

Robin Paul Malloy

# Law in a Market Context

**An Introduction to Market  
Concepts in Legal Reasoning**

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# LAW IN A MARKET CONTEXT

## An Introduction to Market Concepts in Legal Reasoning

In *Law in a Market Context*, Robin Paul Malloy examines the way in which people, as social beings, *experience* the intersection of law, markets, and culture. His work recognizes that experience varies by such characteristics as culture, race, gender, age, and class, among others. Thus, market analysis must account for these variations. Through case examples, illustrative fact patterns, and problems based on hypothetical situations he demonstrates the implications and the ambiguities of law in a market society. In his analysis he provides a complete and accessible introduction to a vast array of economic terms, concepts, and ideas – making this book a valuable primer for anyone interested in understanding the use of market concepts in legal reasoning.

ROBIN PAUL MALLOY is Professor of Law, and Economics of Law, as well as Director of the Program in Law and Market Economy, at the College of Law, and a Professor of Economics (by courtesy appointment) in the Maxwell School of Citizenship and Public Affairs of Syracuse University. He has published seven other books including *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, 2000).

### Advance Praise for *Law in a Market Context*

As someone who writes in the areas of critical race and feminist theory, I find Malloy's approach to be particularly useful because it provides critical scholars who are concerned with issues of social justice and equality with a new and theoretically sophisticated way to understand and reckon with the market. *Law in a Market Context* should find its way on to every critical scholar reading list.

Professor Emily Houh, University of Cincinnati, U.S.A.

Malloy builds a strong and long-needed bridge between humanistic and economic approaches to the study of law. I recommend this book to lawyers, judges, policymakers, and academics who want to sharpen their critiques of market thinking, as well as those who want to be better armed in the defense of markets.

Professor Shubha Ghosh, University at Buffalo, S.U.N.Y., U.S.A.



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in Legal Reasoning

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CAMBRIDGE  
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE

The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge, CB2 2RU, UK

40 West 20th Street, New York, NY 10011-4211, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

Ruiz de Alarcón 13, 28014 Madrid, Spain

Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 2004

Printed in the United Kingdom at the University Press, Cambridge

*Typeface* Minion 10.5/13.5 pt.      *System*  $\text{\LaTeX}$  2<sub>ε</sub> [TB]

*A catalogue record for this book is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Malloy, Robin Paul, 1956–

Law in a market context : an introduction to market concepts in legal reasoning /  
by Robin Paul Malloy.

p. cm.

ISBN 0 521 81624 6 (hardback) – ISBN 0 521 01655 X (pbk.)

1. Law and economics. 2. Sociological jurisprudence. 3. Markets – Social aspects. I. Title.  
K487.E3M355 2004 340'.11–dc21 2003055398

ISBN 0 521 81624 6 hardback

ISBN 0 521 01655 X paperback

*For  
Gina and Giovanni  
and  
in celebration of the first twenty-five years of marriage to  
Margaret Ann  
June 1978–June 2003*





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## PREFACE

In this book, I offer a new way of thinking about the relationship between law and market theory. The approach is *not* the same as one would find in books on Law and Economics or an Economic Analysis of Law. In contrast to those types of books, I undertake to think more broadly about the way in which law is understood in a market context. I am *not* driven by concerns for particular conceptions of economic efficiency, but instead hope to explain how law and legal institutions work with markets and market institutions in shaping the contours of public policy and social organization.

I do not employ a traditional neoclassical economic methodology, and my audience is not made up of people in the law and economics movement. While a few progressive scholars of law and economics will find this work of interest, the book is primarily designed to assist non-law and economic scholars. It provides an introduction to using economic concepts in legal reasoning from a perspective of Law and Society, and Law, Culture, and the Humanities.

This book positions economics as an important and influential tool when used in legal reasoning and public policy making. It does not, however, treat economics as a “hard” science, nor does it present economics as independent of politics and ideology. Economics, because of its scientific appearance, has gained influence with lawyers and judges. This is because it gives the judge and the law an appearance of objectivity and neutrality in dealing with complex social problems. Appearance is not, however, reality. This book lifts the veil of economic objectivity and shows the subjectivity and malleability of economic reasoning in law. It explains that economic outcomes depend upon the way in which facts and issues are framed. Consequently, there is often more than one economically sound way of approaching a particular problem.

