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### Author

Lieberman, David

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David Lieberman

Jurisprudence and Social Policy Program  
University of California, Berkeley

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## Adam Smith on Justice, Rights and Law

### 1. The Unexecuted Account of Law and Government

“I shall in another discourse,” Adam Smith reported in the final paragraph of *The Theory of Moral Sentiments*, “endeavour to give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society ...” (TMS.VII.iv.37). Smith’s announcement of this future volume on the general principles of law and government - originally presented in the 1759 first edition of his moral treatise - was then reissued over the next three decades in all the subsequent editions of *The Theory of Moral Sentiments* published in Smith’s own lifetime. Even the heavily-revised sixth edition of 1790, published in the year of Smith’s death, retained the passage; though by this time Smith acknowledged that his “very advanced age” left him “very little expectation” of completing “this great work” which some thirty years earlier he “entertained no doubt of being able to execute” in its entirety (TMS, “Advertisement”, p.3)<sup>i</sup>.

As in the case of Smith’s two most famous publications, the projected work on “the general principles of law and government” took shape as part of Smith’s duties as a professor at Glasgow University. He had, in fact, first lectured on law and jurisprudence even before he received election in 1751 to the first of his two Glasgow chairs. (Indeed, according to the testimony of one of his Glasgow students, it was the success of these earlier Edinburgh-based law lectures that secured Smith his appointment at Glasgow.<sup>ii</sup>) Smith’s Glasgow teaching in moral philosophy, as described in the well-known summary John Millar furnished for Dugald Stewart’s 1794 *Account of the Life and Writings of Adam Smith, LL.D.*, was organized into

four parts. The first was devoted to “Natural Theology”. The second part “comprehended Ethics” and “consisted chiefly of the doctrines which he afterwards published in his Theory of Moral Sentiments.” The third part treated at greater length “that branch of morality which relates to *justice*”; and following the approach of Montesquieu, traced “the gradual progress of jurisprudence” and the attendant developments of “law and government” from “the rudest to the most advanced ages.” The fourth and final part examined “those political regulations” designed to increase the riches, the power, and the prosperity of a State,” and “contained the substance of the work” he later published as “An Inquiry into the Nature and Causes of the Wealth of Nations” (EPS, pp.274-5).

Although Smith himself failed to realize the long-projected volume on “law and government”, two substantial manuscript reports of the third and fourth parts of his Glasgow teaching have survived, and are now published in the Glasgow Edition as Smith’s *Lectures on Jurisprudence*.<sup>iii</sup> While these notes of lectures cannot be treated as simple substitutes for the “great work” Smith never executed, they provide the fullest evidence we have for a major component of his moral philosophy. In biographical terms, the *Lectures on Jurisprudence* disclose the contours and principal elements of subjects that commanded Smith’s philosophical attention throughout his adult career. In their content, the *Lectures* provided the setting for Smith’s explorations of many of the major themes developed in the *Wealth of Nations*; including the account of the historical progress of civil society, which served to structure so much of the Smithian understanding of commercial society. Perhaps of most importance, these *Lectures on Jurisprudence* supply the illuminating connective tissue between Smith’s two great and enduring published contributions to moral and social theory. As such, in recent years these materials have come to figure critically in the general interpretation of Smith’s science of man, and of the broad jurisprudential orientation

suggested by his placement of political economy within the “science of a legislator” (WN.IV.ii.39).<sup>iv</sup>

## 2. Justice and Natural Jurisprudence

The starting point for Smith’s treatment of “the general principles of law and government” is the account of justice contained in the second Part of *The Theory of Moral Sentiments*. The discussion turned on the several important respects in which the virtue of justice differed from other moral virtues.<sup>v</sup> In the operation of the moral sentiments, the failure to perform most virtues stimulated, in actual and ideal spectators, reactions of disapproval and disappointment. But in the case of failures of justice, the moral response proved sharper and more potent. Violations of justice involved readily-perceived “injury” to its victims (or, “real and positive hurt to some particular persons”); and in these cases, actual and ideal spectators were moved to “resentment”, and even more, to the positive support for “punishment” (or “the violence employed to avenge the hurt”) for those committing such acts of injustice (TMS.II.ii.I.3-5).

If violations of justice thus prompted a particular and atypically forceful moral reaction, the conduct required by the virtue of justice could likewise be differentiated from the rest of moral life. In contrast to the frequently open-ended and active performances attending the fulfillment of other social virtues, the virtue of justice was conspicuous for its largely “negative” orientation.

Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely

very little positive merit. He fulfils, however, all the rules of what is peculiarly called justice ... We may often fulfil all the rules of justice by sitting still and doing nothing. (TMS.II.ii.I.9)

Justice was further distinguished on account of its unique societal impacts. Whereas some form of society might exist in the absence of the practice of other moral virtues, no society could “subsist among those who are at all times ready to hurt and injure one another.” On this basis, justice was displayed as “the main pillar” supporting social life. Remove justice, Smith maintained, and “the immense fabric of human society ... must in a moment crumble into atoms” (TMS.II.ii.3.3-4). It was this distinctive feature, Smith went on carefully to explain, which laid the foundation for the mistaken theory that identified the origins and obligations of justice in terms of its utility. This rival approach (such as that Smith found in Hume’s account of justice) confused “efficient” and “final” causes. In cases of injustice, the distinctive moral response of resentment and punishment concerned the particular injury directly suffered, and not the general social interest ultimately served by this moral response (see TMS.II.ii.3.5-10).

In later sections of his moral treatise, Smith pursued further implications of what he had identified to be the distinguishing properties of justice. Since what was required by justice in a given situation could be identified with unique precision and specificity, it was possible to formulate the requirements of justice as a body of “general rules” whose operation admitted few “exceptions or modifications.” In contrast, the “general rules” of all other virtues - in the case of (say) “the offices of prudence, of charity, of generosity, of gratitude, of friendship” - necessarily would “admit of many exceptions, and require so many modifications,” as to make it impossible to regulate moral conduct in this way (TMS.III.6.9-10).

This contrast later came into particular prominence when Smith, in the final section of the final part of *The Theory of Moral Sentiments*, examined “the Manner in which different Authors have treated of the practical Rules of Morality” (TMS.VII.iv). There he condemned the tradition of Christian casuistry for its effort “to lay down exact and precise rules for the direction of every circumstance of our behaviour” (TMS.VII.iv.7). The approach rested on the foundational error of treating the whole of morality in terms of those kinds of general rules which could successfully regulate moral practice only in the case of the virtue of justice. “Books of casuistry,” Smith accordingly noted, “are generally as useless as they are commonly tiresome” (TMS.VII.iv.33). On the other hand, it remained possible and entirely useful to treat systematically those general rules that properly obtained in the case of justice; such was the conventional program for jurisprudence, designed “to prescribe rules for the decisions of judges and arbiters” (TMS.VII.iv.8). In its usual manifestations, jurisprudence considered the particular versions of the rules of justice contained in actual systems of positive law. But, in its most ambitious and systematic form, this branch of moral philosophy aimed to construct “what might properly be called natural jurisprudence, or a theory of the general principles which ought to run through and be the foundation of the laws of all nations.” Here the work of the Dutch jurist, Hugo Grotius, proved both seminal and exemplary. He was the first, Smith reported, to attempt a system of natural jurisprudence; and “his treatise of the laws of war and peace, with all its imperfections, is perhaps at this day the most complete work that has yet been given upon this subject” (TMS.VII.iv.37).

