

Adam Smith and ‘the Most Sacred Rules of Justice’

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Introduction

In his *Theory of Moral Sentiments*, Smith provides detailed and well-informed descriptions of the way people interact, of the way they emotionally respond to each other and make judgments about feelings and actions as morally good or bad. Scholars agree that his purposes include at least the following two: First, he wants to *provide evidence* for his claim that humans’ natural dispositions include not only self-love or selfishness but also ‘sympathy’, a disposition to emotionally care for each other which plays a key role in a person’s moral development. And secondly, his study of the dynamics of social interaction aims at *explaining* the way in which, through processes of interaction driven both by self-love and sympathy, people can, as individuals, acquire the capacity of self-command and moral conscience and, as members of a society, a state of mutual approval and respectful co-citizenship in accordance with moral standards. Self-command and moral conscience are, according to Smith, the characteristic features of the free and responsible moral agent. Respectful interaction in accordance with moral standards allows people to achieve a state of social harmony in which they still enjoy a great degree of individual liberty, a state which, according to Smith, is a condition for a happy life.

That people have by nature certain emotional dispositions in common neither implies that the societies in which they actually live are all the same; nor does it imply that all those societies are the same in which the conditions for a happy life are fulfilled to a high degree. Smith was fully aware of the fact that moral norms, understood as the non-conventional standards of propriety adapted by the members of a particular society, are subject to geographical and historical changes. But this does not mean that his project in TMS was exclusively sociological and psychological in kind, that he only wanted to explain how different cultures (and, in particular, different moral cultures) come into existence even though all humans are intrinsically the same.¹ There is evidence enough that Smith’s ambitions reached beyond

¹ Here, I disagree with the otherwise very informative readings of TMS as provided by Campbell (1971), Haakonssen and Winch (2006) and Raphael (2007).

social science, that he had a third purpose which was philosophical, namely normative in kind, that he wanted to *explore what was morally right and wrong from a pan-cultural or cosmopolitan point of view*, or rather: from the point of view of human nature as it prevails across all cultural differences. Smith's theory of sympathy, of the impartial spectator, his analysis of the morally good in terms of proper sympathetic feelings, judgments and actions, his account of moral conscience as well as his description of the virtuous man do indeed support a normative reading of the TMS.² But what was Smith's view of morality?

In this paper, I shall focus on Smith's third purpose, suggesting a new answer to this question. I shall try and defend the claim that Smith argues for there being some moral rules the authority of which is absolute, namely 'the most sacred rules of justice' (TMS II.ii.2.1, p. 84),³ and that his argument is convincing. A rule prescribing to act in a certain kind of way (in accordance with a certain norm) has absolute authority if all people of all times and cultures have an obligation to follow it and if this obligation is independent of any factual authority this rule might have, that is, if this obligation is independent of whether or not people in a particular social environment actually act in accordance with this rule (and the norm underlying it) or not. If the members of a society did not act in accordance with the rules of justice, they could never achieve any consensus on standards of proper behaviour that could be considered as having more than factual, namely justified or moral authority. The focus of my argument will be Smith's theory of the nature, function, origin and authority of the 'sacred rules of justice'.

Smith's Normative Moral Theory: The State of the Debate

In the literature, the answer to the question what Smith's normative moral project actually was is highly controversial. Samuel Fleischacker reads Smith as a cultural pluralist and moral relativist: for Smith, moral thinking is common sensical; he is aware of there being different, mutually incompatible moral cultures; any impartial spectator is himself informed by the moral thinking of the culture to which he himself belongs. But the impartial spectator does

² I fully agree with Heilbroner who wrote that the TMS 'contains a number of distinct, although intertwined, themes'; his list of these themes only partly overlaps with mine, and even both lists taken together might not provide a complete account of the topics Smith deals with in the TMS. See Heilbroner 1982: 428.

³ Smith also uses two other, slightly different formulations: He speaks of 'the most sacred rules of morality' (TMSII.ii.3.8, p. 89) and of 'the most sacred rules of conduct' (TMS III.4.7, p. 159).

not have the means to identify and correct the prejudices inherent in this thinking. Whereas Fleischacker does not deny that there are some universalistic tendencies in Smith's argument, he does not find them convincing. Instead, he argues that different cultures as Smith understands them are equally morally justified and concludes that, according to Smith, there are no moral norms the authority of which reaches beyond the confines of a particular social group or culture.⁴