This book is also concerned with cultural differences in the relationship between law and market theory. With this in mind, it explores the way in which people, as social beings, *experience* the relationship between law,

markets, and culture. This is a very different point of inquiry than that of traditional law and economics, which is concerned with an empirical or social science approach to understanding law within a particularized discourse of economics *as* science. This inquiry examines the relationship among law, markets, and culture with respect to a variety of characteristics such as race, gender, age, education level, class, income, and geographic location, among others. Thus, I see the primary audience as people who are interested in law, and its relationship to the social, political, and cultural structure of the marketplace. These are people who understand the significance of market forces in everyday life, appreciate the sense in which we are all embedded within markets, and yet question, doubt, or even reject some, or all, of the constraints of traditional approaches to an economic analysis of law.

There is, in this regard, a gap between the current works in law and economics, and the experiences of many people. This divergence carries over to the process of legal reasoning employed by many lawyers, judges, and public policy makers. This book is offered to bridge this gap. To achieve this goal I focus on building a basic conceptual vocabulary in economics rather than on promoting any particular conception of efficiency. I believe that there is a need for a book that simply and clearly explains the relationship between law and market economy with a concern for showing how certain market assumptions relate to legal reasoning, particular legal outcomes, and the formulation of public policy. I want the reader to become skilled at using and understanding various economic concepts and assumptions. I want the reader to appreciate the way in which these concepts and assumptions can be used to advance particular socio-legal values in legal reasoning, public policy, and the advancement of social justice and prosperity.

I also want readers to understand that the ideas and concepts discussed in this book are already part of our legal discourse. Courts, legislatures, and regulatory agencies already use many of these concepts. Consequently, it is important to understand these ideas and how they work. One needs to understand that knowledge of these ideas is fundamental to the modern-day practice of law. Just as lawyers must know property law, contract law, and tort law, they must also know basic economics and the market context in which law operates.

The book provides materials on all of the basic elements and concepts needed for understanding law in a market context. It discusses the relationship between law, markets, and culture. It also explains, in a non-quantitative way, all of the basic terms and concepts of economics that are

used in the law and economics literature, and that are used in legal reasoning. In each chapter there are a number of examples and illustrations, and at the end of each chapter there are problems for thought and discussion. I designed these problems to assist the reader in thinking about the issues raised in the material. I also developed these problems to serve as the basis of group discussion or as essay questions that can be assigned when the book is used in conjunction with a course or seminar. The idea behind the problems is to use them to develop an ability to manipulate different frames, references, and representations for advancing a variety of logical and persuasive legal arguments.

In writing this book I realize that some people will suggest that more attention should have been paid to political theory, and others may suggest that there should be more material on cultural studies. I also realize that there are different approaches to interpretation theory and to semiotics. As with any book of this type, compromises have been made in an effort to make concepts accessible and understandable. I have made my own adjustments to Peirce's work so as to develop an approach with applicability to legal and economic reasoning. I do not purport to say that Peirce would say what I do, only that my approach has a clear Peircean influence. In particular, this influence is a product of my many years of work with Roberta Kevelson, who during her lifetime published numerous works on Peirce, and who served, for approximately fifteen years, as Director of the Center for the Study of Law and Semiotics at Penn State University.

As with any book of this kind, each individual reader is likely to have his or her own personal way of addressing the various issues covered. This is good because it can enrich the discussion of the material and lead to making further progress on the overall project of broadening our understanding of the relationship among law, markets, and culture. I hope that each reader understands that my effort is to offer an introduction to a new way of understanding law and market relationships. I do not purport to offer a new or definitive set of answers. Instead, I offer an invitation to anyone interested in taking this book as a starting point for rethinking the use of economic ideas in law. I am hopeful that my invitation will be taken up not only by people who think in a way similar to me, but also by people that merely find new ways of addressing the issues of law in a market society as a result of reading this book.

As an introductory book, this work is designed for people interested in jurisprudence; law and society; legal theory; law, culture, and the humanities; and law and markets. The book can be used to structure a course on the topic of "Law in a Market Context," "Law and Market Economy," or

“Law, Markets, and Culture.” It can also be used to supplement materials in a variety of courses related to jurisprudence, and contemporary legal theory, including courses on law and society, law and humanities, law and culture, and feminist and other types of critical theory. Likewise, the book can be used as a supplement to law school courses such as property, contracts, torts, real estate transactions, and land use. This is particularly true when the course is taught with a casebook making reference to a variety of economic concepts applied to law. In such a course my book can be a useful supplement for the person seeking to integrate market concepts while wanting an approach that differs from that of traditional economic analysis of law. (See the notes on p. xvi for a few suggested ways to pair this book up with other readings when used in different types of courses.)