### 3. Natural Jurisprudence

There was much that was quite conventional in Smith's identification of natural jurisprudence as a distinct and important branch of moral philosophy, and in his acknowledgement of Grotius' achievement in launching the field through his celebrated 1625 treatise, *On the Law of War and Peace*.<sup>vi</sup> His review of previous treatments of moral rules echoed several of the claims advanced earlier in the eighteenth-century by several of the influential proponents of the Grotian project; most notably by Grotius' erudite translator and propagandist, Jean Barbeyrac. Barbeyrac's *An Historical and Critical Account of the Science of Morality*, which first appeared as the preface to his 1706 French translation of Pufendorf's *The Law of Nature and Nations* (1672), lauded Grotius for helping rescue moral science from the calamitous grip of scholasticism; and centered the subsequent history of morals on the reception and critical recastings of Grotius' rights theory at the hands of such figures as Selden, Hobbes, and Locke - a process that reached its most comprehensive and commanding expression in Pufendorf's natural jurisprudence. Smith joined Barbeyrac not only in emphasizing the foundational nature of Grotius' jurisprudence; but, more generally, in finding an important point of unity between Grotius and classical stoicism in their shared repudiation of scholastic and casuistical approaches (see TMS.VII.iv.3-6 and VII.iv.34-5). At the same time, it is less clear that Smith viewed the post-Grotian development of the science in the same triumphalist terms mapped by Barbeyrac. In the *Lectures on Jurisprudence*, Smith singled out for praise Hobbes (the "next writer of note" after Grotius) and reported the "very ingenious and distinct" publications of the Prussian jurists, Henry von Cocceji and his son, Samuel (LJ(B)1-4).<sup>vii</sup> Pufendorf, in contrast, was noticed glancingly and somewhat unenthusiastically as a critic of Hobbes; thus suggesting that the insistence in *The Theory of Moral Sentiments* on Grotius' continued pre-eminence reflected Smith's reservations over the contributions of his most famous successor.



One important dimension of this jurisprudential tradition, directly relevant to Smith's own experience, was its impact on the teaching of moral philosophy at the Protestant universities of northern Europe. Pufendorf's natural law theory, especially in the form of his conveniently compact redaction, *On the Duty of Man and Citizen (De officio hominis et civis juxta legem naturalem)* (1673), became a standard and extensively-utilized text of ethical pedagogy.<sup>viii</sup> In the case of Scotland, Pufendorf's treatise entered the curriculum of Glasgow University in the 1790s under the reforming initiative of Gershom Carmichael, whose innovation was soon copied at Edinburgh and elsewhere. Carmichael published an influential edition and commentary on Pufendorf's *De Officio* in 1718; and this remained the set text in moral philosophy at Glasgow during the period of Smith's studentship in the 1730s.<sup>ix</sup> Smith's "never to be forgotten" teacher, Francis Hutcheson, praised Carmichael as "by far the best commentator" on Pufendorf's brief compendium of natural jurisprudence.<sup>x</sup> And Hutcheson's own posthumously published course of Glasgow lectures, *A Short Introduction to Moral Philosophy ... containing the Elements of Ethics and the Law of Nature*, largely conformed in structure and approach to the model of Pufendorf as mediated by Carmichael.

Accordingly, Smith's own entry into the science of jurisprudence can be thought of in terms of two powerful and largely complementary frames. There was first the argument of *The Theory of Moral Sentiments*, explaining the subject-matter of natural jurisprudence and indicating the still-imperfect state of the science.<sup>xi</sup> And, second, was the established pedagogy of Glasgow University, with the writing of Grotius' successors firmly in place in the teaching of moral philosophy. The two frames clarify the importance Smith ascribed to the study of "the general principles of law and government", and they can usefully guide our initial consideration of the content of Smith's *Lectures on Jurisprudence*.

#### 4. Lectures on Jurisprudence

The earlier of the two reports of Smith's lectures best reveals the more conventional elements of his teaching, and the manner in which he developed his moral theory to accommodate the established categories of natural jurisprudence. The discussion of justice in *The Theory of Moral Sentiments* (as in the case of Hume's discussion in the *Treatise* and the *Enquiry*) contained no explicit theory or mention of rights. Rather, situations of justice were revealed and elucidated on the basis of the kind of spectatorial moral reaction which involved "resentment" and support for the "punishment" of those responsible for the misdeed in question. In the *Lectures*, Smith reformulated his theory, such that the kinds of "injury" which prompted this resentment involved the violation of another's right. "Justice is violated," Smith maintained, "whenever one is deprived of what he had a right to and could justly demand from others, or rather, when we do him any injury or hurt without a cause" (LJ(A)i.9). Having thus arrived at the key category of rights, Smith next navigated the established taxonomies and distinctions attending the jurisprudential analysis of rights.<sup>xii</sup> He organized the exposition of rights in terms of the threefold classification utilized by Pufendorf in *De officio* and Hutcheson in the *Short Introduction*; distinguishing among the rights exercised "as a man", rights "as a member of a family", and rights "as a citizen or member of a state". His discussion again followed both predecessors by first taking up the class of rights "that belong to a man as a man." And this category of rights enabled Smith quickly to cover and explicate a series of no less familiar taxonomies and classifications: the difference between "what Puffendorff calls natural rights" and "those which they call adventitious"; "the distinction which Mr. Hutchinson, after Baron Puffendorf, has made"

between “perfect and imperfect rights”<sup>xiii</sup>; and between “real” and “personal” rights (see LJ(A)i.12-16).

In addition to these occasions when Smith readily assimilated the analytical categories of natural jurisprudence (and the civilian tradition more generally), he proved in the *Lectures* no less adept at utilizing the distinctive materials of his own moral theory to help resolve established controversies over the content of legal rights. In introducing the personal rights derived from contract, Smith referred to what “an impartial spectator would readily go along with” in order to explain the kinds of agreements that gave rise to legally valid obligations (LJ(A)ii.42-5). The same spectatorial perspective clarified that the grounds of contractual obligation rested upon the expectation of performance (and the recognizable “injury” caused by non-performance); an insight which Smith next used to reject the rival interpretations (embraced by other “writers on the law of nature and nations”) that derived contractual obligation “from the will of the person to be obliged” or the duty “of veracity” (LJ(A)ii.56-9).

