

LAW AND THE INVISIBLE HAND

A contemporary interpretation of Adam Smith's work on jurisprudence, revealing Smith's belief that progress emerges from cooperation and a commitment to justice. In Smith's theory, the tension between self-interest and the interests of others is mediated by law, so that the common interest of the community can be promoted. Moreover, Smith informs us that successful societies do at least three things well. They promote the common interest, advance justice through the rule of law, and they facilitate our natural desire to truck, barter, and exchange. In this process, law functions as an invisible force that holds society together and keeps it operating smoothly and productively. Law enhances social cooperation, facilitates trade, and extends the market. In these ways, law functions like Adam Smith's invisible hand, guiding and facilitating the progress of humankind.

ROBIN PAUL MALLOY is the E. I. White Chair and Distinguished Professor of Law, and a Kauffman Professor of Entrepreneurship and Innovation at Syracuse University College of Law. He is a leading expert on market jurisprudence, property, real estate development, and land use regulation. Malloy has published numerous books and scholarly articles. This is his fourth book with Cambridge University Press.

Law and the Invisible Hand

A THEORY OF ADAM SMITH'S JURISPRUDENCE

ROBIN PAUL MALLOY

Syracuse University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
 978-1-108-83663-0 — Law and the Invisible Hand: A Theory of Adam Smith's Jurisprudence
 Robin Paul Malloy
 Frontmatter
[More Information](#)

CAMBRIDGE
 UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
 103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108836630

DOI: 10.1017/9781108874168

© Robin Paul Malloy 2022

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2022

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Malloy, Robin Paul, 1956– author.

TITLE: Law and the invisible hand : a theory of Adam Smith's jurisprudence / Robin Paul Malloy, Syracuse University, New York.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2022. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2021024916 (print) | LCCN 2021024917 (ebook) | ISBN 9781108836630 (hardback) | ISBN 9781108812702 (paperback) | ISBN 9781108874168 (epub)

SUBJECTS: LCSH: Law and economics. | Smith, Adam, 1723-1790—Influence.

CLASSIFICATION: LCC K487.E3 M3548 2022 (print) | LCC K487.E3 (ebook) | DDC 343.07—dc23

LC record available at <https://lcn.loc.gov/2021024916>

LC ebook record available at <https://lcn.loc.gov/2021024917>

ISBN 978-1-108-83663-0 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

For

Margaret

With love... as Time Goes By

Contents

<i>About the Cover</i>	<i>page</i> ix
<i>List of Figures</i>	xi
<i>About the Author</i>	xiii
<i>Preface</i>	xv
<i>Acknowledgments</i>	xxi
<i>Guide to Citations by Adam Smith</i>	xxiii
1 Introduction: Law's Invisible Hand	1
2 Setting the Stage	10
3 Social Organization in the Informal Realm	21
3.1 The Invisible Hand	21
3.2 The Man in the Mirror	27
3.3 The Impartial Spectator	30
3.4 Connecting Smith's Three Metaphors	35
4 Social Organization in the Formal Realm	40
4.1 Utility	41
4.2 Authority	44
4.3 Justice	49
4.4 Connecting Smith's Three Pillars	57
5 Integrating the Informal and Formal in Smith's Theory	59
6 The Spectator View	65
6.1 Language and Interpretation	68

7	Judgment and Justice	77
	7.1 Aesthetic Judgment, Justice, and Smith's Ideal	79
8	The Sentiment of Common Interest	82
9	The Impartial Spectator, <i>Homo economicus</i>, and <i>Homo identicus</i>	87
	9.1 <i>Homo economicus</i>	90
	9.2 <i>Homo identicus</i>	97
	9.3 A False Dichotomy and the Impartial Spectator	101
10	Understanding the Four Stages of Progress	104
	10.1 Smith's Four Stages	104
	10.2 Market Process Theory	107
11	Adam Smith in American Law	119
12	Parting Thoughts	143
	<i>Bibliography</i>	155
	<i>Index</i>	165

About the Cover

For those readers familiar with the works of Adam Smith, the cover art depicting a standing image of Adam Smith should be a reminder of the famous 1790 etching by John Kay. A number of years back, I obtained an old print of the John Kay etching from an antiquarian bookstore. I have it framed and hanging in my office.