I can report that I developed and used these materials in a course with law students and graduate students. The course, titled “Law and Market Economy,” is a cross-listed course that typically enrolls about thirty students. These students are primarily based in the College of Law but always include about a half dozen graduate students from other departments on campus. Many of these students would identify themselves as being interested in feminism, critical race theory, social justice, and public interest law. All of the students would identify themselves as interested in the problems of law, legal institutions, and public policy as related to the pressures and constraints of markets. In using the materials over several years I benefited greatly from student feedback. I also found that students completed the course with a clear ability to recognize, construct, and deconstruct a variety of economic arguments in law. This was even true for students with no prior study in economics or interpretation theory, and true for my graduate students with no prior work in law. The outline of “tools” included near the end of chapter 3 proved to be an important and valuable organizing kit for all of my students. It gave them an easy and useful way to go back and organize their notes and provided a structured guide for building the skills necessary to go on to advanced work.

I also used some of the materials in this book in teaching a first-year course on property and in teaching upper-level courses on real estate transactions and land use planning. The materials worked well to explain a number of concepts including, among others, risk, externalities, the commons problem, Coase, valuation, and cost and benefit analysis.

Many of the ideas in the book can be extended or expanded upon, but the goal is not to write the definitive word on the subject matter. The goal is to provide an accessible and reasonable-length primer. For a more



detailed examination of some of the ideas and concepts addressed in this book I suggest that you refer to the list of sources, and in particular to Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, 2000); and Robin Paul Malloy, *Framing the Market: Representations of Meaning and Value in Law, Markets, and Culture*, 51 *Buffalo Law Review* 1 (2003). Many of the ideas expressed and developed in chapters 1–3 are extensively footnoted in the article I wrote for the *Buffalo Law Review*.

In completing this book I benefited from the input and assistance of a number of people, and from the supplemental research support of the Syracuse University College of Law. Therefore, I wish to express my gratitude to those who supported me in this project. In particular, I thank Chris Ramsdell for her administrative assistance, and the following people who provided helpful comments and suggestions in reviewing various parts or drafts of this manuscript, including: Brian Bix, David Brennan, Alan Childress, Wythe Holt, and Martha McCluskey. I also benefited from ongoing discussion with my colleague, David Driesen. I thank Shawn Sauro, Nazakhtar Nikakhtar, and Meghan Honea for research assistance at various times over the time period involved in writing this book. I also thank the people who reviewed and commented upon the manuscript for Cambridge University Press. Mistakes and errors are of course my own. Finally, I wish to thank Finola O’Sullivan, Nikki Burton, Jackie Warren, Barbara Docherty, and others at Cambridge University Press for their support and assistance throughout the long and difficult process of publication.

## NOTE FOR TEACHERS

I now offer a few suggestions on ways of pairing this book with other readings to be used in various types of courses. These are only suggestions, offered with the hope of giving the reader a more specific idea on how to integrate this book into different types of courses.

### **Courses on “Law and Market Economy,” “Law in a Market Context,” or “Law, Markets, and Culture”**

The book can be used on its own with time devoted to discussion of the Problems. It can also be used with supplemental law review articles or with full text versions of the cases discussed in the text. Some books that can be paired with *Law in a Market Context* to build a one-semester course or seminar include the following books: David Throsby, *Economics and Culture* (Cambridge, 2001); Cass R. Sunstein, *Behavioral Law & Economics* (Cambridge, 2000); Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, 2000); Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post-Modernism* (Princeton, 1997); Regenia Gagnier, *The Insatiability of Human Wants: Economics and Aesthetics in Market Society* (Chicago, 2000); Deirdre N. McCloskey, *The Rhetoric of Economics* (2nd ed., Wisconsin, 1998); Hernando DeSoto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000); *Beyond Economic Man: Feminist Theory and Economics* (Marianne A. Ferber and Julie A. Nelson, eds., Chicago, 1993); and Richard A. Epstein, *Simple Rules for A Complex World* (Harvard, 1995), David Driesen, *Economic Dynamics of Environmental Law* (MIT, 2003).

