumulation of food and drink without a good means of refrigeration or storage, they may select the best items for themselves, but they end up sharing or distributing some of their excess accumulation with others in exchange for other goods, services, and

25. LAW AND THE INVISIBLE HAND, *supra* note 1, at 27–29; TMS, *supra* note 4, at 204–05; TMS-G, *supra* note 4, at 110–11.

26. LAW AND THE INVISIBLE HAND, *supra* note 1, at 40; TMS, *supra* note 4, at 167; TMS-G, *supra* note 4, at 86.

27. LAW AND THE INVISIBLE HAND, *supra* note 1, at 23; TWN, Vol. I, *supra* note 3, at 477–78.

28. LAW AND THE INVISIBLE HAND, *supra* note 1, at 24–25; TMS, *supra* note 4, at 304; TMS-G, *supra* note 4, at 184–85.

amusements that they themselves desire. In this way, those who provide these goods, services, and amusements, benefit from the excess accumulation and discretionary income of those people who have more wealth than they do.

In these two examples used by Smith, we see what I call the paradox of self-interest.²⁹ The paradox is that people pursue their own self-interest and yet to do this they have to understand the interests of others so that they direct their attention to producing goods, services, and amusements that are desired by others. In short, people must think about, understand, and serve the interest of others in order to advance their own self-interest. It is a reciprocal and mutual relationship in which self-interest is incoherent in the absence of its relationship to the interests of others.

Taking all of these insights together and expanding on the triadic structure of Smith's analysis, I was able to fit the idea of Smith's informal and formal realm with another important idea in Smith's work; 'perfect justice'. Smith saw justice in the informal and formal realms of social organization linked by the shared metaphorical device of the impartial spectator. He understood that the closer informal norms and values were to the norms and values of social institutions, the smoother society would operate.³⁰ This would lead to greater voluntary compliance with rules and norms, and greater social cooperation and collaboration. The movement toward or away from unity between the informal and formal realms of social organization was a dynamic part of Smith's theory. Smith ultimately suggested that perfect justice was an ideal, but even unity of norms and values within a society's informal and formal realms was open to critique. A community might be in complete agreement on everything and yet what they agree upon might not be worthy of approbation. Ultimately, this could be problematic because justice required an aesthetic judgment with respect to the praiseworthiness of the jurisprudential order of society. It was not enough that everyone in a community might share the same logical or ethical understanding of justice if that shared understanding fell below the aesthetic expectations of the impartial spectator. Ultimately, perfect justice was an aspirational and aesthetic ideal. An ideal rooted in time immemorial and evolving with human experience. All of this was stored and refined over time in the mind's eye of the impartial spectator.

29. LAW AND THE INVISIBLE HAND, *supra* note 1, at 28.

30. *Id.* at 63, 67, 103.

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For Smith, the goal of progress included advancing toward an ideal of perfect justice, and, as explained in the book, this required movement in the direction of ‘concrete reasonableness’ in balancing self-interest with the interests of others. This concrete reasonableness is Smith’s “golden mean” wherein members of a community are able to merge their self-interest in sympathy with the interests of others.³¹ Perfect justice involves the complete unity of self-interest in sympathy with the interests of others so as to advance the common interest of humankind. This merging of interests involves what I identify as the sentiment of ‘common interest’, and the more concrete this becomes in practice, the closer a community moves toward perfect justice.³²

SMITH’S PRAGMATIC TURN

One of Smith’s greatest contributions to jurisprudence is his anchoring of law, judgment, and justice within the human experience.³³ He acknowledges that everyday people must come together and work out ways of peacefully interacting, cooperating, and living together. For Smith, the rules of justice evolve with human experience and co-evolve with concerns for politics and economics. This is what I identify as Smith’s pragmatic turn in law. Extrapolating from my book, I offer seven key insights related to Smith’s pragmatic turn.

1. *Justice* comes from within each and every one of us, from the domain of the “impartial spectator within our breasts.” In other words, ‘we’ as individuals and ‘we’ as acting through our institutions, are responsible for law and for justice. Law and justice do not simply get handed down to us from the gods or from some special order of people or religious organization.
2. *Legal judgments* are not made from behind a hypothetical veil of ignorance. They are rationally made by real people with knowledge of a given situation, acting in compliance with due process and with reference to experience.
3. *Shared core values and moral sentiments* evolve naturally from human experience dating back to time immemorial.