In examining the personal rights created “by delinquency” (*ex delicto*) of another, and the related issue of the appropriate severity of the sanction imposed by law on the offending party, Smith again returned to the ordering logic of the moral sentiments. Rehearsing themes fully explored in the account of justice in *The Theory of Moral Sentiments* (see TMS.II.ii.3.6-11), he insisted that “the measure of the punishment to be inflicted on the delinquent is the concurrence of the impartial spectator with the resentment of the injured” (LJ(A)ii.89). This perspective, Smith went on to explain, repudiated the alternative thesis, “which Grotius and other writers commonly alledge”, that the original “measure of punishments” derived from utilitarian considerations “of the publick good” (LJ(A)ii.90-1).<sup>xiv</sup>

Such instances, which might easily be expanded, provide useful indication of the relative ease with which Smith adapted his moral teaching to the established structures and

controversies of natural jurisprudence (even though his published works gave scant indication of this potential). At the same time, they contrast with many important counter-examples where Smith's discussion involved a more striking repudiation of major elements in the writing on the laws of nature and nations. Thus, to cite two well-known cases, his treatment of natural rights (which referred chiefly to rights of "our person" or "our reputation") proceeded without any recourse to the idea of a state of nature (LJ(A)ii.93). It "serves no purpose to treat of the laws which would take place in a state of nature," Smith curtly noted in criticism of Pufendorf, "as there is no such state existing" (LJ(B)3). And his treatment of rights relative to the sources and limits of political obligation included an explicit rejection of the proposition embraced by "the generality of writers" that "government owes its origins to a voluntary contract" (LJ(A)v.114-9).<sup>xv</sup> Smith's discussion in these cases obviously involved more substantial revisions than the kind of discrete, doctrinal adjustments advanced in his treatment of contracts or punishment. They invite further scrutiny of the manner in which Smith's jurisprudence recast the intellectual and pedagogic traditions to which it contributed.

## 5. The Natural History of Legal Establishments

In the course of a chapter-length survey of the recent "progress of science relative to law and government," Smith's most famous student, John Millar, rehearsed (what we have seen to be) familiar points concerning the novelty and achievements of "Grotius and other speculative lawyers." These jurists had aimed to construct "systems of jurisprudence" that contained those general principles of law which might ideally govern the administration of justice in particular states. Millar then turned to the succeeding, eighteenth-century

contributions “by President Montesquieu, by Lord Kames and by Dr. Smith”. Their studies of law and government had focused less on the Grotian effort to identify “a system of law” embodying “our views of absolute perfection,” and instead scrutinized “the circumstances which occasioned various and opposite imperfections in the law of different countries” and which prevented human laws achieving the excellence “we find no difficulty in conceiving.” To this end, they had emphasized “the first formation and subsequent advancement of civil society”; the rise and development of “arts and sciences”; the “acquisition and extension of property” in all its forms; and the combined impact of these and other social forces on “the institutions and laws of any people”. The result was the construction of a “natural history of legal establishments” that constituted Smith’s most distinctive contribution to the science of law.<sup>xvi</sup>

Millar’s account probably served better to characterize his own conception of jurisprudence than to capture some uniform program contained in the writings of Montesquieu, Kames and Smith. Nonetheless, the terms of the discussion plainly echoed Smith’s own, published description of jurisprudence, which similarly identified two, complementary tasks for this field of moral speculation. First, natural jurisprudence had an explicitly normative and universalistic orientation: “a theory of the general principles which *ought* to run through and be the foundation of the laws of *all* nations” (TMS.VII.iv.37; emphasis added). And, as such, it stood in critical relationship to “systems of positive law,” which were instituted to “enforce the practice” of justice, but whose operation never achieved the envisaged perfection of “a system of natural jurisprudence”. Second was the effort to understand and elucidate the various circumstances that so prevented positive law from fully achieving the dictates of “natural justice”. Here Smith noted such forces as the corrupting influences of “the interest of the government,” or “the interest of particular orders of men who tyrannize the government,” or “the rudeness and barbarism of the people”

(TMS.VII.iv.36). Accordingly, Smith's projected "discourse" on "the general principles of law and government" was designed to take up both questions: the established, normative goals of natural jurisprudence as well as the more sociological discussion "of the different revolutions" positive law and government "have undergone in the different ages and periods of society" (TMS.VII.iv.37).

This orientation helps explain the major and most striking feature of the *Lectures on Jurisprudence*, which was the enormous amount of historical detail in terms of which Smith elucidated the established catalogue of legal rights, as "a man", a "member of a family" and "a member of a state". Indeed, as the cumulative weight of discussion makes clear, aside from the relatively narrow range of rules Smith treated under the category of "natural rights", the vast bulk of jurisprudence concerned materials that, for Smith, only could be understood in terms of the specific historical circumstances of their emergence and subsequent development. As Smith characteristically reported at the start of his discussion of the five conventional foundations of property rights (occupation, accession, prescription, succession, tradition): "Before 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" (LJ(A)i.26-7).

It was in this precise setting that Smith went to identify the "four distinct states" (or "ages") through which "mankind pass" - "1<sup>st</sup>, the Age of Hunters; 2<sup>dly</sup>, the Age of Shepherds; 3<sup>dly</sup>, the Age of Agriculture; and 4<sup>thly</sup>, the Age of Commerce" (LJ(A)i. 27).<sup>xvii</sup> This four-stage taxonomy of societal development became a central (and in recent scholarship, a much-studied) fixture of the historical writing of the Scottish philosophes; and there are strong reasons to think that Smith's jurisprudence lectures were the vehicle through which the theory first gained currency.<sup>xviii</sup> In the lectures themselves, Smith utilized the "four stages of society" to explain the varied nature and especially the extent of rights of property

under distinct social formations. Thus, in “the age of hunters” the objects of property generally were limited to goods of immediate possession, so that property rights themselves were largely confined to the juridical category of “occupation”. In “the age of shepherds”, inequalities of property grew dramatically (a development having profound consequence for the structure of authority in these communities). The most important objects of property were the animals under pasturage. And this form of property gave rise to a wider range of property forms (“from herds and flocks to the land itself” LJ(A)ii.97); and to new grounds of property title (as, for example, property by “accession” in the case of the milk and offspring of the cattle under “occupation” (LJ(A)i.64). But it was not until the “age of agriculture” that rights of property attained their full juridical elaboration. It was not until this stage of social development that “property of land” became paramount; and it was this specific “species of property” which historically received “the greatest extension it has undergone” (LJ(A)i.52-3).

The four-stage theory again explicitly appeared when Smith came to consider the principal forms and functions of government, as part of his exposition of the individual’s rights “as a member of a state”. As in the case of property rights, Smith made clear that the analysis of both the basic forms and the main functions of political society needed to be framed in terms of the broader progress of civil society. Government, which for Smith always presupposed “property” and an “inequality of ... goods”, did not arise until “the age of shepherds”, when increasing inequalities of wealth first rendered it “absolutely necessary” (LJ(A)iv.22-3). In these societies, the earliest institutionalizations of judicial and executive power emerged (see LJ(A)iv.34). But, as in the case of property rights, it was not until the age of agriculture that the organization of states and their characteristic functions assumed the shapes recognizable in the categories of modern jurisprudence. It was the governments of agrarian societies which routinely practiced the principal attributes of sovereignty

(legislative, judicial, and federative (or executive) power); and which were organized historically as either democracies, aristocracies, and monarchies (see LJ(A)iv.1-3).

## 6. Historical Jurisprudence

The established jurisprudence on natural law and natural right had no difficulty recognizing the idea (as here voiced by Pufendorf) that “the laws or usages” of any particular state needed to be judged in terms of the specific “character of the people or of the territory” over which they governed.<sup>xix</sup> Nonetheless, in its extensive historical detail and in its broader historical orientation, Smith’s *Lectures on Jurisprudence* differed markedly from its immediate pedagogic predecessors. The contrast with Hutcheson’s *Short Introduction to Moral Philosophy* occurs over many topics; and can be illustrated in their treatments of chattel slavery, which both moralists considered conventionally as part of the rights of “masters and servants”. Hutcheson’s brief and critical survey of chattel slavery began with a firm condemnation of some of the standard justifications for the institution. Considering the case of slavery as a form of legal punishment, he warned, “no cause whatsoever can degrade a rational creature from the class of men into that of brutes or inanimate things, so as to become wholly the property of another, without any rights of his own.”<sup>xx</sup>

Smith, in his treatment, likewise drew attention to the moral outrages that attended chattel slavery. In his account of Roman slavery, for example, he was concerned to report not only those “hardships which are commonly taken notice of by writers”, but also the “severall others which are not so generally attended to” (LJ(A)iii.94). But the moral censure was counter-balanced and qualified by a no less forthright acknowledgment of the historical pervasiveness of slavery and of the near-impossibility of its full abolition (LJ(A)iii.101-2).



