

**REVIEW OF LAW AND THE INVISIBLE HAND
(CAMBRIDGE UNIVERSITY PRESS) BY PROFESSOR
ROBIN PAUL MALLOY**

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I. INTRODUCTION

For multiple reasons, I am deeply grateful for Professor Malloy’s book, *Law and the Invisible Hand: A Theory of Adam Smith’s Jurisprudence*.¹ In recent decades scholars of history and economics have revealed a more modern and holistic vision of Adam Smith, but scholars in law, for the most part, have yet to take notice.² Indeed, most law professors I speak to are entirely unaware that Smith is, essentially, one of us—he taught jurisprudence and, essentially, public policy and regulation, at the University of Glasgow over the course of twelve years.³ In this regard Professor Malloy has been way out ahead

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1. See generally ROBIN PAUL MALLOY, *LAW AND THE INVISIBLE HAND: A THEORY OF ADAM SMITH’S JURISPRUDENCE* (Cambridge Univ. Press 2021) [hereinafter *LAW AND THE INVISIBLE HAND*].

2. See generally Adam Gopnick, *Market Man: What Did Adam Smith Really Believe?*, *THE NEW YORKER* (Oct. 11, 2010) <https://www.newyorker.com/magazine/2010/10/18/market-man> (illustrating an interesting example of this newer, more holistic understanding of Smith).

3. ADAM SMITH, *LECTURES ON JURISPRUDENCE* 4–5 (R.L. Meek, D.D. Rafael & P.G. Stein, eds., Oxford Univ. Press 1978) (1763) [hereinafter *LOJ*] (describing a year-long course in moral philosophy, one quarter of which was dedicated to

of us. His latest book is in some ways a capstone to a career spent clearing the cobwebs from Smith's legacy, thereby revealing new ways for us to think about perennial problems of communal living in civil society.

Clearing these cobwebs is important work because misunderstandings about Smith matter. Myths like the idea that, to Smith, "self-interest" equated with "selfishness" live on not just in the popular culture, impacting how nonlawyers think about liberty, regulation, and markets, but, as the book reveals, these myths appear even in some contemporary American judicial opinions.⁴ This is, frankly, alarming. Thus, the more clarity we have about Smith's jurisprudence, and the sooner we have it, the better. To that end, Professor Malloy's book could not come at a better time.

The review will proceed as follows. I will first explain what I understand to be the core of the book—its thesis, perhaps, which is captured by the phrase "an aesthetics of justice" (section II). I will then break that core down and describe what I understand to be the mechanics of the system Smith proposed, which involves what Professor Malloy has named "the spectator view" (section III). I will then highlight two specific aspects of the book that I find particularly important, which are that Smith's jurisprudence was both normative and what I have previously called "process-based" (section IV).⁵ I will then offer two critiques. One is really a compliment, which is that the book could have gone even further in showing the normative nature of Smith's jurisprudence, including that he valued justice for the sake of justice, and not for any other instrumental purpose (section V). The other is more substantive and concerns the use of the invisible hand metaphor (section VI). I wrap up with a short conclusion (section VII).

II. *LAW AND THE INVISIBLE HAND: A(N AESTHETIC) THEORY OF SMITHEAN JURISPRUDENCE*

Professor Malloy makes plain from the outset that his book offers "a" theory of Smith's jurisprudence, not "the" theory, since we do not actually know what Smith's theory of jurisprudence, if he had one, was. Instead, what we know is that he lectured publicly on jurisprudence, and then later taught the subject as part of a year-long

jurisprudence, and another quarter dedicated to public policy, or "political regulation," concerning "police, revenue, and arms").

