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Robin Paul Malloy, *Law and the Invisible Hand: A Theory of Adam Smith's Jurisprudence* (Cambridge: Cambridge University Press, 2022), pp. xxiv + 179, \$24.99 (paperback). ISBN: 9781108836632.

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Scholars of Adam Smith reside in many places, but very few of them find their homes in law schools. A prominent exception is Robin Paul Malloy, who has spent his career on law faculties, including for the last thirty years as a professor at Syracuse University College of Law. Most of Malloy's legal research has focused on land-use law, but Adam Smith occupies a prominent place in his scholarly *oeuvre*, both as an object of study and as a guidepost for the construction of an approach to jurisprudence. These strands of Malloy's work come together in his latest book, *Law and the Invisible Hand: A Theory of Adam Smith's Jurisprudence*.

The informed reader might well recoil at the book's title. Some would argue that we have had too much of invisible hands. And, after all, Smith left us no statement of his theory of jurisprudence, as Malloy admits. But his effort in the book is rather more speculative and, indeed, adventurous: It is an attempt to reconstruct Smith's theory of jurisprudence based on the many hints scattered through the record of his thinking. As with any such effort, there are gaps, uncertainties, and claims that are open to question. Yet, Malloy has left us with a remarkable and painstakingly constructed piece of scholarship that at once offers an important new perspective on Smith and a contribution to jurisprudential thinking more generally.

The view of Smith that animates Malloy's analysis is one that "challenges the caricature of Adam Smith as a one-dimensional and uncaring man of profit" and instead treats him as "a complex thinker with a concern for both self-interest and the public interest," subordinating the former to "the requirements of justice because he understood that justice was the most important pillar on which civil society rested" (p. 3).<sup>1</sup> So conceived, Smith is neither the laissez-faire bobblehead championed by the 'Adam Smith Necktie' crowd nor the greed-and-exploitation-sanctioning capitalist apologist portrayed by some left critics. Instead he is a deeply thoughtful student of social organization whose concerns go well beyond individual liberty, profit, and national wealth. Such a portrait, then, requires moving beyond an emphasis on one or the other of Smith's major works to take up Smith in his totality.

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<sup>1</sup> All page references here are to the volume under review.

Malloy's reconstruction of Smith's jurisprudential perspective relies heavily on Smith's discussions of the self–social interplay. The problem at hand, of course, is the organization of society—what one might call the “problem of order”—and Malloy portrays this ordering as the product of ongoing interaction between an “inner” and an “outer” realm. The inner realm is that of individual thought and action, which are “mediated by an *inner impartial spectator*” and undertaken in light of “informal rules, norms, and cultural practices.” The outer realm, meanwhile, is “mediated by an *outer impartial spectator*” and involves formal institutions, such as law. The role of each is key in holding society together and determining the extent of societal flourishing (p. 5).

The dynamics of Smith's inner realm, the contours of which are found especially (though by no means solely) in *The Theory of Moral Sentiments* (*TMS*), are explained via three metaphors: the invisible hand, the man in the mirror, and the impartial spectator. The invisible hand translates the individual propensity to truck, barter, and exchange—stimulated by self-interest—into outcomes that satisfy “the desires and demands” of all “without the need for detailed and centralized government planning.” Here, then, self-interested action becomes, on balance, a positive force for the larger social good. As Malloy notes, however, this harmonization is only partial, implying a need to place limits on the pursuit of self-interest (pp. 22–23). But man is also a social being, one who is both socially situated and lives in community with others. It is here that “the man in the mirror” becomes operational as a metaphor for society. In Malloy's words, “we see ourselves in a mirror that reflects our socially situated existence” (p. 29) and so pursue our self-interest in a way that tends to account for the interests of others. The “impartial spectator,” in a sense, puts the bumpers around all of this, operating through one's conscience to judge the acceptability of one's self-interested (potential) conduct. In doing so, the spectator channels our actions toward that which society deems “reasonable” (p. 31). In this sense, the spectator acts in a manner akin to the common law judge—a correspondence noted by Smith himself (p. 32)—“making socially informed judgments based on a set of shared core values and sentiments” (p. 35). Putting these elements together, we have an informal system where the tendency to pursue one's self-interest is tempered by a sensitivity to the interest of others and the need to conform to societal norms.

The development of the outer realm's formal institutions, in Smith's system, is a natural accompaniment to the evolution of society, with justice as the “main pillar” (*TMS*) upon which effective social organization rests (p. 86). But alongside this stand the pillars of “utility” and “authority.” The former, defined as “beneficial” rather than in more strict Benthamite terms, provides the compass by which society judges the goodness of things (p. 42) and is the formal sector's counterpart to the invisible hand. Authority, which Malloy portrays as the formal complement to the man in the mirror, overcomes the problems associated with anarchy through institutions of civil governance and its mechanisms for laying down rules and settling disputes, as well as supplying services such as defense, education, and provision for the needs of the poor. The third and main pillar, justice, provides security of person and property, protection of the public from harm, and due process—that is, formal constraints on the unfettered pursuit of self-interest that parallel the informal constraints imposed by the impartial spectator (p. 49).

It goes almost without saying that the informal and formal sectors are interdependent, with formal structures affecting the habits of thought associated with the informal side

and informal thinking giving rise to pressures for continuity and change in the formal sector. But what matters for the attainment of perfect justice, in Malloy's construction, is an alignment of the informal and formal realms—that is, of individual action and the expectations reflected in its social institutions. The progression toward such alignment brings with it social and economic development; the failure of this, in contrast, brings social and economic stagnation or regress. It is difficult to come away from the guts of Malloy's analysis, nicely illustrated with some diagrams that he has constructed to bring out the interaction of its essential features, without nodding one's head in agreement. In short, it is a theory that seems to reconcile nicely with the known aspects of Smith's system.