Smith devoted special attention to a more sociological discussion of the manner in which the condition of the slave worsened under social conditions of “opulence and refinement”, or under the political conditions of democracy (LJ(A)iii.110-1). And he then explained the quite exceptional political dynamics which had led to slavery’s otherwise unlikely elimination “in only a small part of Europe” (see LJ(A)iii.101, 117-22).

The discussion of chattel slavery also illustrates the manner in which Smith standardly combined the normative goal of natural jurisprudence with the dense explanatory narrative of social and political history. The critical, normative argument served to identify institutionalized failures of “natural justice”, while the historical material served to illuminate the explanatory contexts for these failures. And - to return to the formulation of *The Theory of Moral Sentiments* - much of this historical elucidation turned directly on “the rudeness and barbarism of the people” or “the interest of particular orders of men who tyrannize the government” (TMS.VII.iv.36). Thus, in the case of slavery, the institution arose among “poor and barbarous people”, where it proved “more tollerable” owing to the shared poverty of slave and master (LJ(A)iii.105). Elsewhere, the institution’s survival was effectively shaped by the imperatives of social and political power. Under democratic government, slavery’s perpetuation was virtually certain, since most often in such communities “the persons who make all the laws” were the “persons who have slaves themselves” (LJ(A)iii.102). Correspondingly, its atypical abolition in Western Europe was owing to the manner in which two powerful elites - the church and the king - used their authority to promote the emancipation of the slaves (“the villains”), as part of their shared efforts to weaken the rival power of the slave-masters (“the nobles and their vassalls”) (LJA.iii.118-20).<sup>xxi</sup>

Much the same logic appeared when Smith considered the manifest abuses attending the rights of private property, such as the law of entails or other rules of succession that

supported the concentration of large landed estates under a single proprietor. The “right of primogeniture”, he maintained, required careful explanation, since “this method of succession” proved “so contrary to nature, to reason, and to justice” (LJ(A)i.116). The origins of primogeniture were to be found in the particular character of allodial and feudal government, which tied together landed property, military capacity and government authority. Both systems historically had emerged in conditions of weak and unstable government authority, in which the allodial and feudal lords functioned “as little princes,” responsible for the security of themselves and their vassals. In such circumstances, the division of landed estates among all heirs threatened the sources of political authority, much as the division of a kingdom among all the royal heirs would undermine the power of the feudal monarchy (LJ(A)i.129-33).<sup>xxii</sup>

The example of primogeniture displays one further, critical dimension of Smith’s historical jurisprudence. This was the manner in which his historical researches frequently complemented the purposes of normative criticism by making clear the antiquated or anachronistic character of many of those positive laws which most glaringly violated natural justice. Thus, in the case of primogeniture, whatever justification this rule of succession might once have enjoyed under the circumstances of allodial and feudal government, these had completely eroded under the conditions of modern politics where law and the public administration of justice secured “the smallest property” as effectively as “the greatest” (LJ(A)1.131).<sup>xxiii</sup> In discussing the European game laws (which contrary “to reason” secured exclusive property rights in “wild animals”), Smith explained how the rules derived from the “tyranny of the feudal government”, when “the king and his nobles appropriated to themselves everything they could, without great hazard of giving umbrage to an enslaved people.” Feudal government, of course, was now obsolete. But, the game laws furnished evidence of the manner in which elements of feudal institutions “still prevails in some

measure in all the governments of Europe” (LJ(A)i.54-5). Similarly, in treating the various laws granting exclusive monopolies and corporate privileges in the exercise of particular trades and manufactures (whose pernicious economic effects were explored at length), Smith emphasized that such regulations might appear “very reasonable” at the time of their historical introduction, when they helped “to bring about ... the separation of trades sooner than the progress of society would naturally effect”. The recovery of this historical rationale, however, plainly disclosed the moral failure of their anachronistic survival. “But as this end is now fully answered,” Smith concluded, “it were much to be wished that these as well as many other remains of the old jurisprudence should be removed” (LJ(A)ii.40-1).<sup>xxiv</sup>

## 7. Jurisprudence and the Progress of Society

In the case of several of the examples noticed above - the eradication of slavery in Western Europe, the introduction of primogeniture, the legislation establishing corporate monopolies - Smith’s discussion highlighted the impact of relatively specific and even idiosyncratic political dynamics on the legal institutions under examination. These accounts of legal change supply useful insight into Smith’s broader understanding and utilization of the four-stage theory of society’s progress with which he introduced his jurisprudence of property and public rights. Some scholars have treated the four-stage theory as offering a fixed scheme of social evolution, in which societal change ultimately is determined by successive economies or “modes of subsistence”.<sup>xxv</sup> The specific examples scrutinized in the *Lectures on Jurisprudence* give little indication that the theory operated either to reduce legal development to a single, over-arching scheme of society’s progress, or to give final priority to modes of subsistence in the explanation of legal rules and legal change. Too much of the

detailed discussion in the lectures concerned rules and practices which were specific to agrarian society for there to be much need for Smith to turn routinely to the larger pattern of societal development in the stages before and after agriculture. And too many of the instances of legal history which most interested Smith turned on the idiosyncratic political arrangements of feudal government for there to be much insight provided by the general features of agrarian society as such. Indeed, when in the *Lectures on Jurisprudence* Smith explored comparatively the pattern of development in particular agrarian communities such as Greece and Rome, his history suggested as much a cyclical pattern of growth and decline as it did a stadial scheme from rudeness to refinement.<sup>xxvi</sup>

The critical appraisal of these historical examples also reveals the scope Smith allowed in matters of positive law for human purpose and normative reflection, as well as for political contingency and the machinations of social elites. And this, perhaps, helps further explain why he viewed the history of jurisprudence as a complement and extension of the normative program of natural jurisprudence, rather than as an alternative to it. Legal history furnished insight and clarification as to why in a particular historical setting the institutions of law failed to achieve the standards of “natural justice”, but it left in place (and, indeed, presupposed) the moral reality of natural justice itself.<sup>xxvii</sup> At the same time, it must be acknowledged, that the combining of natural jurisprudence and historical jurisprudence was never entirely seamless. One important fault line concerned the manner in which Smith’s lectures accommodated two distinct organizing schemes for the analysis of a legal system. The first, supplied by natural jurisprudence, distributed the legal materials into three discrete categories according to the legal status of an individual legal subject: rights as “a man”; rights as “a member of a family”; rights as “a member of a state”. The second, supplied by the taxonomy of the four-stages theory, ordered by legal materials according to relevant “stage” of society, but in a manner that emphasized the interdependence of those legal rights

and legal practices which the classification of natural jurisprudence separated. As heuristic devices, the two schemes thus pointed in different directions.