4. See *LAW AND THE INVISIBLE HAND*, *supra* note 1, at 125, 140, 142.

5. See Chapin Cimino, *Virtue Jurisprudence*, in *THE OXFORD HANDBOOK OF VIRTUE* 621, 623, 628 (Nancy Snow ed. 2017).

course in moral philosophy at the University of Glasgow.⁶ We know he had planned a major volume on the subject, which would have been only the third monograph published during his life had he completed it, which he did not; instead he ordered his unfinished manuscripts burned before he died.⁷ Though he did not publish a stand-alone volume on jurisprudence, the subjects of law, public policy, and justice run throughout both of his published works: *The Theory of Moral Sentiments*⁸ and *An Inquiry Into the Sources and Causes of The Wealth of Nations*.⁹ We also have records of student notes taken during his course on jurisprudence, from two different years he taught it.¹⁰ These were later published as *The Lectures of Jurisprudence*. From these materials Professor Malloy constructs “a” theory of jurisprudence one could extrapolate from Smith.

So what is that theory? Start here: the book argues convincingly that to Smith, justice under law was the key to social organization and social progress, as law “mediated” between the institutions of economics and of politics.¹¹ These institutions could conflict with each other to the extent that one prioritizes the private interest, and the other, the public good. This conflict is *the* perennial problem of law and justice in any civil society. According to Professor Malloy, in Smith’s view, the better law could reconcile these two interests—indeed, even harness them to promote the ends of the other—the better off society would be.

As the book puts it, to Smith, civil society functioned best when “individual judgments regarding acceptable behavior come closer to public and institutional judgments regarding the proper relationship

6. LOJ, *supra* note 3, at 1.

7. LAW AND THE INVISIBLE HAND, *supra* note 1, at 8.

8. See generally ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (D.D. Rafael & A.L. Macfie, eds., Oxford Univ. Press 1976) (1759) (Glasgow Edition) [hereinafter TMS-G].

9. See *Id.* at 194–211; See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edward Cannan, ed., 2000) (1776).

10. LOJ, *supra* note 3, at 5–6.

11. LAW AND THE INVISIBLE HAND, *supra* note 1, at 1–3. Notably, another contribution in the book, to which I have been unable to give sufficient attention in this review, is that the impartial spectator’s normative “point of view” is neither that of “economic man,” typically considered the “rational actor” of the modern law and economics movement, nor that of “homo identicus,” which the book calls “a device typically used in critical legal theory and by practitioners of identity politics.” *Id.* at 97; Instead, the spectator’s point of view “is positioned as a universal and generalizable referent.” *Id.* at 89.

between private and public interest.”¹² This alignment—which the book calls an *aesthetic* of justice—seems to be the key to Smith’s jurisprudence.¹³

The book shows us that Smith’s aesthetics of justice meant that, in resolving the inherent and ever-present tensions between private and public interests, the boundaries set by law institutionally (in what the book calls the “formal realm”), should align as closely as possible with the boundaries individuals would set personally (in what the book calls the “informal realm”), in resolving the same tensions.¹⁴ When these two judgments align, they produce an “aesthetic of justice,” which both characterizes Smith’s jurisprudence and sets it apart from any other comparable theory.¹⁵ And so, my take on the thesis of the book is: to Smith, the more law institutionally aligns with personal understandings of right and wrong, and specifically, *right and wrong in terms of the balance between self-interest and the public interest*, the more society becomes a just and productive one.¹⁶

III. THE MECHANICS OF AN AESTHETIC THEORY OF JUSTICE

So, how does this work? How can law institutionally align with personal understandings of right and wrong between self-interest and the public interest? Law is not self-actualizing, of course—people create, administer, and enforce law. Thus, the first thing we need to do is to conceptualize a personal decision-maker. In Smith’s theory, the decision-maker is represented by the perhaps-familiar metaphor of the impartial spectator. The impartial spectator is, in sum, each person’s internal moral conscience.¹⁷ The book describes the impartial spectator this way:

12. *Id.* at 4.

13. *Id.* Professor Malloy credits Smith’s interest in this alignment to Smith’s belief that all human beings have an inherent concern for the well-being of not just themselves, but of their “fellow humans,” over and above any prudential concerns of “identity politics, efficiency, and wealth maximization.” *LAW AND THE INVISIBLE HAND*, *supra* note 1, at 4.

14. *Id.* at 60–62 figs. 5.1–5.3.

15. *Id.* at 63 fig. 5.4, 64.