### **Courses on jurisprudence and contemporary legal theory**

For these types of courses one might pair *Law in a Market Context* with one or two of the following: Robert Hayman, Nancy Levit, and Richard

Delgado, *Jurisprudence – Classical and Contemporary: From Natural Law to Postmodernism* (West, 2nd ed., 2002); Dennis Patterson, *Law and Truth* (Oxford, 1996); Martha Chapallas, *Introduction to Feminist Legal Theory* (Aspen, 1998); Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Blackwell, 1986); Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon, 1996); Brian Bix, *Jurisprudence: Theory and Context* (Carolina Academic Press, 2000); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University, 1995); Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford, 1998); and Samuel J.M. Donally, *A Personalist Jurisprudence, The Next Step: A Person-Centered Philosophy of Law for the Twenty-first Century* (Carolina Academic Press, 2003).

### **Courses using *Law in a Market Context* as a supplemental reader**

Most subject areas of law now have leading casebooks and textbooks that reference various economic terms and concepts. This is the result of the widespread acceptance by legal institutions of market theory as relevant to legal reasoning. This observation seems to be most true with respect to property law. Consequently, *Law in a Market Context* is especially helpful in addressing the many economic terms and concepts that are frequently expressed or implied in course books for the following subjects: Basic and advanced courses on Modern Property Law; Land Use, Zoning, and Development Law; and Environmental, and Natural Resources Law. Other courses such as Contracts, Torts, Corporate Law, Real Estate Transactions, and Intellectual Property depend upon the particular course book that is chosen.

### **Other courses**

*Law in a Market Context* is also designed to be a primary or supplemental book for graduate and undergraduate courses on Legal Studies; Law and Policy; Law and Society; Sociology of Law; and other classes related to the subject areas identified above.

## ACKNOWLEDGMENTS

In writing this book I benefited from the use of materials that I published in several previous works. I wish to thank the following publishers for granting permission for this use.

- (1) Buffalo Law Review, for permission to include in chapters 1–3 and 7, substantial material published in Robin Paul Malloy, *Framing the Market: Representing Meanings and Values in Law, Markets, and Culture*, 51 Buffalo Law Review 1 (2003). There are material changes and differences between the chapters and the article.
- (2) Aspen Law Publishers and James Charles Smith, for permission to include materials on valuation and risk in chapter 5, taken from Robin Paul Malloy and James C. Smith, *Real Estate Transactions: Problems, Cases, and Materials*, pp. 8–32 (2nd ed., 2002).
- (3) West Publishing, for permission to intermittently include materials in chapter 5, taken from Robin Paul Malloy, *Law and Economics: A Comparative Approach to Theory and Practice*, pp. 14–45 (1990).
- (4) Cambridge University Press, for permission to use materials from Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (2000).

## NOTE ON CITATIONS

All footnotes in the book are prepared as short-form citations of the identified sources listed in the Sources section (p. 235). All footnote citations have been prepared with reference to *The Bluebook: A Uniform System of Citation* (17th ed., 2000).



## Introduction to law in a market context

### **An overview**

This book examines the way in which people, as social beings, *experience* the relationship among law, markets, and culture. It does this with the recognition that people understand their experiences through the mediation of institutions of language, communication, and interpretation (interpretive institutions). Furthermore, it acknowledges that experience varies by a number of characteristics including race, gender, age, class, education, income, and geographic location, among others. Thus, law and market analysis must account for these variations.

With this in mind, the book advances two primary objectives. The first objective involves providing a framework for understanding the relationship among law, markets, and culture. This includes a framework for understanding the interpretive process and the ways in which interpretive institutions facilitate wealth formation and (re)distribution. In particular, attention is focused on understanding the way in which law functions to mediate the tension between culture (as an expression of a public and community interest) and the market (as an expression of private and self-interest). This involves an examination of the way in which legal actors and advocates understand and create legal arguments. This is important because it establishes a framework for understanding the way in which market ideas are borrowed and incorporated into law.

The second objective of the book involves providing an accessible introduction to a number of important economic terms and concepts that are frequently used in legal analysis. This involves an examination of economic terms and concepts as strategic “tools” for shaping legal reasoning. This is important because it provides a working vocabulary for understanding economic ideas that are already at work in the law, and it facilitates the use of these ideas in new situations. Attention is focused on understanding the way in which these tools create market advantages for

particular individuals and groups, and on learning to use these tools to one's own advantage.

The connection between these two objectives is in understanding how to use market concepts to influence the mediating process of law and legal institutions. This includes learning about the numerous ways of selecting, substituting, and re-characterizing the many economic terms and concepts available for advancing alternative lines of legal argument. This is important to effective legal reasoning – and to exercising favorable influence in the wealth formation and (re)distribution process.