For this book, I wanted a cover that would convey a transformative message of maintaining a scholarly commitment to the tradition of Adam Smith while examining his work in a contemporary context. I wanted the cover to illustrate my goal of bringing Adam Smith back into contemporary conversations about law and jurisprudence. To convey this message, I took Adam Smith out of the library setting portrayed by John Kay, where he is cloistured away from the world outside and identified as “Adam Smith the Author of The Wealth of Nations.” I placed Adam Smith in a room with a large picture window and a contemporary New York skyline in the background. I also added some law-related objects to Smith’s surroundings to indicate that this is a book about Smith’s contributions to law rather than to economics. In this image, Smith is engaging the contemporary world on matters of jurisprudence.

With this goal in mind, I discussed my ideas for a transformative book cover with a local artist who I hired to do the work. The artist, Joe Orsak, lives and works in Syracuse, NY. His webpages are at jorsak.com.

Caption: Law and the invisible hand

Credit: Artwork copyright Robin Paul Malloy. A license has been granted to Cambridge University Press to use this artwork on the cover.

Figures

5.1 The informal realm	<i>page</i> 60
5.2 The formal realm	62
5.3 Interactive informal and formal realms	62
5.4 Maturing of informal and formal realms	63
6.1 Triadic relationships in interpretation	70

About the Author

Robin Paul Malloy is the E.I. White Chair and Distinguished Professor of Law and a Kauffman Professor of Entrepreneurship and Innovation at Syracuse University College of Law. He is a leading expert on market jurisprudence, property, real estate development, and land use regulation. Malloy has published nineteen books and more than thirty scholarly articles, in addition to numerous book chapters and essays. Many of his books are on real estate, property, and land use law. Among his works are two edited books on Adam Smith's relationship to law, and several book chapters and scholarly papers on Smith and jurisprudence.

Malloy's books with Cambridge University Press include:

1. *Law and Market Economy: Reinterpreting the Values of Law and Economics* (2000) (Translated into Spanish and Chinese)
2. *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (2004)
3. *Land Use Law and Disability: Planning and Zoning for Accessible Communities* (2015)

Malloy's edited books on Adam Smith:

1. *Adam Smith and the Philosophy of Law and Economics* (Malloy and Evensky eds., Kluwer Academic Press, 1994)
2. *Adam Smith and Law* (Malloy ed., Routledge, 2016)

Malloy's books on law and economics include (in addition to the two Cambridge books mentioned earlier on law and markets):

1. *Law and Economics: An Introductory Toolkit for Lawyers* (Carolina Academic Press, 2019)

Cambridge University Press

978-1-108-83663-0 — Law and the Invisible Hand: A Theory of Adam Smith's Jurisprudence

Robin Paul Malloy

Frontmatter

[More Information](#)

2. *Law and Economics: New and Critical Perspectives* (Malloy and Braun eds., Peter Land Publishing, 1995)
3. *Law and Economics: A Comparative Approach to Theory and Practice* (West, 1990) (Translated into Japanese)

Preface

In writing this book, I have been acutely aware of the fact that Adam Smith never actually published a finished book on his theory of jurisprudence. Therefore, my book cannot simply be a descriptive work that reports on what Adam Smith wrote. For this reason, I have intentionally subtitled the book, “A” *Theory of Adam Smith’s Jurisprudence* rather than “Adam Smith’s Theory of Jurisprudence.” This title acknowledges that as the author, I have had to construct a theory of Smith’s jurisprudence from the limited and partial information available. I believe that even without the book that Smith intended to publish, we do have significant insights about his theory of jurisprudence based on his other works. Therefore, I carefully examined the materials that we do have concerning Smith’s views, and I developed a theory of his jurisprudence based on the available evidence. While there are gaps in Smith’s materials with respect to some details of his theory, it is possible to overcome these gaps. I have used a number of tools to do this and present, herein, a coherent and generalizable theory of Adam Smith’s jurisprudence.