Charles Griswold reads Smith as an epistemic moral sceptic: the moral practices of actual societies provide the only evidence on which we can rely in order to answer questions about what we are morally obliged to do. Given the actual plurality and mutual incompatibility of moral cultures, we have no evidence for there being moral rules which have more than factual authority. Ordinary people within their cultural boundaries tend to be naïve moral realists and believe that their moral judgments are universally valid, that all people should act in accordance with them, independently of their cultural identity. But this is no more than the common sensical way of distinguishing the authority of the moral norms underlying those judgments from that of merely contingent social norms. From the point of view of the philosopher, this common sensical view cannot be justified.⁵ According to Griswold, Smith avoids a more radical version of moral scepticism in so far as he assumes 'that the principles of human nature are constant through time'.⁶

James Otteson attributes to Smith the position of a moral absolutist. He reads the TMS as a divine command theory of the authority of moral norms according to which these norms should be endorsed by all people independently of their cultural identity because they have been prescribed by God. According to Otteson, Smith first provides an explanation of how the norms used in moral judgments arise in a society through an evolutionary process of communication and collective learning by trial and error. Smith's theory of sympathy plays a key role in this explanation. Sympathy, however, does not reach beyond the circle of those people with whom an individual person has acquired some degree of familiarity. In order to justify the claim that these norms should have authority over all people independently of their

⁴ See Fleischacker 2005: 105/6, 107-115 and 125-7; in Fleischacker 1999, the focus is more on Smith's liberalism.

⁵ Griswold 1999: 155-173, 349/50.

⁶ Griswold 1999: 352.

circles of familiarity, Smith ultimately relies on a transcendent source of these norms and their absolute authority, namely God.⁷

Carola Freiin von Villiez has suggested a Rawlsian reading of Smith's moral theory, accommodating moral pluralism with moral universalism. She distinguishes between three different levels of moral judgment which reflect different degrees of impartiality of the underlying norms: natural moral judgments, social moral judgments and well informed impartial moral judgments.⁸ Only the latter can rightly claim to be universal and ultimately justified.⁹ In the course of their socialization, people proceed from the first to the second level of moral judgment and their judgments thereby acquire a higher degree of impartiality or justification. But in order to make moral judgments that are not culturally biased, they have to move up to the third level. The third level is characterized by the exercise of moral conscience. Moral conscience allows a person to distinguish communal norms which represent an actual cultural consensus from moral norms proper (norms of praise from norms of praiseworthiness). According to von Villiez, the norms of praiseworthiness represent the point of view of ideal impartiality which has overcome any cultural bias.

Fonna Forman-Barzilai does not clearly distinguish between Smith's second and third purpose in the TMS – nor does Smith, as one might want to add. According to her reading of the TMS, what Smith provides in this work is 'a description of how moral culture develops and sustains itself, and not a theory of how we become conscious about that process or how we might transcend it when necessary'.¹⁰ This means that Smith, according to Forman-Barzilai, reaches his second purpose. But what follows from this concerning his success or failure of reaching his third purpose, the purpose of providing a normative moral theory? Forman-Barzilai argues convincingly that Smith's theory of moral conscience and his distinction between praise and praiseworthiness by no means provide a psychologically realistic explanation of how an individual who has been socialized within a particular culture can learn to put the moral prejudices inherent in this culture into question and to identify and use absolutely valid norms for her or his moral judgments.

⁷ Otteson 2002, chapters 6 and 7.

⁸ See von Villiez 2006: 117.

⁹ See von Villiez 2006: 127.

¹⁰ Forman-Barzilai 2006: 94.

According to the reading of the TMS I am suggesting here, Smith's theory of conscience does not play the central role in his normative moral theory. Thus, I disagree with both Forman-Barzilai and von Villiez in their understanding of the function of the theory of conscience within TMS. Contrary to von Villiez, Forman-Barzilai argues that Smith did not convincingly defend his claim that conscience provides the competence for making properly objective moral judgments. The claim I reject is that Smith's theory of conscience was at the heart of his normative moral theory: the target of Forman-Barzilai's criticism can therefore not be this theory. I agree with Otteson according to whom Smith argues in favour of there being some moral norms which have absolute authority; but I reject Otteson's claim that Smith has to rely on transcendent sources for defending this view. Furthermore, I share Fleischacker's and Griswold's attributing to Smith a moral theory that leaves ample room for justified moral pluralism; but according to my reading of the TMS there is more to Smith's normative moral theory than either Fleischacker or Griswold are willing to admit.