The place in his jurisprudence where Smith made explicit something of this tension was in the second reported series of lectures where he addressed the issue of where to begin his account of justice in terms of the standard, threefold division of rights in natural jurisprudence. In his earlier lectures, he had followed Hutcheson and Pufendorf in beginning with the individual's rights "as a man", which led him to present his historical jurisprudence of property rights before he came to his historical discussion of government (under the third category of the individual's rights as "a member of a state"). The problem, as Smith acknowledged it, was that "property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government" (LJ(B)11). The problem, in other words, was that the categories of natural jurisprudence analytically separated just those institutions whose *interdependence* Smith's historical jurisprudence sought to elucidate.

Smith's solution, as reported in the second lecture series, was to abandon Hutcheson and his own earlier practice, and embrace the method of the "civilians" by beginning his discussion with "government and then [to] treat of property and other rights" (LJ(B)11). One major result of this reordering of materials was that it enabled Smith to reach far more quickly, and thus give greater prominence to, one of the most original and powerful elements of his historical jurisprudence: his account of the emergence of the modern European system of public justice and regular government.

Smith's history of the transformation of European government and society under the impact of commerce and manufactures received its best-known and most confident formulation in the third book of *Wealth of Nations*, on "the different Progress of Opulence in different Nations". The basic features of the account, however, received their first

elaboration in the discussion of government in the *Lectures on Jurisprudence*. There, as in the later political economy, Smith explained how the introduction of “commerce and manufactures” came to destroy the feudal order. The great lords undermined their own social power by directing their surplus wealth away from the maintenance of retainers and tenants and on to the consumption of the refined and costly goods of the “tradesman or artificer”. This, in turn, freed their tenants and retainers from their former positions of dependency; helped pacify the countryside; served to enrich and strengthen the social power of urban and mercantile orders; and made possible the extension throughout the society of that more ordered and stable administration of justice which earlier developed in the European towns and urban centers. Among the cumulative effect of these transformations, as Smith put it in the *Wealth of Nations*, was the gradual introduction of “order and good government, and with them, the liberty and security of individuals” (WN.III.iv.4).<sup>xxviii</sup>

In the climactic, concluding passages of Book III of the *Wealth of Nations*, Smith coolly observed the profound ironies revealed by this historical transformation. “A revolution of the greatest importance to the publick happiness” had been produced by those “who had not the least intention to serve the publick.” The “great proprietors”, in their new expenditures, merely sought to “gratify the most childish vanity”; while the “merchants and artificers” merely had pursued “their own pedlar principle of turning a penny wherever a penny was to be got” (WN.III.iv.17). The fuller and more detailed rehearsal of this history in the *Lectures on Jurisprudence* lacked these splendid ironies, though there too Smith’s was a narrative of contingency and unintended consequences. What, however, the framework of the *Lectures* helpfully displays was the extent to which Smith’s historical sociology mobilized and recombined in novel fashion its basic jurisprudential elements. The historical treatment neatly wove together a narrative of changes in the *objects* of property right (from land and retainers to the luxuries of commerce and manufactures); in the *practice* of property

rights (from feudal dependency to security of tenancy and personal independence); and in the *government structures* preserving property rights and justice (from feudal instability to regular government and personal liberty). Here, as elsewhere in the *Wealth of Nations*, the synthetic achievement of Smithian political economy rested firmly on the pedagogic experience of the Glasgow professorship.

## 8. Police, Revenue and Arms

In the second and briefer part of the *Lectures on Jurisprudence*, Smith turned to “the general principles of law and government” as they related to “Police, Revenue, and Arms”. The first topic addressed “the cheapness of commodities, public security and cleanliness”; “Revenue” referred to the measures adopted “for defraying the expences of government”; and “Arms” concerned the steps taken by government to defend the community “from foreign injuries and attacks” (LJ(B)5-6). As in the case of the prior and more extensive discussion of the principles of law and government relating to justice, Smith’s subject-matter was taken from the established pedagogy of natural jurisprudence. Pufendorf, in *de Officio*, had briefly identified each of these topics in chapters on “the functions” and on “the duty” of the sovereign. These included, among other tasks, measures “to ensure the growth of the citizens’ personal prosperity”; authority “to compel the citizens to defray” the expenses of the state; and responsibilities “to ensure safety against outsiders” by organizing “as many men as may seem necessary for the common defence”.<sup>xxix</sup> And Hutcheson, in his Glasgow teaching, had raised several of the specific issues Smith explored in this part of his lectures, such as the discussion of “values or prices of goods,” and the arguments identifying the sources of “wealth and power” in “diligence and industry”.<sup>xxx</sup>

Nonetheless, Smith's treatment, and above all the extreme selectivity with which he focused on particular topics, clearly differed from the earlier pedagogic materials. The manner in which the lectures involved an innovative traversal of the established jurisprudential field is perhaps most clearly found in his coverage of "police". The term, as Smith clarified it, denoted a large and heterogeneous body of regulations, most often relating to urban spaces, covering such matters as the prevention of crimes; the safety of roads and the maintenance of public order; and the cheapness and supply of goods and staples.<sup>xxxii</sup> Yet, while fully acknowledging the capacious area of law conventionally covered under "police", Smith at the very outset of his lectures emphasized that many of these subjects were too "mean and trifling" to be included "in a system of jurisprudence". In contrast, those regulations devoted to "the cheapness of provisions" and "having the market well supplied" were identified as "the most important branch of police"; and these, accordingly, warranted special attention (LJ(A)2-4). Hence, when Smith later in his lectures came to this material following the more lengthy treatment "of Justice", he swiftly focused on the matter of "cheapness or plenty". The exploration of the topic, he no less swiftly explained, properly centered on the foundation-question of "wherein opulence consists" (LJ(B)203-6). Then followed, in summary form, a line of argument later made famous in the pages of the *Wealth of Nations*: that "the division of labour" was the source of "the opulence of a country" (a point already illustrated with the example of the manufacture of pins); that the cause of such division of labour was to be found in the "propensity in human nature" to "barter and exchange"; and that this analysis revealed that most of the government policies aimed at securing "cheapness and plenty" were, in fact, counter-productive contributors to "the slow progress of opulence" in "modern times" (LJ(B)212-5,218-20,223, 235).

Smith's account of "taxes and revenue" - the second main topic of this part of the *Lectures on Jurisprudence* - immediately followed upon the preceding analysis of those



misguided government measures retarding “the progress of opulence”. Indeed, the treatment effectively continued the same discussion, since it was in terms of the specific matter of “opulence” that Smith assessed at length the relative merits of the two principal sources of government revenue, “taxes upon possessions” and “taxes upon consumptions” (LJ(B)307,310). This was succeeded by another extended commentary devoted to what Smith identified as “the last division of police” (LJ(B)326). This division concerned “the influence of commerce on the manners of a people,” the setting in which Smith sketched many of the themes to which again he returned in the *Wealth of Nations*, particularly Book V’s arguments in support of “institutions for the education of youth” under conditions of extensive division of labour (see LJ(B)328-33, and WN.V.i.f.50-61).