I have intentionally avoided making this book a detailed discussion of jurisprudence, in the sense of attempting to locate and compare Smith’s work with that of other important scholars of jurisprudence over the past 250 years. It is also not a book that engages technical, philosophical, and ethical debates. In this book, I simply undertake to piece together a coherent theory of Adam Smith’s jurisprudence in a new and innovative way; in a way that others have not done. By design, the book is mostly conceptual and is written for a general audience. I have taken considerable care to write this book in a way that presumes of readers no prior expertise in the subject matter.

In the book, I make a number of innovative connections among ideas in Smith’s writings to develop a coherent and generalizable theory of Smith’s jurisprudence. To begin with, I focus on developing a better understanding of the relationship among Smith’s three significant metaphors (the invisible hand, the man in the mirror, and the impartial spectator) and his three pillars of civil society (justice,

authority, and utility). I then go on to develop and conceptualize Smith's informal and formal realms of social organization and the idea of an aesthetics of justice in Smith's work. I also offer a perspective on Smith's theory of progress through the stages of social development. Fundamental to my work is showing the importance of interpretation theory to developing a fuller appreciation of Smith's theory of jurisprudence. I believe my work puts Smith in a more contemporary context. By doing so I hope to make Adam Smith more relatable to contemporary readers. I have tried to show that Smith was a thinker that defies simplistic contemporary labels such as conservative or liberal. Smith had a complicated and nuanced approach. By contemporary political standards some people may object to a number of Smith's positions, but his ideas still challenge us to think about important questions in jurisprudence. For this reason, we should continue to study and discuss Smith's work.

I have devoted considerable time to making sure that my key points and arguments are consistent with and derivable from Smith's writings. I have presented portions of my work for this book in several different forums, including conferences and workshops with legal academics, legal economists, and historians of economic thought. I have benefited from feedback provided by participants in each of these groups. As a result of such feedback, I made changes and adjustments to clarify some of my interpretations of Smith's work.

As I indicated above, my work for this book necessarily employed interpretation theory. For those familiar with my earlier writings, it will be observed that my approach to textual interpretation (the reading of Smith's work) is consistent with my earlier work regarding legal semiotics. In this regard, I am influenced by the work of American philosopher, Charles S. Peirce, and by my long association with a Peirce scholar, Roberta Kevelson. I was fortunate to be able to spend some fifteen years working with Kevelson and being actively involved in her roundtables on semiotics. She did much to inform my thinking about Peirce and my application of some of his central ideas to my work. In prior writings, I have gone into detail with respect to applying Peirce's interpretive method to economics and to market theory. Peirce's theory is complex and involves a lot of subject-specific jargon; therefore, in this book, I use Peirce's methods but avoid going into the technicalities of his theory of semiotics, so as not to distract from the general message and readability of the book.

Readers should also have in mind that I am not writing this book as an economist, historian, or philosopher. This is important because each of these disciplines employs its own method of working and writing. I am writing this book as a legal academic educated in the common law tradition. I also became familiar with the civil law tradition when I was on the faculty of Tulane Law School. As a legal academic, my approach to research and writing is informed by methods applicable to legal scholarship. In examining Smith's work on jurisprudence, it is important to have a thorough understanding of law. This includes knowing something about