31. *Id.* at 79, 82–86 (specifically citing the “golden mean” at 86 n 7).

32. “In other words, the perfection of justice involves minimizing the variance between self-interest and the interest of others so that everyone is engaged in promoting the common interest of humankind.” *Id.* at 79. Admittedly this is a complex idea and one that is worthy of further inquiry going forward.

33. *Id.* at 65.

They are not dictated by church officials or any other special order of people; they evolve over time and relate to culture and context.

4. *Natural justice* is an evolutionary and dynamic process. Smith discusses natural justice in the sense that while it is part of the human experience and influenced by human behavior, it is beyond the control of the “men of system.” Natural justice evolves in a somewhat indeterminate way, even as it works to provide stability and predictability.
5. Society is not held together by a hypothetical *social contract*, but by the forces of authority and utility as mediated by justice. Smith expressly rejects social contract theory. Smith explains that civil/civic society rests upon certain pillars. He never gives us an account of specific pillars beyond mentioning those of authority, utility, and justice. Of these three pillars, Smith proclaims that justice is the primary pillar upon which society rests.
6. Progress depends upon *the division of labor*, but the division of labor is limited by the extent of the market. Law provides the infrastructure for extending the market while stabilizing exchange and making expectations more predictable. This predictability and stability encourages market participation, planning, and investment.
7. *Perfect justice* is an ideal, but pragmatically it is unattainable because human beings are imperfect. Nonetheless, we can make progress toward the ideal by seeking a “golden mean” in which the sentiment of common interest permits us to merge our self-interest in sympathy with the interests of others in an effort to promote the common interest of humankind.

These seven key insights illustrate ways in which Smith can be understood as a pragmatist after the style of Charles S. Peirce. In addition, Smith, like Peirce, understood the process of interpreting and producing meaning as a triadic one, grounded in experience, and arising out of a communicative process. Smith understood that experience, core values, and moral sentiments frame and filter our decision-making process. Smith understood that everyone makes judgments from a particular jurisprudential point of view. The only variable was the extent to which one did this knowingly and thoughtfully. On this score, Smith believed that a fundamental role of education was to facilitate the learning of, and maturing in, the shared core values and moral sentiments of the community. For this reason,

Smith supported the provision of a basic education to everyone. Smith understood that the rule of law involved more than learning legal rules; it also included the internalization of shared core values and moral sentiments.

SMITH'S DYNAMIC AND EVOLUTIONARY THEORY

Smith explained that law co-evolves with politics and economics. In a metaphorical sense, Smith described the dynamic process of progress over time in terms of four stages. These four stages included: age of hunters; age of herders; age of farming and agriculture; and the age of commerce.³⁴ The stages themselves were less important than the idea of progress over time. Each stage involved particular arrangements in terms of law, politics, and economics. In each stage progress included an increasing maturity in understanding of our shared core values and moral sentiments, and a movement toward an ideal of perfect justice.

Smith's theory is evolutionary across the stages of development. By way of summary, I can give a succinct overview of Smith's evolutionary process.³⁵ Smith writes that we are born dependent on others for our survival, and from this dependence as an infant and young child we learn to cooperate with one another. We are *self-interested* and at the same time we *sympathize* with others. This endows us with an ability to embrace different perspectives. At the same time, we have a *natural desire to truck, barter, and exchange*, and this requires us to communicate and cooperate with others, including those who are distant from us and those who may have different values and customs.³⁶ Through trade, exchange, and other means, we facilitate an accumulation of assets and accumulation facilitates our ability to specialize in certain activities while trading with others for the things we want and need. This fosters a division of labor. In turn, the *division of labor* advances opportunities for innovation and progress as we have time to focus our attention on new and better ways of engaging in work and trade. *But*, Smith warns, the division of labor "*is limited by the extent of the market.*"³⁷ Thus, one key function of law is to extend and diversify the market by providing the infrastructure of greater exchange. Law sets the rules and

34. LAW AND THE INVISIBLE HAND, *supra* note 1, at 18–19, 41–42, 83, 104–07, 117–18.

35. See *id.* at 10–20 for an extended discussion on this topic.

36. *Id.* at 67, 151–52.