In comparison with these extensive explorations of the nature, sources, progress, and moral impacts of opulence, Smith’s coverage of the final title of this part of the lectures, “of Arms”, was proportionately brief and routine. His closing remarks on the laws of war and peace - a topic which had received such lavish exposition in the mainstream literature on “law of nature and nations” - was perhaps most remarkable for its comparative lack of novelty. In contrast to so much of the preceding jurisprudence, this part of Smith’s instruction boasted the less-momentous qualities of balance, judiciousness and predictability.

## 9. Justice and Police

In his report of Smith’s Glasgow teaching (to which reference was made above<sup>xxxii</sup>), John Millar distinguished the second part of the *Lectures on Jurisprudence* from the earlier material in two ways. The second part - “on police, revenue, and arms” - had largely reached publication through the vehicle of Smith’s *Wealth of Nations*.<sup>xxxiii</sup> And the second part

addressed laws and regulations founded on “*expediency*”, whereas the first and larger part examined those laws and institutions founded “upon the principle of *justice*” (EPS, p.275).

In so differentiating the moral principles animating the two parts of Smith’s jurisprudence, Millar seemed eager to honor Smith’s own insistence on the need in moral philosophy to keep distinct the special properties of justice as a moral virtue. As we have seen, only the practice of justice could be specified as a system of exact rules; and the failure to observe this peculiarity had led earlier moralists into casuistry (an error which seventeenth-century writers on natural jurisprudence had not entirely avoided) (see TMS.VII.iv.7). Accordingly, the form of normative guidance to be expected in the treatment of justice and perfect rights did not set the model for the form of normative guidance to be expected in the treatment of police.

At the same time, however, Millar’s juxtaposing of “justice” and “expediency” in Smith’s moral teaching is, potentially at least, quite misleading. The risk lies in supposing that the laws and regulations founded upon what Millar termed the principle of “expediency” were simply independent of, or unconnected with, the laws and regulations founded upon the principle of justice. In fact, justice was relevant to the consideration of virtually all the practices and topics Smith covered under “police, revenue, and arms”. The distinction between “justice” and “expediency” served to distinguish two distinct moral perspectives on law and government. But it emphatically did not carve out two separate and autonomous regions of social life, each exclusively shaped by a single and different moral virtue.

The *Lectures on Jurisprudence* supplied ample testimony to the manner in which the virtue of justice saturated the varied laws and policies covered under the headings, “police, revenue, and arms”. Thus, Smith reported that one of the principal branches of “police” concerned the general measures taken by government to ensure the security of the community by preventing crime or by bringing to justice those who committed crime. These

materials Smith termed “the justice of police”, and accordingly chose to discuss in “the former part of jurisprudence” covering justice and perfect rights (LJ(A)i.3). Again, in considering the established issues concerning “a just cause of war” - which appeared within the section on the laws of nations that Smith attached to the discussion “of Arms” - he promptly explained that “whatever is the foundation of a proper law suit before a court of justice may be a just occasion of war” (LJ(B)340). The same, direct appeal to “the rule of justice” featured routinely as Smith went on to consider what was lawful in the conduct of war, and the obligations on belligerent states in their dealings with neutral nations.

In the case of “plenty or opulence” - the topic which dominated Smith discussion of “police” - the relationship to justice requires more careful elaboration. The “first and chief design of every system of government,” he explained at the start of his lectures, was “to maintain justice” by securing to the members of the community their property and “what are called their perfect rights.” The further measures government adopted “with respect to the trade, commerce, agriculture, [and] manufactures of the country” were secondary to, and presupposed the achievement of, government’s primary goal of maintaining justice (LJ(A)i.1-2).

This initial formulation of the interconnection between “justice” and “opulence” was then given greater specificity when Smith examined at length “the causes of the slow progress of opulence” which implicated the operation of law and government (LJ(B)285). First and foremost among these was the failure of government, particularly frequent “in the infancy of society”, to secure its primary goal of establishing a stable structure of justice. Without the background security of rights and property, people had “no motive to be industrious,” and no other political defect could “be more an obstacle to the progress of opulence” (LJ(B)287-8). Smith next turned to a second and different way in which government might frustrate the advance of opulence, through the positive (and frequent)

adoption of “oppressive measures” which damaged either “agriculture” or “commerce”. The examination of this issue led Smith into several subjects he had scarcely noticed earlier in the lectures, such as the discussion of the relative merits of rival approaches to taxation. But no less frequently, the examination led Smith back to topics he already had considered in terms of justice. Thus, to cite a leading example, his survey of “oppressive” government measures began with the various laws which threw “great tracts of land into the hands of single persons.” This account naturally focused on the “right of primogeniture” and the “institution of entails”, which Smith had previously analyzed at length in his treatment of property rights, and which he again related to “the tyranny of the feudal aristocracy.” But whereas in the first part of the lectures (on justice), these institutions were condemned as the unjust remnants of an earlier and oppressive political order, now they were condemned as “extremely prejudicial to the public interest” on account of their “great hindrance to the progress of agriculture” (LJ(B)289-95). In this example, as elsewhere, the “principles of law and government” as applied to “justice” and as applied to “police” offered two, complementary frameworks for the assessment on the same body of positive law.<sup>xxxiv</sup>

In the *Lectures on Jurisprudence*, the manner in which Smith’s treatment of “opulence” thus extended and presupposed the jurisprudence of justice would have been readily apparent given the manner in which the two discussions appeared as successive parts of a single body of moral instruction. However, Smith’s ultimate failure to execute his general work on “law and government”, coupled with his celebrated triumph in publishing the *Wealth of Nations*, worked to sever this immediate thematic connection. As the work of a recent generation of Smith scholars has rightly emphasized, the special significance of the *Lectures on Jurisprudence* is to indicate just how much of Smith’s mature political economy remained linked to his earlier study of justice and law.

## 10. Conclusion: Justice and the *Wealth of Nations*

Justice, of course, was not Smith's subject in the *Wealth of Nations*. Nonetheless, his expansive exploration of the virtue of justice, and its place in the history of law and government, exercised a pervasive impact on his treatment of the political economy of commercial society. In the final book of the *Wealth of Nations*, Smith turned directly to one such dimension of his understanding of justice, first articulated in the *Theory of Moral Sentiments* and then chronicled in detail in the *Lectures on Jurisprudence*. This was the virtue's unique standing as a necessary prerequisite for the maintenance on any social order. Among the "duties of great importance" placed upon the sovereign was "the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice" (WN.IV.ix.51 and WN.V.i.b.1).