both the common law system of England and the civil law system of Continental Europe. This is important because Smith lectured on law in Scotland, which is a mixed jurisdiction with a civil law tradition. Readers interested in the historical relationship between common law and civil law in Scotland might beneficially consult the work of John Cairns and Andrew Simpson. For those interested in comparing how the civil law operates in the mixed jurisdiction of Louisiana in the United States, consult the work of John Lovett. The important point is that Smith knew and taught both the civil law and the common law. Structurally and theoretically the common law tradition differs from that of the civil law, and for those not familiar with these two systems, it is important to keep in mind that the term “civil law” is not what some people might think. It is not a distinction between a criminal lawsuit and a civil lawsuit, as in the American context. The civil law tradition is built on Roman law and is organized differently than the common law system derivable from England. Some would say that the civil law is much more hierarchical than the common law and that it gives more weight to the legislative function and the use of codes, whereas the common law is generally more decentralized and more focused on the activities and opinions of judges and lawyers. In a way, the civil law is also much more systematized than the common law. From a jurisprudential perspective, it is important to note that some of Smith’s classifications and categories of rights and obligations in his lectures on jurisprudence are grounded in civil law. Thus, reading Smith may be confusing if one is not familiar with the basic distinctions between the two systems and their respective terminologies. I have taken these distinctions into account in working to develop a generalizable theory of Smith’s jurisprudence.

In the course of writing this book, I have tried to strike a balance in the use of footnotes. For those familiar with Smith’s work, much of my writing will have easily recognizable connections to Smith’s writings. For those less familiar with Smith’s work, my notes should provide guidance and ample references for further inquiry. I also provide a Bibliography at the end of the book to assist those readers interested in digging deeper into materials I have benefited from in my research.

In prior books and articles, I have used the term “law and market economy” to describe my work and to distinguish it from the more typical work done in law and economics and in the economic analysis of law. My work on law and markets has focused on the way markets relate to core human values. I am interested in the dynamics of the exchange process and in the interpretive implications of economic methods applied to law. Thus, I have examined the application and incorporation of economic concepts and ideas into law in terms of their rhetorical and interpretive implications for traditional meanings and values in jurisprudence. I explore, for example, what it means to equate efficiency with justice, and to substitute conversations about fairness for cost and benefit calculations. When we change the way we talk about law, we also change the substantive meanings and values supported by the law. Thus, I have taken a different approach from many people who prefer to focus

more directly on the application of an economic calculus to law. I believe that my approach allows for a different and broader consideration of the relationship between law and markets than does a more traditional approach to the economic analysis of law. Adam Smith's work also supports a broader and more diverse approach to law and markets. Smith's jurisprudence was not asking questions about the economic efficiency of law, but was instead focused on the role of justice in facilitating progress. While economic analysis has informed thinking about law and made a positive contribution to jurisprudence, the theory of markets and of the markets' relationship with jurisprudence is only partially explainable in standard economic terms. Smith's jurisprudence was about more than an inquiry into the economic analysis of law; it was about determining the proper relationship among the legal, political, and economic aspects of social organization. This requires not only a concern for the logical and mathematical analysis of law from an economic perspective, it requires an ethical, moral, and aesthetic evaluation of human relationships. I believe Smith was trying to think of jurisprudence in a complex way that included multiple perspectives. Consequently, I have come to believe that a better term for the nature of Smith's inquiry into the relationship among law, markets, and politics is "market jurisprudence." This term invites a broad range of scholars to participate in a conversation open to multiple ways of looking at the market and its relationship to jurisprudence. This may include perspectives from history, political science, sociology, anthropology, and linguistics, in addition to economics.

Over the course of many years of research and writing leading up to the completion of this book, I have become indebted to two wonderful people. First and foremost, my wife Margaret who has joyfully participated in endless discussions about Smith, the invisible hand, the impartial spectator, and the man in the mirror. She is always a good listener and a good contributor to the development of new ideas along the way. She makes me explain my ideas, challenges them, and helps me test them out. Her input and support have always been incredibly valuable and important. Second, my friend Jerry Evensky, who I first met back in 1989 when I was being interviewed for a position that I eventually accepted at Syracuse University. I was in law and Jerry in economics, and we both shared a keen interest in Adam Smith. Jerry, specializing in the history of economic thought, writes extensively on Adam Smith. My interests in Smith mostly revolved around consideration of Smith's work in relationship to law and economics. Over thirty years of friendship, coffees, lunches, and dinners, Jerry and I have delighted in arguing about and critiquing each other's ideas regarding Smith. I believe I enjoyed the greater benefit in being able to learn about Smith from Jerry, but I do think Jerry enjoyed the exercise of having someone to discuss and debate the finer points of Smith's work. Over the course of these discussions and as a product of deeper research for this book, some of my earlier ideas about Smith have evolved and changed. I am indebted to Jerry's willingness to review and critique the numerous ideas and questions that I raised

with him in pursuing this book project. While we don't always agree on how best to interpret Smith, he has guided me in my thinking and forced me to clarify my ideas.