16. *Id.* at 11. Professor Malloy’s book identifies the expansion of markets as a mark of a healthy justice system in Smith’s view. “It is also clear that Smith believed justice was of critical importance to civil society and to the workings of an extensive, inclusive, and diverse market economy.” *Id.* I do not disagree but am less interested in Smith’s hopes for law’s effects on markets than with Smith’s ideas about what makes law “just” in the first place.

17. TMS-G, *supra* note 8, at 149–50. (“The all-wise Author of Nature has . . . taught man to respect the sentiments and judgments of his brethren; to be more or less pleased when they approve of his conduct, and to be more or less hurt when they

Smith understood that social cooperation meant that there had to be recognized limits to the pursuit of self-interest. There had to be at least an informal sense of the socially acceptable level of self-interested activity that others would tolerate. This meant that people needed to exercise judgment in evaluating their own conduct, as well as the conduct of others. The metaphor of the impartial spectator responded to this need for judgment, and with it Smith established a value-centered reference point for determining when a course of action went too far and was to be judged unacceptable.¹⁸

Notably, the impartial spectator is not limited to personal judgment; the impartial spectator was responsible for legal judgments as well. Professor Malloy makes this plain when he writes that:

Adam Smith's theory of jurisprudence revolved around the use of his metaphorical device of the impartial spectator. The impartial spectator represented a naturally occurring force within human beings – a force of reasoning, judgment, and justice. . . . In Smith's theory, the impartial spectator was positioned as a real person who made judgments by drawing on experience and referencing this experience to the core shared values and moral sentiments of the community. The goal of these judgments was to make fair, reasonable, and rational decisions that would be understood as just.¹⁹

Thus, Professor Malloy's book shows us that Smith, in his writing and teaching, used the impartial spectator to represent the mechanism for making both personal as well as legal judgments.²⁰ In the book Professor Malloy calls this "the Spectator View."²¹

disapprove of it. He has made mad, if I may say so, the immediate judge of mankind But though man has, in this manner, been rendered the immediate judge of mankind, he has been rendered so only in the first instance; and an appeal lies from his sentence to a much higher tribunal, to the tribunal of their own consciences, to that of the supposed impartial and well-informed spectator, to that of the man within the breast, the great judge and arbiter of their conduct.”)

18. LAW AND THE INVISIBLE HAND, *supra* note 1, at 30.

19. *Id.* at 65.

20. *Id.* at 60 fig. 5.1, 62 fig. 5.2. As the book situates the impartial spectator as one of three important metaphors for understanding “informal” societal organization, it also situates “justice” as one of three important pillars of “formal” society organization, the other two being “authority” and “utility.” *Id.* at 21–39, 40–58.

21. LAW AND THE INVISIBLE HAND, *supra* note 1, at 65.

IV. “THE SPECTATOR VIEW”: A JURISPRUDENCE THAT IS NORMATIVE
AND PROCESS-BASED

“The Spectator View” is the key that opens up Smith’s jurisprudence, and it is one of the book’s most important ideas.²² I have my own thoughts about the impact of this contribution but let us hear from the author first. Of the spectator view, Professor Malloy writes:

Using the spectator device, Smith accomplished two things. First, he developed a theory of judgment based on human experience and the application of value-based reasoning. This was important because good judgment was the foundation for justice. Second, by locating the impartial spectator within every person, Smith repositioned the vantage point of justice; he placed it within the domain of everyday people and moved it away from the church, the clergy, and those claiming to have supernatural access to the mind of the deity. By grounding his theory in experience, Smith’s spectator device implicitly included an understanding that as markets expanded and the division of labor proceeded, the experiences of the people would be affected – and thus, so too, the meaning of justice in the operation of the spectator device.²³

These are extremely important contributions and worth further attention. Start with the latter: the book wants us to pause and appreciate that, by vesting the impartial spectator, resident in all people,²⁴ with the power to render legal judgment, Smith thereby rejected both social contract theory and natural law theory. That Smith rejected the two prevailing theories of jurisprudence of the time is itself remarkable. But I think the spectator view is equally remarkable for two other reasons, both embedded in the Professor Malloy’s first observation that Smith “developed a theory of judgment based on

22. *Id.*

23. *Id.*

24. *Id.* In the first paragraph of TMS-G, when Smith introduces the concept of “fellow feeling”—think of “fellow feeling” as the circuitry across which the impartial spectator imagines the experience of another person in order to render judgment of approval or disapproval—Smith says that “[t]he greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.” TMS-G, *supra* note 8, at 9.

human experience and the application of value-based reasoning.”²⁵ Those reasons are as follows.