Smith's discussion in Book V of "the Expence of Justice" reintroduced many of the themes of his earlier lectures. Government historically emerged and developed with the growing inequality of property. Its chief objective then was to preserve justice by securing the rights of property, which was to say that it was "instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all" (WN.V.i.b.12). In this setting, though, Smith's special concern was with another, more particular historical development, again first charted in his history of law. This was the process by which the political institutions charged with the administration of justice - courts and judges - had come in the European states, and especially in England, to be detached from the other branches of public power. As ever for Smith, this was a history of unintended consequences, prompted by the immediate self-interest of the socially powerful (in this case,

sovereigns lacking the financial incentives to dispense justice directly). But the eventually-resulting consequence of this dynamic was the separation and increasing independence of “judicial” from “executive power”, an institutional structure that greatly enhanced opportunities for “the impartial administration of justice”. This distinctive feature of modern British politics, moreover, was specifically responsible for “the liberty of every individual” and “the sense which he has of his own security” (WN.V.i.b.25).<sup>xxxv</sup>

In these concluding remarks, Smith joined an important body of contemporary political speculation which emphasized the extent to which modern liberty in Britain owed more to the integrity and independence of the law and the courts than it did to the structures of parliamentary representation.<sup>xxxvi</sup> But he also returned to the larger themes of his own political economy, and to the manner in which the achievement of personal liberty and personal independence had been the product of the social and political transformations introduced by commerce and the progress of opulence. The “impartial administration of justice” treated in Book V, in this sense, was but a particular (though politically momentous) institutional manifestation of the historical sociology presented in Book III. Under the impact of commerce, the destruction of the feudal order and the power of the feudal aristocracy had created the opportunity for relations of justice to succeed the previous conditions of personal dependency. The historically-parallel separation of judicial and executive power served further to realize this opportunity for justice. And, as Smith first explained in his jurisprudence “of police”, and then later elaborated in his political economy, this stable structure of rights and justice had done most to secure economic prosperity. As he put it in identifying the true sources for the success of Britain’s colonial trade as against that of other European states, “above all, that equal and impartial administration of justice which renders the rights of the meanest British subject respectable to the greatest” served to

provide “the greatest and most effectual encouragement to every sort of industry” (WN.IV.vii.c.54).

To say that commercial society offered new opportunities for the practice of justice, however, was not to say that commercial society was in any sense inherently or effortlessly just. All systems of positive law, Smith maintained in his *The Theory of Moral Sentiments*, remained imperfect approximations of the rules of natural justice; and, as we have seen, among the objectives Smith assigned to natural jurisprudence was the task of revealing and elucidating such practical failures of justice. In scrutinizing in the *Wealth of Nations* the network of laws and institutions he synthesized into a unified system of “commercial or mercantile” regulation, Smith’s primary concern was to explain the actual damage these rules caused to the economic prosperity they were alleged to promote. But Smith was no less concerned to assess, and to censure, this mercantilist system from the perspective of justice. Such laws, he observed in examining the restraints governing the trade in corn, were “evident violations of natural liberty, and therefore unjust” and “as impolitick as they were unjust” (WN.IV.v.b.16). Or as he more summarily expressed it in a set of concluding criticisms on the complex and counter-productive structure of bounties, subsidies and monopolies: “It is unnecessary, I imagine, to observe, how contrary such regulations are to the boasted liberty of the subject, of which we affect to be so very jealous” (WN.IV.viii.47).

Smith’s jurisprudence had been concerned not only to identify the imperfections of justice. It further sought to account for such failures historically, most often in terms of the distortions occasioned by “the interest of the government” or by “the interest of particular orders of men who tyrannize the government” (TMS.VII.iv.36). Here, too, the analysis of the law and justice in commercial society conformed to the logic of Smith’s more general jurisprudence. The mercantilist system, Smith was eager to show, worked its injustices by serving the interests of one privileged social order against the interests of weaker social

groups.<sup>xxxvii</sup> Indeed, this background framework perhaps helps to explain the urgency and sheer repetition with which Smith insisted in identifying “our merchants and manufactures” as “the principal architects” of “this whole mercantile system” (WN.IV.viii.54).

Thus, “the greater part of the regulations concerning the colony trade” had been designed by the merchants conducting that trade, whose “interest” thereby had “been more considered than either that of the colonies or that of the mother country” (WN.IV.vii.b.49). “To found a great empire for the sole purpose of raising up a people of customers,” Smith ironically noted of the legal monopolies governing colonial trade, was “a project altogether unfit for a nation of shopkeepers; but extremely fit for a nation whose government is influenced by shopkeepers” (WN.IV.vii.c.63). The great linen manufactures had “extort(ed) from the legislature” the current system of protective bounties on exports and tariffs on competitive imports. (WN.IV.viii.4). The “woollen manufactures” had outpaced “any other class of workman” in persuading “the legislature that the prosperity of the nation depended upon the success ... of their particular business.” The “cruellest of our revenue laws” proved “mild and gentle, in comparison of some of those which the clamour of our merchants and manufactures” had “extorted from the legislature” (WN.IV.viii.17). “It is the industry which is carried on for the benefit of the rich and the powerful,” Smith scathingly concluded, “that is principally encouraged by our mercantile system. That which is carried on for the benefit of the poor and the indigent, is too often, either neglected, or oppressed.” (WN.IV.viii.4).

In so distorting the operation of natural justice, the law of the modern commercial state, for all its distinctive features, recognizably conformed to the general patterns of legal imperfection expansively detailed in Smith’s *Lectures on Jurisprudence*. As in earlier eras, the failures of justice could be identified in the political handiwork of the rich and the powerful. Natural justice thus provided an appropriate template for delineating the defects, no less than the remarkable achievements of modern commercial society. In these respects,



Smith's instruction in the *Wealth of Nations* proved a fitting testimony to his protracted and partially realized engagement with "the general principles of law and government".

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- <sup>i</sup> Several years earlier, in a letter of 1785 to Rouchefoucauld, Smith acknowledged that “the indolence of old age” rendered completion of the work “extremely uncertain”, even though the “materials ... are in a great measure collected;” *Correspondence*, no. 248.
- <sup>ii</sup> The lectures on law were one of a series of freelance lectures Smith delivered in Edinburgh between 1748-51. The content and biographical details concerning these lectures are described in Ross 1995, pp.84-108.
- <sup>iii</sup> The two reports, referred to as LJ(A) and LJ(B) are identified as “Report of 1762-3” and “Report dated 1766”, and comprise material from Smith’s final years at Glasgow University. The editorial introduction to the Glasgow volume supplies a full account of the dating and condition of the two reports, and of the differences between them. A quite fragmentary report of an earlier version of the lectures is described in Meek 1976(a). These lectures first became available to Smith scholarship in the edition of LJ(B) published by Edwin Cannan in 1896. In quoting from the *Lectures on Jurisprudence*, I have occasionally modernized spelling and corrected syntax.
- <sup>iv</sup> See Meek and Skinner 1973, for a leading example of the use of the *Lectures on Jurisprudence* to chart Smith’s development as an economic theorist. The scholarship of Winch and Haakonssen as proved the most critical and influential in indicating the importance of the *Lectures on Jurisprudence* for general interpretation of Smith’s moral and social theory; see especially, Haakonssen 1981, Haakonssen 1982 and Haakonssen 1996, chapter 4; and Winch 1978, chapters 3-4, and Winch 1996, chapters 4 and 6. My interpretation in this chapter is throughout heavily indebted to Winch and Haakonssen’s contributions.