37. *Id.* at 14, 104–07, 118 (discussing extending the market).

expectations of exchange. Law facilitates stability, predictability, and planning and this encourages investment, trade, and cooperation. Law also ensures justice so that new people are brought into the market on an expectation that they will be treated fairly in the event of a dispute or disagreement. In doing this, law extends the market and helps to fuel additional accumulation that leads to a further division of labor, that is once again limited by the extent of the market, and yet again the market must be extended using the infrastructure of law. This cycle continues and produces a dynamic of progress moving society forward through the four stages. In this process, law, economics, and politics *co-evolve* as interactive forces that cannot be fully controlled or anticipated by the “*men of system*”.³⁸ Law is always in some ways, incomplete and indeterminate at the same time as it promotes continuity and stability. Cooperation, interdependency, and collaboration increase with extensions of the market through the various stages of progress.

In accordance with Smith’s jurisprudential point of view, three core values emerge as common threads among successful societies. They are informed by the expectations and judgments of the impartial spectator. These three things are:

1. *Promote the common interest of society* by protecting the rewards of self-interested pursuits while constraining unbridled selfishness and preventing uncompensated harms to others.
2. *Advance justice through the rule of law* by ensuring the security of person and property, advancing equality of treatment and opportunity, and providing due process of law. This includes protecting the public from harmful externalities, providing everyone with the essential necessities of life, and offering everyone an opportunity for a basic education.
3. *Facilitate our natural desire to truck, barter, and exchange* by extending the market, enhancing the division of labor, building cooperation and trust, and protecting the rewards of lawful accumulation.

In advancing justice through the rule of law, Smith was primarily concerned with enhancing equality of opportunity and not with equalizing the outcomes generated by competition or by the lawful pursuit of self-interest. In other words, he would have accepted the

38. *Id.* at 15, 52, 107. TMS, *supra* note 4, 380–82; TMS-G, *supra* note 4, at 233–34.

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existential status quo.³⁹ At the same time, Smith would encourage people to seek opportunities for improvement in their own condition and circumstances. Smith would encourage people to work hard and diligently to achieve their full potential despite any constraints limiting their opportunities relative to others. In this way they might advance their own self-interest while simultaneously contributing to the advancement of the broader community.

Smith recognized that some people had advantages over others, but this was a situation arising from the earliest of times with different people having advantages and disadvantages at different times in history. Smith did not imagine a world with no bias or unfairness. Smith recognized these imperfections but felt that progress would be made over time as a result of the dynamic forces at work within his theory of social progress and justice. Thus, Smith was forward looking. Even so, he did make allowances and approved of providing the poorest members of the community with the essential necessities of life and with a basic education.

Moreover, Smith understood that progress toward what he called perfect justice meant something other than equalizing wealth accumulation. Smith understood that people often thought wealth would bring them more happiness or more ways to achieve happiness, but in truth, happiness was not simply measured in terms of wealth accumulation. In this regard, Smith believed that happiness was facilitated by having a just “legal system that provided everyone with security in their person, respect for their property, and protection of their freedom to make self-directed decisions.”⁴⁰

SMITH’S GENERALIZABLE THEORY OF JURISPRUDENCE

Bringing all of the pieces of Smith’s theory together, we are offered a dynamic and interactive conception of jurisprudence, one advanced for its time and still relevant today. As explained above, Smith had a view of social organization that consisted of an informal realm and a formal realm. The informal realm operated in response to experience, cultural norms, and custom. The formal realm developed as society became more complex and the networks of exchange grew

39. LAW AND THE INVISIBLE HAND, *supra* note 1, at 84, 102. *See generally*, JAMES BUCHANAN, THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER (1991); JERRY EVENSKY, ADAM SMITH’S MORAL PHILOSOPHY: A HISTORICAL AND CONTEMPORARY PERSPECTIVE ON MARKETS, LAW, ETHICS, AND CULTURE 53 (2005).