First, the spectator view makes crystal clear that Smith’s thinking and writing was set in a moral context; he was, after all, a moral philosopher who taught ethical philosophy, political economy, religion, and jurisprudence.²⁶ As the book puts it, the impartial spectator was not value-neutral, but instead had a “point of view,” which arose out of the “core shared values and moral sentiments of the community.”²⁷ Thus the spectator view is explicitly normative, or, as the book says, “value-based.”²⁸ The value of this contribution is hard to overstate. Just this—the naming of the impartial spectator as a moral agent—is incredibly important. It is brave, and it is correct, and it is a necessary contribution to debates about contemporary jurisprudence.

And second, the spectator view shows us that Smith’s jurisprudence was not just normative, but was what I have previously called “process-based.”²⁹ As Professor Malloy reveals, Smith’s jurisprudence involved the process of “judgment based on human experience and the application of value-based reasoning.”³⁰ In other words, Smith did not set about identifying a substantive set of moral standards that a good or just law should meet; instead, Smith showed us through his work on law, ethics, markets, and statehood how law *should function* in order to accomplish the ultimate purpose of a state. Functioning is a process.

But process or function toward what end? This is a very important question. As the book reveals, Smith believed the purpose of the state was to create the conditions that would allow for the happiness of its

25. LAW AND THE INVISIBLE HAND, *supra* note 1, at 65.

26. See LOJ, *supra* note 3, at 4–5.

27. LAW AND THE INVISIBLE HAND, *supra* note 1, at 65. Importantly, though Smith’s jurisprudence is rooted in the shared experiences, and so shared values, of a *community*, and that different communities have different experiences and so different shared values, Smith does not believe that the impartial spectator’s normative evaluative process is thereby made entirely situational or relative. Instead, he believes there are certain principles of human nature that “custom and fashion” cannot alter: “[t]he principles of the imagination, upon which our sense of beauty depends, are of a very nice and delicate nature, and may easily be altered by habit and education: but the sentiments of moral approbation and disapprobation, are founded on the strongest and most vigorous passions of human nature; and though they may be somewhat warped, cannot be entirely perverted.” TMS-G, *supra* note 8, at 200.

28. *Id.*

29. See Cimino, *supra* note 5, at 621–39.

30. LAW AND THE INVISIBLE HAND, *supra* note 1, at 65.

citizens.³¹ And, the book shows us that, for Smith, no single substantive value “embodied” by law—such as the value of “utility” or the value of “autonomy”—could create these conditions. A properly functioning justice system could not look to a single substantive value to answer questions of “what law is best?” or “what does justice require?” Again, Professor Malloy’s book reveals that Smith thought a properly functioning justice system was characterized by a normative *process* of evaluation, discernment, and judgment, each and every time, fresh and new.³²

Notably, Professor Malloy takes two chapters (Chapter 6, The Spectator View, and Chapter 7, On Judgment and Justice) to theorize this process of legal reasoning—the spectator view. These chapters are based on a theory of semiotics that was entirely new to me and which are unique as far as I can tell in literature about jurisprudence. They also seem to be the heart of the book and its most ambitious exposition.³³

In these chapters Professor Malloy draws on both Smith’s work on language, and the more contemporary American philosopher Charles Peirce’s theory of interpretation, to deconstruct, and then reconstruct, precisely *how* the impartial spectator can interpret, communicate, analyze, and render judgments “impartially” while still operating from a value-based point of view. The key to this “progress grounded in process” seems to be the concept of the “interpretive referent”: “Functionally, Smith’s impartial spectator mediated the tension between the competing forces of self-interest and the interests of others. The spectator did this by providing an interpretive reference

31. *Id.* at 86.