As will be explained, understanding law in a market context is not the same as doing an economic analysis of law. This is because law in a market context focuses on the meanings and implications of using market concepts in law – not on doing an economic analysis of law. Before we begin our examination of this difference, however, it is appropriate to acknowledge the pioneering work of a few of the people that have greatly influenced the integration of legal and economic reasoning. This group includes such people as Gary Becker,<sup>1</sup> Guido Calabresi,<sup>2</sup> Ronald Coase,<sup>3</sup> and Richard Posner,<sup>4</sup> all of whom advanced new and thoughtful ways of understanding law and legal institutions. They, and others, made important contributions in many areas of law, and this should be recognized even though there may be disagreement with the subjective and political framing of their legal reasoning. Collectively, they helped develop

<sup>1</sup> See generally Becker, *Crime and Punishment* 169, 191–93; BECKER, *ECONOMICS OF DISCRIMINATION*; BECKER, *A Theory of Competition*; BECKER, *ECONOMIC APPROACH TO HUMAN BEHAVIOR*; BECKER, *HUMAN CAPITAL*; BECKER & MURPHY, *SOCIAL ECONOMICS*; BECKER, *ECONOMIC THEORY*; GHEZ & BECKER, *ALLOCATION OF TIME AND GOODS*; BECKER, *ACCOUNTING FOR TASTES*; BECKER, *ECONOMICS OF LIFE* (a collection of essays on everyday topics).

<sup>2</sup> See generally CALABRESI, *COST OF ACCIDENTS*; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability*; Calabresi, *The Pointlessness of Pareto*; CALABRESI, *COMMON LAW FOR THE AGE OF STATUTES*; CALABRESI, *IDEALS, BELIEFS, ATTITUDES*.

<sup>3</sup> See generally Coase, *The Problem of Social Cost*; COASE, *THE FIRM, THE MARKET, AND THE LAW*; Swygert & Yanes, *A Primer on the Coase Theorem*.

<sup>4</sup> See generally POSNER, *ECONOMIC ANALYSIS OF LAW*; Posner, *Utilitarianism, Economics, and Legal Theory*; Posner, *Rational Choice, Behavioral Economics*; POSNER, *PROBLEMATICS OF MORAL AND LEGAL THEORY*; POSNER, *LAW AND ECONOMICS: THE INTERNATIONAL LIBRARY OF CRITICAL WRITINGS IN ECONOMICS* (Posner & Parisi, eds.); POSNER, *ECONOMIC STRUCTURE OF THE LAW* (Parisi, ed.); POSNER, *ECONOMICS OF JUSTICE*; POSNER, *FRONTIERS OF LEGAL THEORY*; POSNER, *LAW AND ECONOMICS* (Posner & Parisi, eds.); POSNER, *SEX AND REASON*; POSNER, *PROBLEMS OF JURISPRUDENCE*; POSNER, *ECONOMICS OF PRIVATE LAW* (Parisi, ed.). See also *Debate: Is Law and Economics Moral?* (publication based on a live debate between Robin Paul Malloy and Richard A. Posner).



new frames of reference, and new patterns of legal thinking. As a result, we now have new rhetorical tools for discussing matters of liability, risk allocation, criminality, and property, among others. Our legal vocabulary has embraced new terms such as transaction costs, externalities, efficiency, wealth-maximization, preference shaping, reasonable investment-backed expectations, and cost-benefit analysis. We have also absorbed conceptual frameworks such as those referenced by such names as the Coase Theorem, the prisoner's dilemma, the tragedy of the commons, the anti-commons, the theory of path dependency, efficient breach, public choice, and game theory. Thus, for better or for worse, and without regard to one's politics, the borrowing of market concepts has *transformed* legal reasoning and captured an authoritative position in the legal imagination.

This book is concerned with the meanings and values created and promoted in law by the use of various market concepts. It seeks to examine and explain how these references to economics shape socio-legal meanings and values, and how they influence the allocation of scarce resources and the opportunities for capturing, creating, and distributing wealth.

The book also brings a humanities-based approach to recent trends in law and market scholarship. Thus, it contributes to an impressive expansion of law and market thinking brought on by a variety of approaches that might collectively be called the "new law and economics." Examples of "new" approaches include ventures into behavioral law and economics (referencing work in behavioral psychology and sociology),<sup>5</sup> the law and economics of norms (referencing theories of norm-building and of informal relationships and organizations),<sup>6</sup> institutional law and economics (referencing institutional economics rather than the more traditional appeal to neoclassical economics),<sup>7</sup> feminist law and economics

<sup>5</sup> See *BEHAVIORAL LAW & ECONOMICS* (Sunstein, ed.); Rostain, *Educating Homo Economicus*.