40. LAW AND THE INVISIBLE HAND, *supra* note 1, at 86.

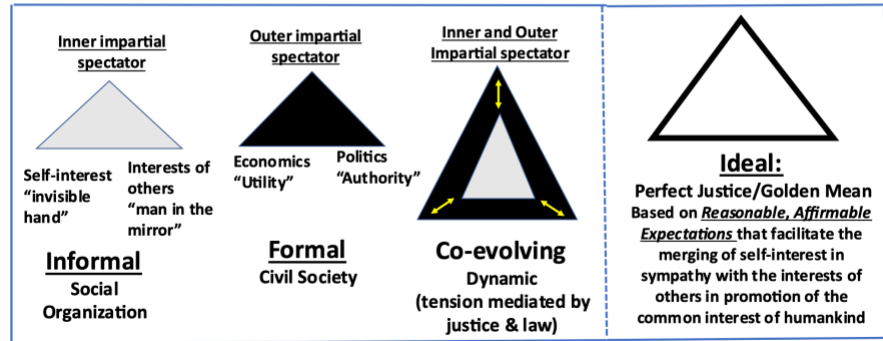
more attenuated. The formal realm responded to institutional norms, rules, and standards. The formal realm consisted of civic institutions—institutions of economics, politics, and law.

In the informal realm, individuals pursue their own self-interest but are held in-check and constrained by both the man in the mirror and the impartial spectator. That is, the interests of others are accounted for in understanding one's own self-interest. As Smith tells us, people must act with knowledge of the fact that others will only tolerate so much from the self-interested pursuits of others. In essence, to get along in society, people must develop a social IQ. They must learn to cooperate, and they must learn to contain the pursuit of self-interest within the bounds of what others will tolerate.

In the accompanying diagram, I illustrate Smith's dynamic theory of social progress and justice.⁴¹ In the diagram you can see the informal realm and the forces of the invisible hand of self-interest, the man in the mirror, and the inner impartial spectator. In the diagram of the formal realm, you see the forces operating within and between formal institutions related to law, economics, and politics. Putting these two images together we can appreciate that the inner and outer realms interact dynamically. Basically, the closer these two triangles come together the more that informal customary norms and values match the community's formal institutional expectations and values. This leads to greater cooperation and voluntary compliance with rules and expectations. Exchange and interactions of all types will be highly voluntary and peaceful. Disputes will be more easily resolved, and progress will be easier to achieve. At the same time, the greater the distance between the informal and formal triangles, the less voluntary compliance and the more difficult social cooperation will be. The relationship between the informal and formal realms represented by these triangles is dynamic and adjusting over time. In Smith's aesthetic and aspirational ideal of perfect justice, where the sentiment of common interest is ideally perfected, the informal and formal realms are in unity with each other, and self-interest is completely merged in sympathy with the interest of others.

41. This is a consolidation of diagrams discussed in more detail in the book. *See id.* at 60–63 figs.5.1, 5.2, 5.3, 5.4. In the consolidated diagram, the triangle representing the “ideal” illustrates complete unity of the inner/outer and informal/formal spheres.

Smith's dynamic theory of jurisprudence included the informal, formal, and ideal.
We can represent these three realms with the four images below.



In Smith's theory of jurisprudence, consistent with ideas expressed in Peirce's work, perfect justice (the ideal), is grounded in a form of pragmatism that promotes judgments based on what I identify as *reasonable (R)*, *affirmable (A)*, *expectations (E)*.⁴² In making arguments to support legal judgments that promote RAE one should address the following criteria.

1. **Reasonable:** Reasonableness involves a *logical* explanation of a decision. In Smith's cost-conscious approach to decision-making this would probably include a cost and benefit analysis along with other economic and behavioral criteria. This goes beyond mere efficiency analysis to include a variety of social, political, and market factors. It requires rational analysis supported by competent evidence.

2. **Affirmable:** A decision should be more than logical, it should be consistent with legal precedent, legal rules, regulations, experience, and cultural norms. It should account for experience and cultural context. The fit between reasonableness and affirmability involves an *ethical* application of the law and legal rules.

3. **Expectations:** A decision should be compatible with reasonable individual and community expectations—in particular, the expectations of an impartial spectator—expectations that embody the core values and moral sentiments of the impartial spectator's point of view. Ultimately, good legal decisions are not merely reasonable and affirmable, they are grounded in *aesthetic* judgments that are worthy of approbation by the impartial spectator.