32. *See generally* LAW AND THE INVISIBLE HAND, *supra* note 1. The one major monograph on Smith’s Jurisprudence outside of the work of Professor Malloy himself is arguably Knud Haakonssen, THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH (1981). In that book, Haakonssen makes a similar point: “Smith’s theory is not a set of basic moral doctrines, nor a prescription for how to construct such a set. On the contrary, it presupposes the existence of a moral life; but it specifies the principles for discussion within that life. By supplying such principles, Smith’s science of morals becomes more than a science; it becomes a critical tool.” HAAKONSEN, *supra*, at 136.

33. LAW AND THE INVISIBLE HAND, *supra* note 1, at 83. Then, the book takes another chapter (Chapter 8, The Sentiment of the Common Interest) to set out how these judgements are not drawn from single substantive values, but instead, embody values of due process. Thus, Professor Malloy’s explicit claim about the value of *process* in Smith’s jurisprudence will be more familiar to readers than my own ideas about a “process-based” jurisprudence.

point for mutual understanding, and this was important to cooperation.”³⁴

In order to provide the “interpretive reference point for mutual understanding,” the spectator (and the spectator’s community) first “needed an agreed-upon system of communication and a theory of interpretation.”³⁵ In Professor Malloy’s hands, Charles Peirce’s theory of semiotics provides a modern explanation of how Smith’s eighteenth century spectator developed the critical “interpretive referent,” without which one cannot assess shared values and make judgments from common experiences.³⁶ Once the interpretive referent was established, the spectator could proceed to make judgments that comport with that referent, a process that requires logic, ethics, and ultimately, aesthetics.³⁷ Professor Malloy writes:

Consistent with Peirce’s theory of the normative sciences, aesthetic judgment is not merely subjective or personal. For a logical means and an ethical end to facilitate justice, they must advance our normative understanding of reasonableness and fairness. Aesthetics for Peirce – and as I am using it here in addressing Smith’s theory of jurisprudence – would be understandable only in relation to a referent; in the case of judgments, a comparison with prior decisions. This means that justice involves an aesthetic judgment grounded in experience and evidenced by a community commitment to certain cognizable standards, core values, and moral sentiments. It is the need to establish a comparative standard for a reasonable and rational understanding of justice that separates Peirce’s aesthetic from that of a mere personal preference for some particular work of art or relational outcome.³⁸

And with this link between Peirce’s aesthetic of justice and Smith’s aesthetic of justice, we arrived back at what I have identified as the thesis of the book. Here Professor Malloy states the claim directly:

In other words, the perfection of justice involves minimizing the variance between self-interest and the interests of others so that everyone is engaged in promoting the common interests of humankind. Smith positions his sense of the aesthetic ideal

34. LAW AND THE INVISIBLE HAND, *supra* note 1, at 66, 70, 85.

35. *Id.* at 66–67.

36. *Id.* at 74–76.

37. *Id.* at 77–79.

38. *Id.* at 78 (internal citations omitted).

as a referent in assessing justice as it is actually experienced in a given system of social organization.³⁹

At bottom, these few chapters are utterly unique in legal academic literature and highly enlightening for anyone interested either in Smith's jurisprudence, the philosophy of language, *or* the process of legal reasoning. I am very grateful to have read them.

V. AND THE BOOK COULD GO FARTHER

The book is undoubtedly successful in demonstrating the normative nature of Smith's jurisprudence. And yet, in my view, it may stop a little short of accounting for the full reach of Smith's moral framework.