<sup>6</sup> See, e.g., *Symposium: Law, Economics and Norms*; LANDA, TRUST, ETHNICITY AND IDENTITY. See MALLOY, *LAW AND MARKET ECONOMY* at 136–37; McAdams, *Signaling Discount Rates*; Blair & Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*; ELSTER, *THE CEMENT OF SOCIETY*.

<sup>7</sup> See generally MERCURO & MEDEMA, *ECONOMICS AND THE LAW* at 101–29, 130–56 (discussing Institutional law and economics, then discussing Neoinstitutional law and economics); NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE*; NORTH, *Transaction Costs*; ADAMS, *RELATION OF THE STATE TO INDUSTRIAL ACTION* (Dorfman, ed.); COMMONS, *INSTITUTIONAL ECONOMICS*; Commons, *Law and Economics*; VEBLEN, *THEORY OF THE LEISURE CLASS*; SAMUELS, *LAW AND ECONOMICS*; SOLO, *ECONOMIC ORGANIZATIONS AND SOCIAL SYSTEMS*; AYRES, *THEORY OF ECONOMIC PROGRESS*.

(referencing feminist theory),<sup>8</sup> and interpretive and representational law and economics (referencing the humanities, various forms of interpretation and rhetoric theory, and law and society).<sup>9</sup>

In this book attention is focused on the emergent interest in interpretive and representational approaches to law and market theory, and on the experiential process by which legal and market reasoning is transformed. Therefore, in exploring an interpretive or representational approach, the book embraces the humanities, including references to esthetics, ethics, and logic. It explores the subjective nature of markets, the lack of universality in a number of economic concepts, and the role of interpretive institutions in generating value and redistributing resources. Moreover, it advances an understanding of the relationship among law, markets, and culture, indicating a need to democratize and enhance access to the meaning and value formation process.

At the outset, however, it must be noted that there are numerous approaches to interpretation theory, and to the cognitive processes that ground interpretation. The focus in this book is, therefore, limited. This book makes reference to the interpretation theory of one of America's greatest philosophers who was also a founder of the philosophical school identified as American Pragmatism, Charles Sanders Peirce.<sup>10</sup>

Peirce's work on interpretation and representation theory is categorized under the term or subject of semiotics, which means the study of "signs."

<sup>8</sup> See generally Hadfield, *Expressive Theory of Contract*; Hadfield, *Price of Law*; O'Connor, *Promoting Economic Justice in Plant Closings*; FERBER & NELSON, *BEYOND ECONOMIC MAN*; White, *Feminist Foundations for the Law of Business*; Meighan, *In a Similar Choice*; SUNSTEIN, *FEMINISM & POLITICAL THEORY*; Dennis, *The Lessons of Comparable Worth*; O'Neil, *Self-Interest and Concern for Others in the Owner-Managed Firm*; McCluskey, *Insurer Moral Hazard in the Workers' Compensation Crisis*.

<sup>9</sup> See, e.g., Kevelson, *Transfer, Transaction, Asymmetry*; Malloy, *Toward A New Discourse of Law and Economics*; Brion, *Rhetoric and the Law of Enterprise*; McAdams, *A Focal Point Theory of Expressive Law*; McAdams, *An Attitudinal Theory of Expressive Law*; Lessig, *The Regulation of Social Meaning*; Malloy, *Law and Market Economy*; Brion, *The Ethics of Property*. The starting place for much of this work are two books by McCloskey, *THE RHETORIC OF ECONOMICS* and *IF YOU'RE SO SMART*. More recent books include: DESOTO, *THE MYSTERY OF CAPITAL*; GAGNIER, *THE INSATIABILITY OF HUMAN WANTS*; KIRZNER, *MEANING OF MARKET PROCESS*; MALLOY, *LAW AND MARKET ECONOMY*; NOOTEBOOM, *LEARNING AND INNOVATION*. While each of these books takes on a particular aspect of the representational relationship between law and economics, each demonstrates the significance of interpretation theory to an understanding of law, markets, and culture.