Having set out what, for him, are the fundamentals of Smith's jurisprudential perspective, Malloy proceeds to tease out details and make applications of key elements of it. The most interesting of these, for most readers, is likely to be chapter 9, "The Impartial Spectator, *Homo economicus*, and *Homo identicus*," which allows Malloy to juxtapose Smithian jurisprudence with the "law and economics" and "critical theory" approaches that hold so much sway in contemporary American legal scholarship and education. The distinguishing feature, in this telling, becomes the respective referents: the common interest, self-interest, and identity-group interest. It should be obvious to the attentive reader which approach is the preferred one in Malloy's story, but the conclusion that he draws is a strong one: The impartial spectator view is not simply painted as preferable to the others; the spectator view is said to be progress-promoting, while the others, with their narrower *foci*, threaten disharmony, instability, and regress.


But this is also where some readers might find their most serious quibbles—or outright disagreements—with the ostensible Smithian jurisprudential perspective and with Malloy's claims for its implications. The impartial spectator does a tremendous amount of lifting here, particularly as regards interpretation (ch. 6) and judgment (ch. 7). The spectator is a lovely philosophical concept around which to theorize in this context, as it internalizes those social considerations which, on their face, would seem otherwise to be trampled upon by the horde of citizens engaged in the (formally or informally) unfettered pursuit of their self-interest. That said, the spectator encounters what seem to be insuperable difficulties as an operational concept owing to its essential ambiguity and indeterminacy. To be blunt, who is he/she/them? Everyone has their own idea of the impartial spectator. Richard Posner's seems to be *Homo Economicus*. The critical race theorist's or critical feminist's seems to be some variant of *Homo Identicus*. For members of the "Make America Great Again" crowd, it is *Homo Trumpicus*. This ultimately devolves into the fundamental issue of law: Who gets to choose? Or, to put matters another way, there is no impartial spectator, only conflicting visions of such.

But now let us give both Smith and Malloy the benefit of the doubt and assume away that problem. There remains the difficulty that Malloy seems to treat these referents, or perspectives on law—the Impartial Spectator, *Homo Economicus*, *Homo Identicus*—as three mutually exclusive bases for legal reasoning. And, in the hands of some (perhaps most), they certainly are. But they need not be, and neither should we be tricked into thinking that the spectator is in some sense the reconciliation of the other two. One could justly argue that these referents are parallel bases for thinking about the law, lenses through which to view law, its history, and its effects, and, what is more, that each (and others) should inform a healthy jurisprudential perspective. There is much to be gained in considering things in isolation, peeling away other considerations to focus on the

particular. In this respect, the modern economist and the critical theorist are close cousins. Of course, as Malloy's analysis highlights, there is also much to be lost from such abstraction—but only if these approaches are taken to be mutually exclusive. Might it be that having several arrows in the quiver and using them all, rather than thinking in terms of one “best” arrow, offers the best base from which to consider social fundamentals, such as law? This does not obviate the ineluctable issue of choice, as different arrows will point in different directions, but it arguably offers a better base of insights for making such choices.

There is one more concern that deserves mention here, this derivative of the depiction of the well-functioning economic system described by Smith in *The Wealth of Nations*. Smith's system, for all of its attributes, demonstrates a very limited recognition of the issues that today go by the name “externality.” This is no great sin; after all, it was only with John Stuart Mill, many decades later, that the importance of positive and adverse spillover effects not accounted for in the market or market prices began to gain traction, and it took more than a full century after Mill for these effects to occupy a substantive place in economic thinking. Heaven knows that one does not need the modern economist's conception of externalities to reason about legal processes in a way that effectively accounts for such benefits and (especially, in this context) harms, but that is not really the point. Rather, it is that the smoothness and fluidity of the market system operating under the system of natural liberty seems, in Smith's hands, to leave precious little room for the existence of such effects. Markets capture that which they need to capture because all of the incentives are in place and pointing in the proper direction. Yet, much of law is about voids and incompletenesses here, meaning that one is left to wonder about our ability to generalize from Smith's thinking.

Historians of economics, particularly those who are not Smith specialists, might be tempted to shy away from Malloy's book, put off by its focus on a subject, jurisprudence, that seems far removed from the “history of economic thought” as traditionally defined. But that would be a serious mistake. One cannot pick and choose one's Smith and hope to understand the selected bits. He was a man of system, not systems, and only the foolish will treat him like a Chinese buffet, where one can come away well fed solely by sampling one's preferred parts. One of the great strengths of Malloy's book is that it is about “Adam Smith”—the Smith who lectured on jurisprudence, who wrote *both The Theory of Moral Sentiments* and *The Wealth of Nations*, and held forth on still other subjects as well. Neither has Malloy given us some dry, dusty law book. Its vision of Smith is directed at a general audience rather than simply those acquainted with legal reasoning. Readers who, like this author, believe that there is no ‘Adam Smith Problem,’ and thus that these various efforts by Smith are, by and large, mutually consistent, will find much to savor and to think hard about in Malloy's exercise. It is good to understand Adam Smith, but it is very hard to do so.

Steven G. Medema   
Duke University

## COMPETING INTERESTS

The author declares no competing interests exist.