I would also like to thank the person who many years ago first got me interested in and excited about Adam Smith when I was an undergraduate student at the Krannert School of Purdue University: Glenn Hueckel. Professor Hueckel is, as of this writing, Professor Emeritus at Pomona College.

Additionally, I wish to thank the Syracuse University College of Law for supporting my research for this book, and for supporting the efforts of several research assistants who have assisted me with proofreading and in formatting footnote materials. These include Robert Baurley, Christopher G. Doak, Devon M. Rhodes, and Maria Zumpano.

Acknowledgments

Some of the points of discussion in this book come from earlier works. I have written extensively on the relationship among law, markets, and culture. I have also written extensively about the application of interpretation theory to law and economics. In writing this book I refer to several of my works that have a central bearing on parts of my argument about Smith's theory of jurisprudence. In particular, I want to acknowledge three works that contribute to my writing of this book.

ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY:
REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000)

ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN
INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING
(2004) (particularly in Chapter 10 of this book)

Robin Paul Malloy, *Adam Smith in the Courts of the United States* 56
LOYOLA L. REV. 33–94 (2010) (particularly in Chapter 11 of this book)

I also wish to acknowledge Professors James Towshend, Williams F. O'Malley and Luca Arnaudo for their input on the use of Latin phrase, *homo identicus*. I originally used the form, *homo identitas* but they suggested this was not proper syntax. I then settled on *homo identicus*, even though this too is an imperfect way to express the idea of a person engaging in identity politics. As an aside, after completing my manuscript, I discovered that another author had also used this term, although for a different purpose and a different meaning. See Daniel Shapiro, *Negotiating the Nonnegotiable* (2016).

Guide to Citations by Adam Smith

In general, the citation form of sources referenced in the footnotes of this book follow the Uniform System of Legal Citation (the Blue Book) for American legal citations. For ease of use, however, citations in the footnotes to the various works of Adam Smith are cited throughout the book in the short form indicated below. Short-form citations refer to the particular editions identified below.

The Theory of Moral Sentiments, cited as “TMS”

ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (E. G. West ed., Liberty Press, 1969, 1976; republication 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).

Where applicable, parallel references are noted to ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D. D. Raphael & A. L. Macfie eds., Glasgow edition, Liberty Press/Oxford, 1976) [noted as **TMS-G for the Glasgow edition**].

(Note: My primary source for references to TMS is the E. G. West edition. Cross-references to the Glasgow edition are provided for those who use this edition, as the West edition has become less readily available in recent years.)

The Wealth of Nations, cited as “TWN”

ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannon ed., 1976) (In two volumes that will be cited as Vol. I, Vol. II, and make reference to the page number in the respective volume). (First published by Adam Smith in 1776).

Lectures on Jurisprudence, cited as “LOJ”

ADAM SMITH, *LECTURES ON JURISPRUDENCE* (R. L. Meek, D. D. Raphael, & L. G. Stein eds., Glasgow edition, Liberty Press/Oxford Press, 1978) (Includes student reports from years 1762–63, Report A; and 1766, Report B).

Lectures on Rhetoric and Belles Letters, cited as “LRBL”

ADAM SMITH, *LECTURES ON RHETORIC AND BELLES LETTERS* (J. C. Bryce ed., Glasgow edition, Liberty Press/Oxford Press, 1983).

Essays on Philosophical Subjects, cited as “EPS”

ADAM SMITH, *ESSAYS ON PHILOSOPHICAL SUBJECTS* (W. L. D. Wightam ed., Glasgow edition, Liberty Press/Oxford Press, 1980).