<sup>10</sup> See *THE ESSENTIAL PEIRCE VOL. 1*; *THE ESSENTIAL PEIRCE VOL. 2*. See generally, KEVELSON, PEIRCE, *SCIENCE, SIGNS*; KEVELSON, CHARLES S. PEIRCE'S *METHOD OF METHODS*; KEVELSON, *THE LAW AS A SYSTEM OF SIGNS*; KEVELSON, PEIRCE'S *ESTHETICS OF FREEDOM*; NOTH, *HANDBOOK ON SEMIOTICS* 39-47; SHERIFF, *CHARLES PEIRCE'S GUESS AT THE RIDDLE*; LISZKA, *GENERAL*

By this term Peirce simply meant to reaffirm the idea that humans are sign making and sign interpreting beings. Signs, as such, include language as spoken and written, visual images, colors, symbols, art, architecture, music, and a variety of other ways in which ideas are communicated. In this book I refer to semiotics as a *cultural-interpretive* approach, because this term expresses the semiotic ideas that the individual interpretive actor is situated within a cultural context and that a culture, in essence, is an implicit interpretive system. This is how one experiences the intersection of law and market economy – not as an isolated and atomistic individual but as an individualized participant in an interpretive community.

In popular culture perhaps the best known semiotician is Umberto Eco, who has numerous successes in both the popular and the academic communities.<sup>11</sup> It is, however, Peirce's work that is of particular value in exploring the relationship between law and market theory because it shares an affinity with a number of core ideas expressed in the works of Adam Smith,<sup>12</sup> and with work in Austrian economics.<sup>13</sup> The

INTRODUCTION TO THE SEMEIOTIC OF CHARLES SANDERS PEIRCE; COLAPIETRO, PEIRCE'S APPROACH TO THE SELF; APEL, CHARLES S. PEIRCE: PHILOSOPHICAL WRITINGS OF PEIRCE (Buchler, ed.); HOOKWAY, PEIRCE; REASONING AND THE LOGIC OF THINGS (Ketner, ed.); MERRELL, PEIRCE, SIGNS, AND MEANING; MERRELL, SEMIOSIS IN THE POSTMODERN AGE; SCOLES, SEMIOTICS AND INTERPRETATION; HAUSMAN, CHARLES S. PEIRCE'S EVOLUTIONARY PHILOSOPHY; POTTER, PEIRCE ON NORMS & IDEALS; MENAND, THE METAPHYSICAL CLUB; MILOVANOVIC, INTRODUCTION TO THE SOCIOLOGY OF LAW (discussing semiotics including Peirce).

<sup>11</sup> See ECO, SEARCH FOR THE PERFECT LANGUAGE; ECO, LIMITS OF INTERPRETATION 51; ECO, OPEN WORK; ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE; THE SIGN OF THREE (Eco & Sebeok, eds); ECO, THEORY OF SEMIOTICS. His popular works include: ECO, MISREADINGS; ECO, FOUCAULT'S PENDULUM; ECO, THE NAME OF THE ROSE (made into a popular hit movie, THE NAME OF THE ROSE, starring Sean Connery, 1986, Fox Films).

<sup>12</sup> See, e.g., MALLOY, LAW AND MARKET ECONOMY 41–42, citing SMITH, THEORY OF MORAL SENTIMENTS 168; SMITH, ESSAYS ON PHILOSOPHICAL SUBJECTS 33–105; Smith argued that we exist in a social context and not as isolated beings; *id.* at 64–69, 106–24, 161–62, citing SMITH, THEORY OF MORAL SENTIMENTS, 71, 200–60, 352, 422 (discussing the impartial spectator), 264 (discussing the way in which general rules emerge from experience); SMITH, LECTURES ON JURISPRUDENCE 207, 311–30, 401–07 (discussing the idea of social organization based on many factors and not the idea of social contract), 14–37, 200–90, 311–30, 401–07 (addressing the dynamic stages of economic and legal evolution); SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS VOL. I 420–45, VOL. II 1, 231–44 (discussing the dynamic stages of economic development); SMITH, LECTURES ON RHETORIC AND BELLES LETTRES (provides a similar analysis with respect to the dynamic development of language).