42. *Id.* at 145–46.

As I teach them, judgments worthy of approbation should include those that are market oriented; embrace robust private property rights; limit redistribution; comply with due process; confirm that all lives matter; and permit private pursuits so long as no uncompensated harm is caused to others. At the same time, societies worthy of approbation protect the public health, safety, welfare, and morals, and provide the poorest among them with a basic education and the essential necessities of life.

Whether one agrees or disagrees with my assessment of Smith, as outlined herein and more fully explained in my book, I hope it invites people to look more closely at Smith's work on jurisprudence. Smith has many insights on the relationship among law, politics, and economics that make for rich discussion in contemporary conversations about law. Many of our contemporary legal disputes involve tension among differing points of view as they compete for authoritative control over the interpretation and production of legal meaning. I believe that Smith offers a compelling value-based approach to understanding and promoting law in a market context, and I think Smith's work should be carefully considered by all who are concerned with the current state of jurisprudence. Adam Smith ought to be considered an important contributor to contemporary discussions of legal theory, and not simply relegated to a historical footnote in a text on jurisprudence.

CONCLUSION

Adam Smith's work reveals that he had complex and nuanced ideas about law, politics, and economics. He was not primarily concerned with economic efficiency or with political expediency, he had a balanced and measured approach in which he sought a *golden mean* among the forces of law, economics, and politics. He believed that as communities worked to approach this golden mean, they made progress toward perfect justice, and at the same time continued to make progress toward improving their general quality of life. In this regard, I believe that history demonstrates that Smith was basically correct. The forces Smith described and the core values he attributed to successful people and communities all seem to be indicators of progress. Those countries with the rule of law and a robust system of justice have generally been the wealthiest and best able to provide their people with a higher standard of living when compared to countries that have followed a different path. While progress, in the Smithian sense, has not presented all people with equality of outcome, this does not mean that progress has not been made for a dramatically increased global population over the past 250 years. After all, it must be

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remembered that Adam Smith was not mapping out a theory of utopia, he was offering us a pragmatic theory of progress and of expanding opportunities.

Importantly, we must acknowledge that while Adam Smith was the founder of economics, he was not simply an economist. Adam Smith understood that the market could and should be interpreted in many ways. His was a broad approach that mixed economics with politics, ethics, history, anthropology, sociology, and linguistics to develop a theory of social progress. This is the reason I do not identify Smith's project as one of 'law and economics' or as an 'economic analysis of law'. I believe that Smith's approach was multi-disciplinary and interdisciplinary and is, therefore, best understood as *market jurisprudence*.⁴³ Smith was seeking to understand law in its market context—to explain jurisprudence as the search for the proper relationship among law, economics, and politics. When this relationship is properly balanced, we may achieve a golden mean and facilitate the aspirational ideal of perfect justice.

I believe that I can best summarize the core thesis of my book by quoting from the last paragraph.

Perhaps the most important and fundamental lesson of Smith's theory of jurisprudence for contemporary lawyers is that successful communities share a commitment to the rule of law and to the primacy of justice. As represented by the metaphor of the impartial spectator, the rule of law requires rational and impartial decision-making in accordance with due process. The rule of law is not merely an expression of economic or political power in some other form. In Smith's theory, conflating the triadic relationship among law, economics, and politics undermines civic society and destabilizes the very pillars upon which civilization rests. Learning from Smith, we know that law and justice cannot simply be reinterpreted in terms of an economic calculus, nor can law and justice be understood as the mere exercise of power in service of identity politics. When the rule of law becomes confused with economics or politics, justice is in trouble. In the midst of such confusion, the language and mechanics of justice may survive as rhetorical and logical exercises in decision-making, but justice loses its ethical and aesthetic grounding. This loss of ethical and aesthetic grounding ultimately undermines the moral authority of law, reduces voluntary cooperation among people, and undercuts the sentiment of common interest.

43. *Id.* at 145.

Consequently, we must avoid confusion by not conflating law into economics or politics. We must recognize law as the primary pillar of civil society, and facilitate its role as the invisible, as well as visible, force that keeps society operating smoothly and productively.⁴⁴

44. *Id.* at 154. Here civil includes civic with reference to society.