Take the book's claim that, to Smith, law was critical to facilitating societal progress.⁴⁰ I do not disagree that for Smith, just law had this effect, and that this effect was critical to the stability and flourishing of any society. That said, the claim strikes me as assigning a role to law and justice that sounds a bit instrumentalist, whereas in my read of Smith's writing and teaching, at least some law is good for its own sake—not for the sake of anything else, including the progress of society.⁴¹

For example, consider Smith's treatment of what he called "perfect rights."⁴² (Smith divided law in multiple categories, of which perfect rights are only one, so I might be splitting hairs here, but I still think the point is valid.) "Perfect rights" belong to a category of law that Smith called, aptly, the "laws of justice." As examples, the laws of justice include the common law rights of property and contract.⁴³ In the book, Professor Malloy considers these laws under the label of "natural justice," and of them, he says, "[n]atural justice can be understood as being linked to the belief that people have a natural right to security of their person and property."⁴⁴ Not much else is said about these rights. But what is the source of this "natural right" people have

39. LAW AND THE INVISIBLE HAND, *supra* note 1, at 79.

40. *See id.* at 1 ("Law enhances social cooperation, facilitates trade, and extends the market.").

41. That law arises in different societies in response to different needs of that society based on the stages of a society's progress is a slightly different point.

42. LOJ, *supra* note 3, at 5.

43. LAW AND THE INVISIBLE HAND, *supra* note 1, at 33. Professor Malloy discusses these lectures to show that, in his view, the impartial spectator could be thought of as the modern common law "reasonable person." *Id.* at 31.

44. *Id.* at 54.

to security of their person and property? As it turns out, the answer is, quite simply, fellow feeling—not societal progress.

When Smith lectures on the proper analysis of such laws, he asks his students: when is a contract promise binding?⁴⁵ The answer he gives, specific example by specific example, is that a contract promise is legally binding when the impartial spectator would find (through the spectator view) that not enforcing the promise would cause an injury that rightly provokes the resentment—a moral sentiment—of an onlooker.⁴⁶ Notably, the moral sentiment of resentment triggers the right of legal redress. And as Smith describes it, in such a case, the right of redress is justice for its own sake:

[W]hen a single man is injured, or destroyed, we demand the punishment of the wrong that has been done to him, not so much from a concern for the general interest of society, as from a concern for that very individual who has been injured. . . . The concern which is requisite for this, is no more than the general fellow-feeling which we have with every man merely because he is our fellow-creature.⁴⁷

So, at least with respect to adjudication of perfect rights, any definition of societal progress would include, to Smith, at least some vindication of justice for its own sake—not in service of any market or other welfare-based measures. But as I said, this is not really a disagreement, it is just a wish to go further.

VI. MY SUBSTANTIVE CRITIQUE: THE METAPHOR OF THE INVISIBLE HAND

First note that in explaining my understanding of the book's thesis and its contributions, the metaphor of the invisible hand has not been mentioned. It does not need to be. The thesis of the book as I understand it is carried almost entirely by the metaphor of the impartial spectator.⁴⁸ That said, the book's title (and indeed its first line and first paragraph) does invoke that *other* well-recognized Smithian metaphor, the invisible hand. The first paragraph of the book says:

Fundamentally, law is to society as gravity is to the solar system; it is the invisible force that holds society together and

45. LOJ, *supra* note 3, at 87.

46. *Id.*

47. TMS-G, *supra* note 8, at 90.

48. That said, the book does invoke and discuss other metaphors Smith uses, including the “man in the mirror.” LAW AND THE INVISIBLE HAND, *supra* note 1, at 27–29.

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.⁴⁹

I do not disagree that to Smith law is a fundamental force in social organization, that law guides and facilitates progress, and that, to Smith, these were not only important, but existentially important, effects. That said, I object to the metaphor in part because I think it is misconstrued, and in part because in its misconstruction, the metaphor actually obscures an important point about Smith's jurisprudence that the book worked so hard to make.