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- <sup>v</sup> Smith's position here corresponds to the approach adopted by other contemporary Scottish moralist with whom he had direct contact: Kames (to whom Smith appears to refer at TMS.II.ii.I.5), and Hume (to whom Smith appears to refer at TMS.II.ii.3.6). Haakonssen 1981 places particular emphasis on the impact of Hume's theory of justice upon Smith's legal theory.
- <sup>vi</sup> Recent scholarship in early-modern and eighteenth-century intellectual history has produced several important studies of the theory of natural rights and natural law that Smith and his contemporaries termed natural jurisprudence. Among a rich literature, see the valuable surveys presented in Tuck 1979 and Tuck 1987; Haakonssen 1996; and Schneewind 1998, chapters 1-8.
- <sup>vii</sup> The notice of the Cocceji's publications is unusual. The appeal of this material for Smith is helpfully examined by Haakonssen in Haakonssen 1996, chapter 4.
- <sup>viii</sup> The reception and impact of Pufendorf's moral and legal philosophy is considered in Othmer 1970 and Medick 1973, and more briefly in Dufour 1991, pp.586-9.
- <sup>ix</sup> See Moore and Silverthorne 1983 and Moore and Silverthorne 1984, and Lenhart 1985.
- <sup>x</sup> Hutcheson 1747, pp.i, iii-iv. The *Short Introduction* comprised a translation of the 1742, *Philosophiae moralis institutio compendiaria*. In 1755, Hutcheson's son published a fuller, independent version of his Glasgow course in moral philosophy, as the two-volume *A System of Moral Philosophy*. For contrasting commentary on these works, see Moore 1990 and Haakonssen 1996, pp.65-85.
- <sup>xi</sup> Smith's judgment that the field still required further development was indicated in a passage in a *The Theory of Moral Sentiments* that first described the project of natural jurisprudence: "The principles upon which those rules [of "the civil and criminal law of each particular state"] either are, or ought to be founded, are the subject of a

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particular science, of all sciences by far the most important, but hitherto, perhaps, the least cultivated, that of natural jurisprudence.” (TMS.VI.ii.intro.2).

- <sup>xii</sup> Haakonssen 1981, pp.99-114, provides the fullest commentary on Smith’s utilization of the conventional categories of natural law and the older, Roman law tradition.
- <sup>xiii</sup> Smith’s discussion of justice in the *Lectures on Jurisprudence* was confined to the analysis of perfect rights. Smith’s distinction between perfect and imperfect rights tracked the distinction between commutative and distributive justice developed in *The Theory of Moral Sentiments*. In the *Theory of Moral Sentiments*, however, Smith’s treatment (again) did not employ the language or concept of rights; compare TMS.VII.ii.i.10 and LJ(A)i.14-15.
- <sup>xiv</sup> The case of legal punishment figured prominently in Smith’s general discussion of the relationship between justice and utility; see the commentary by Raphael 1972-3 and Haakonssen 1981, pp.120-3.
- <sup>xv</sup> The rejection by Smith and other of the Scottish philosophes of the idea of a state of nature is routinely noted as a significant element in their historical or sociological approach to the science of human nature. See, for example, the influential discussion in Forbes 1954.
- <sup>xvi</sup> Millar 1818, iv, pp.282-5. See also his comments at ii, p.429-30n, where Smith is identified as “the Newton” of these historical inquiries.
- <sup>xvii</sup> In the second report of the lectures, the terminology is simplified: “The four stages of society are hunting, pasturage, farming, and commerce”; LJ(B)149.
- <sup>xviii</sup> The first published usages of the “four stages theory” in Scotland appear in two historical legal studies of the 1750s: Dalrymple 1758 and Kames 1758. Meek proposes that Smith’s Edinburgh law lectures was the likely source for both authors; see Meek

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1976(b), pp.111-2. There also is evidence that the account of societal progress in the introductory section of William Robertson's 1769 *History of the Reign of Charles V* likewise was taken from the same source; see the discussion in Ross 1995, p.105. Meek 1976(b) remains the fullest survey of the use of the "four stages theory" among the Scottish writers.

<sup>xix</sup> Pufendorf 1991, p.143. The use of historical materials in Pufendorf's moral and legal philosophy is examined in Hont 1987 and Dufour 1991, pp.579-86; and see Forbes 1982.

<sup>xx</sup> Hutcheson 1747, p.274. See also the longer and somewhat clearer discussion in Hutcheson 1755, ii, pp.201-12.

<sup>xxi</sup> This historical analysis also points to the importance of Smith's efforts to convince the contemporary "masters" of slaves that the institution in fact violated their economic interests; see LJ(A)iii.126-30 and LJ(B)290-1, 299-300. See also the better-known discussion of the institution in the *Wealth of Nations*; WN.III.ii.8-12.

<sup>xxii</sup> The law of entails, not discussed here, is considered at LJ(A)i.160-7.

<sup>xxiii</sup> A more familiar rendering of this argument appears in the *Wealth of Nations*; see WN.III.ii.1-7.

<sup>xxiv</sup> This form of historical criticism later figured routinely in the condemnation of unjust laws in the *Wealth of Nations*. See, for example, the discussion of primogeniture: "Laws frequently continue in force long after the circumstances, which first gave occasion to them, and which could alone render them reasonable, are no more." (WN.III.ii.4).

<sup>xxv</sup> This alternative characterization of the four-stages theory appears most emphatically in the scholarly attempts to compare Smith's historical theory with that of Marx; see



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Pascal 1938; Skinner 1967 and Skinner 1975; and Meek's early (and subsequently revised) treatment in Meek 1954. Salter 1992 offers an important survey of and contribution to the subsequent debate over the interpretation of Smith's theory of history. Salter's article was prompted, in part, by the revised interpretation of the historical orientation of Smith's *Lectures on Jurisprudence* presented by Winch and Haakonssen, which I chiefly follow here.

<sup>xxvi</sup> See Winch 1978, pp.63-4, and Haakonssen 1981, pp.178-81, for a further exploration of this point.

<sup>xxvii</sup> Again, my reading follows the interpretation advanced in Winch and Haakonssen; see especially, Haakonssen 1981, chapter 8.

<sup>xxviii</sup> The fuller discussion in the *Lectures on Jurisprudence* helpfully clarifies Smith's understanding of the particular features of England and English politics which prevented it from conforming to the common pattern on the Continent, where the decline of the power of the feudal aristocracy led to the rise of royal absolutism; see LJ(A)iv.164-79 and LJ(A)v.1-15.

<sup>xxix</sup> Pufendorf 1991, pp.154, 140.

<sup>xxx</sup> Hutcheson 1747, pp.209-13, 322-3. Cannon proposed that this material provided the initial stimulation for Smith's engagement with political economy; see Cannon 1896, pp.xxvi-xxvii

<sup>xxxi</sup> Smith at several points characterizes what he understands by "police, revenue and arms"; see LJ(A)i.1-4, vi.1-2, LJ(B)5, 203-5. See also the surveys of eighteenth-century discussions of "police" and "*polizeiwissenschaft*" in Small 1909 and Walker 1978.

<sup>xxxii</sup> See above, Section 1.

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- <sup>xxxiii</sup> Millar here followed Smith's own statement in the "Advertisement" to the sixth edition of *The Theory of Moral Sentiments*.
- <sup>xxxiv</sup> See also the similar example of Smith's treatment of slavery under the heading of police, LJ(B)290-1, 299-300.
- <sup>xxxv</sup> For the parallel and fuller discussion of this legal history in the *Lectures on Jurisprudence*, see LJ(A)v.1-43, and LJ(B)64-75.
- <sup>xxxvi</sup> For a summary and introduction to this argument in eighteenth-century political theory, see my "The Mixed Constitution and the Common Law", in Goldie and Wokler forthcoming. Smith's own position is further illuminated in Winch 1996, chapter 4.
- <sup>xxxvii</sup> See, for example, Smith's formulation at WN.IV.viii.30: "To hurt in any degree the interest of any one order of citizens, for no other purpose but to promote that of some other, is evidently contrary to that justice and equality of treatment which the sovereign owes to all the different orders of his subjects."