<sup>13</sup> See, e.g., SHAND, THE CAPITALIST ALTERNATIVE; KUKATHAS, HAYEK AND MODERN LIBERALISM; HAYEK, CONSTITUTION OF LIBERTY; HAYEK, LAW, LEGISLATION, AND LIBERTY (VOL. 1, RULES AND ORDER) (VOL. 2, THE MIRAGE OF

compatibility with Austrian economics is most apparent with respect to the idea of “market process theory,” as expressed in the work of such well-known economists as Friedrich Hayek and Israel Kirzner.<sup>14</sup> Peirce’s work also shares a conceptual grounding that is similar to economist Joseph Schumpeter’s theory of “creative destruction,” which is central to an understanding of creativity in economics.<sup>15</sup> In addition, because Peirce was interested in developing a theory of the sciences, his approach lends itself to the deconstruction and interpretation of empirical and social science work, such as that done within the framework of an economic analysis of law. Peirce’s concern for understanding the way in which we experience the sciences makes his approach readily applicable to the study of law and market theory.<sup>16</sup>

Peirce’s work and the idea of understanding law in a market context should also be of interest to critical theory scholars.<sup>17</sup> Critical theorists have contributed a great deal to our understanding of the experiential nature of law, and these insights are valuable to the cultural-interpretive process. Critical theorists, and other non-law and economics scholars, have also reminded us of the fact that law is not a natural science. And, even though references to the natural and social sciences can be helpful, law involves human practices and experiences that are not fully explainable or understandable in scientific terms.

This book, therefore, examines the way in which the “institutions” of language, communication, and interpretation function to redistribute and create wealth. It also explores ways in which an interpretive approach can make us better and more effective lawyers by facilitating an understanding of law in its market context. This can be done in at least three ways. First, Peirce’s approach enhances our ability to use *framing* devices to identify value-enhancing opportunities in the exchange process. Framing

SOCIAL JUSTICE, 1976) (VOL. 3, THE POLITICAL ORDER OF A FREE PEOPLE, 1979); KIRZNER, MEANING OF MARKET PROCESS; KIRZNER, DISCOVERY AND THE CAPITALIST PROCESS.

<sup>14</sup> *Id.* <sup>15</sup> See SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–106.

<sup>16</sup> Thus, it is not surprising that Peirce’s work has been cited and favorably discussed by Richard Posner in two of his books (PROBLEMS OF JURISPRUDENCE 462–64; PROBLEMATICS OF MORAL AND LEGAL THEORY 99, 104, 264; and MERCURO & MEDEMA, ECONOMICS AND THE LAW).

<sup>17</sup> See, e.g., Houh, *Critical Interventions*. In this excellent article the author reconsiders the good faith rule in contract law. With specific reference to race and employment matters, she uses critical theory and law and market economy theory (with reference to Peirce) to rethink and restructure the established approach in the area. In integrating her approach she reforms our thinking about the good faith rule in contract law and develops a new cultural-interpretive pattern of legal argument.

involves identifying a category or general viewpoint from which a fact pattern or problem will be addressed. Second, it facilitates the use of *referencing* devices that enhance our ability to mediate between contested matters within a given interpretive framework. Referencing involves the identification and selection of particular criteria, from among several, for use in analyzing issues *within* a given frame. And, third, it explains how semiotic devices can be used to create value by transforming legal convention – by creating new *representations* that extend the networks and patterns of exchange. Representation involves the way in which abstract ideas and concepts are made comprehensible and able to be exchanged, as in using a written deed to represent an estate interest in land so that it can be sold or mortgaged. Each of these points can be initially illustrated with some simple examples.

As to the idea of framing, consider a typical real estate financing transaction.<sup>18</sup> Imagine that a developer has formed a corporate entity to deal in real estate transactions. In an effort to raise needed cash for a new venture, the developer seeks to borrow against \$10 million in equity that it has in an office building. At the outset one needs to consider the way in which this financing transaction might be framed. It might be framed as a loan secured by a mortgage on the office building. In this setup the developer retains full ownership of the building and gives a mortgage lien as collateral for the promise of repayment. On the other hand, the transaction could be set up as a sale and lease back of the property. Here the developer sells the building to a buyer to raise cash and then leases it back to use the space. The proceeds of sale provide funding as a substitute for the mortgage loan, and the lease payments to the buyer mimic the repayment of a mortgage. Now the transaction involves a sales contract, coordinated leasing terms, and no mortgage. A third way of doing this transaction might involve the sale or pledge of the stock in the corporate entity holding legal title to the property. In this framing of the transaction the exchange is shifted out of real property law and into the law governing corporate stock transfers. Each of these three transactional frames is common practice and collectively they illustrate several different ways of approaching the problem. Each framing of the transaction triggers different aspects of law, and different cash flow, tax, and other economic consequences.

Once a specific frame and transactional view have been decided upon, there are still many points to be considered and evaluated. Within the

<sup>18</sup> See MALLOY & SMITH, REAL ESTATE TRANSACTIONS 3–43.