Now, I am taking a risk here: I recognize that there are not many writers who say that *even the invisible hand is not what we think it is*. One who does is Smith scholar Emma Rothschild, who asserted that Smith used the metaphor ironically, taking a dim view of the forces propelling the invisible hand.⁵⁰ That said, I have not seen anyone else point out that the metaphor seems to be misunderstood, let alone built, as I see it, on self-delusion. Yet that is how I read the metaphor. If I am right, it is an unfortunate omission in the literature because self-delusion was a big concern of, and theme for, Smith generally.⁵¹

Start with common ground: I agree with Professor Malloy that ultimately, the invisible hand—paradoxically, as the book says—has the effect of benefitting others.⁵² But I am not sure I agree with Professor Malloy that the invisible hand is not a force of selfishness. Maybe it is more accurate to say that I think it is a force “short-sighted self-centeredness,” emphasis on “short-sighted.” Either way, like

49. LAW AND THE INVISIBLE HAND, *supra* note 1, at 1. (Chapter 1 is called “Introduction: Law's Invisible Hand”).

50. Emma Rothschild, *Adam Smith and the Invisible Hand*, 84 AM. ECON. REV. 319, 319 (1994). (“The point of this paper is to put forward an interpretation of how Adam Smith viewed the invisible hand, and to make a suggestion about how modern economists might view it. The interpretation is that Smith did not particularly esteem the invisible hand and thought of it as an ironic but useful joke.”).

51. *See generally* TMS-G, *supra* note 8, at 158–59 (“It is so disagreeable to think ill of ourselves, that we often purposely turn away our view from those circumstances which might render that judgment unfavourable. He is a bold surgeon, they say, whose hand does not tremble when he performs an operation upon his own person; and he is often equally bold who does not hesitate to pull off the mysterious veil of self-delusion, which covers from his view the deformities of his own conduct. . . . *This self-deceit, this fatal weakness of mankind, is the source of half the disorders of human life.* If we saw ourselves in the light in which others see us, or in which they would see if they knew all, a reformation would generally be unavoidable. We could not otherwise endure the sight.”) (emphasis added).

52. *See generally* LAW AND THE INVISIBLE HAND, *supra* note 1, at Chapter 8.

Professor Rothschild, I think Smith was more clear-eyed about the nature of the invisible hand than are those of us writing feverishly today to correct the lingering misinterpretations of his work.

In the text of TMS-G where the metaphor arises,⁵³ Smith begins by describing situations where people, naturally though mistakenly, pursue material goals out of the false belief that material things and accomplishments will bring happiness; they will not.⁵⁴ My theory is that this false belief is the seed of self-delusion on which the metaphor rests.

In this discussion, Smith says that one mistake people make is to overvalue the *fit* of a material thing's means-to-its-end and undervalue the *end* of the thing itself. So we chase material things because we value not the end they serve, but instead because we value how well they serve it. As fit of means-to-ends is vitally important in legal analysis, and as Professor Malloy's book stresses that the ends of law to Smith were not value-neutral, this is a point worth exploring.

To illustrate his point, Smith gives the example of a person who values a watch more for the watch's mechanical ability to keep time (its means-to-ends fit) than its ability to keep its owner *on time* (the ultimate end of a watch).⁵⁵ Smith finds this a foolish misevaluation, and one that causes a lot of waste: "How many people ruin themselves by laying out money on trinkets of frivolous utility?"⁵⁶ To Smith, this was not only foolish; it was consequential: "[n]or is it only with regard to such frivolous objects that our conduct is influenced by this principle; it is often the secret motive of the most serious and important pursuits of both private and public life."⁵⁷

Extrapolating, as Smith does, he says that when people (mis)value wealth as a means to an end—becoming ambitious to earn money to obtain the ability to buy objects—we are missing the point.⁵⁸ The ultimate goal is happiness, not money to obtain objects, which we have mistaken for happiness.⁵⁹ And in the end, we all come to realize

53. See generally TMS-G, *supra* note 8 at 179–87. I'm referring to the first chapter of TMS-G Part IV, On Utility, which begins the run-up to the appearance of the invisible hand metaphor.

54. See *id.* at 179–93.

55. *Id.* at 179–80.

56. *Id.* at 180.

57. *Id.* at 181.

58. See TMS-G, *supra* note 8, at 181.

59. See *id.* ("With the most unrelenting industry he [the poor man's son, who condemned with 'ambition . . . begins to . . . admire[] the condition of the rich'] labours night and day to acquire talents superior to all his competitors. He endeavours to bring those talents into public view, and with equal assiduity solicits

we were wrong: money cannot buy happiness. Smith says at the end of one's life, when one is sick and old, one finally realizes that *things* do not bring happiness after all. He says:

But in the languor of disease and the weariness of old age, the pleasures of the vain and empty distinctions of greatness disappear. To one, in this situation, they are no longer capable of recommending those toilsome pursuits in which they had formerly engaged him. In his heart he curses ambition, and vainly regrets the ease and indolence of his youth, pleasures which are fled for ever, and which he has foolishly sacrificed for what, when he has got it, can afford him no real satisfaction.⁶⁰

And then he says, essentially, well, even if our deluded pursuit of material goods was not ever going to bring happiness, it was, at least, a *useful* delusion:

The pleasures of wealth and greatness, when considered in this complex view, strike the imagination as something grand and beautiful and noble, of which the attainment is well worth all the toil and anxiety which we are so apt to bestow upon it.

And it is well that nature imposes upon us in this manner. It is *this deception* which rouses and keeps in continual motion the industry of mankind.⁶¹

The deception which “rouses and keeps in continual motion the industry of mankind” *is* the invisible hand, which Smith finally explicitly names on the next page.⁶² For this reason, I think the invisible hand implies not just irony but also self-delusion. (From this

every opportunity of employment. For this purpose he makes his court to all mankind; he serves those whom he hates, and is obsequious to those whom he despises. Through the whole of his life he pursues the idea of a certain artificial and elegant repose which he may never arrive at, for which he sacrifices a real tranquility that is at all times in his power, and which, if in the extremity of old age he should at last attain to it, he will find to be in no respect preferable to that humble security and contentment he had abandoned for it.”).

60. *Id.* at 182.

61. *Id.* at 183 (emphasis added).

62. *See id.* at 183, 184–85 (continuing with the theme of self-deceit and undervaluing the actual purpose served by a thing, Smith observes that rich accumulate more than they can consume or use, which then causes them to need to dispose of their excess accumulations somehow, leading them to “divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.”).

very particular perspective, I hope that law does not function as “the invisible hand” of civil society!)

One final note in this extended discussion: Smith’s observation that “ends matter”—they matter more than the fit of means to ends—might capture Smith’s jurisprudence, at least to me, in a nutshell. The goal matters. In *Law and the Invisible Hand*, Professor Malloy identified this goal as “minimizing the variance between self-interest and the interests of others so that everyone is engaged in promoting the common interests of humankind.”⁶³ And as Professor Malloy’s book so plainly and refreshingly states, this goal is not value-neutral.

VII. CONCLUSION

I will sum up simply by saying that the book’s contributions to the conversation about jurisprudence in general, and Smith’s value-and-process-based take on jurisprudence in particular, are both timely and deeply necessary. As the book itself exhorts, more legal scholars would do well to revisit Adam Smith. I am always surprised by the number of legal academics who think they know Smith, but do not. Perhaps because they think they know him, they remain relatively uninterested in him. They should be.

In my experience, these encounters stand in sharp contrast with the nonlawyers I speak with who freely admit that are not very familiar with Adam Smith beyond his reputation as the author of *The Wealth of Nations*. Nonlawyers are often fascinated when they learn what *else* Smith actually wrote, not to mention what he *taught*. Perhaps lay people, precisely because they lack the power to influence the legal system that legal academics and judges possess, are especially motivated to explore another way forward for the future of law, and for that reason, are more curious about the ways Smith’s work on law might shed new light on modern legal problems. Especially, as the book reminds us of the core, ever-present need for law to mediate between interests public and private.

Professor Malloy’s book reveals that there is another way, another view of law, one that does not need to “take sides” between the intellectual left and right, and yet is principled, bounded, *and* moral. I am grateful to have had the opportunity to offer my own thoughts on the book’s successes.

63. LAW AND THE INVISIBLE HAND, *supra* note 1, at 79.