The scholarly controversy over Smith's view of morality is explicable in terms of the fact that he has a somewhat ambivalent view both of the *history of civilization and moral progress* and of the *process of socialization of a child and this child's moral education* in particular. For Smith, civilization is both a process of collectively shaping the standards of propriety for moral judgments and, because this process is taking place simultaneously within different groups of people living under different external circumstances, a process in the course of which different sets of moral standards emerge, each of them confined to a particular culture. Thus, while being indispensable for any moral development, actual processes of civilization prevent this development from actually reaching its goal: the shaping of moral standards with absolute authority. And as far as the process of socialization of an individual child is concerned, Smith sees it not only as an essential part of a child's moral education but also as something that, typically and most frequently, hinders this child from actually reaching the ideal end of moral perfection, of becoming 'wise and virtuous' (TMS VI.iii.25, p. 247) beyond any kind of cultural bias: during his socialization, a child interacts with other people, including parents and teachers. He learns two things.¹¹ On the one hand, he learns to overcome his naturally overwhelming selfishness, to exercise self-control (at least to some extent), and he acquires a moral conscience. And in virtue of this the process of socialization is an essential part of moral education. But on the other hand a child is, while being

¹¹ The child can just as well be a girl.

socialized, exposed to social pressure to adapt to the social rules which shape the society into which he is born; and these rules have, at least to some extent, been shaped by historically and culturally contingent factors. Socialization inevitably includes the endorsement of cultural prejudices. Because of this, the process of socialization, while being indispensable for a child's moral education, also prevents a child from achieving moral perfection, that is a culturally unbiased, strictly impartial point of view from where alone strictly objective moral judgments can be made. Not even the acquisition of moral conscience can provide a remedy against the moral disease of cultural bias: 'The violence and loudness, with which blame is sometimes poured out upon us, seems to stupify and benumb our natural sense of praise-worthiness and blame-worthiness.' Under such circumstances, we have to rely on our moral conscience in order to revive 'our natural sense of praise-worthiness and blame-worthiness' as it originates in our natural sympathy; but the standards of praiseworthiness have themselves been shaped by partly contingent factors and can therefore not be taken to have absolute authority (TMS III.2.33, p. 131).¹²

However, there is more to Smith's normative moral theory than his theory of conscience (the internalized impartial spectator); there is also his theory of the 'sacred rules of justice'. My questions are these: Do the rules of justice as Smith presents them in his TMS articulate obligations with absolute authority, with a normative authority over all people, across all times and places, independently of the contingent particulars of their socialization within a particular culture, independently of whether or not these rules are part of the social practice they have been taught to adopt? Can reflection on these rules help to make the voice of the 'natural principles of right and wrong' (TMS V.2.2, p. 200) heard in the middle even of the 'violence and loudness' of a majority (TMS III.2.33, p. 131)?

The Place of the 'Rules of Justice' within the Argument of the TMS

¹² There is one passage which Smith added to the 2nd edition of TMS but then removed from the 6th edition in which he states this most clearly: 'But though this tribunal within the breast be thus the supreme arbiter of all our actions, though it can reverse the decisions of all mankind with regard to our character and conduct, and mortify us amidst the applause, or support us under the censure of the world; yet, if we inquire into the origin of its institution, its jurisdiction we shall find is in a great measure derived from the authority of that very tribunal, whose decisions it so often and so justly reverses.' (TMS III.2, p. 129). The distinction between praise and praise-worthiness actually does not solve this problem as it is unclear where the standards of praise-worthiness arise, if not as shared norms within a society or cultural group. Here, I agree with Haakonssen and Winch who attribute to Smith the view that 'the process known as civilization contained debit items as well as credits', a view according to which 'there is no guarantee that spontaneous social evolution will deliver the best outcome' (Haakonssen and Winch 2006: 377).

Norms and the rules prescribing to act in accordance with them do not play the most prominent part in the TMS. Smith starts with an anthropological claim: he attributes to human beings both self-love or selfishness and an emotional disposition that he labels as ‘sympathy’. Sympathy is a complex natural disposition, including a disposition to empathically respond to the sentiments of others, to desire the sympathy of fellow-humans and, in general, to desire a state of mutual sympathy with other people. Smith uses the notion also for describing those feelings we have when we actually share the feelings of another person. Underlying it is a view of human nature according to which humans are essentially social and moral beings whose happiness depends on their being members of a peaceful, free and flourishing society. Members of such a society enjoy relations of mutual sympathy. Mutual sympathy should, however, be based on mutual approval and thereby accord to impartial standards of propriety. Impartial standards of propriety are moral standards.

People are, however, not naturally endowed with a disposition to behave in a way that is promoting their happiness most efficiently. Their sentiments, unconstrained by the effects of socialization, fail to provide proper moral guidance in a twofold way. On the one hand, people tend to behave in an overly selfish way and thereby provoke the resentment and antipathy of others rather than their gratitude and sympathy (TMS III.4.6, p. 158/9). And on the other hand they tend to empathically sympathize with every creature whose emotional state they witness; but sentiments of empathic sympathy as generated by a ‘transfusion’ of sentiments are ‘extremely imperfect’ (TMS I.i.1.6 and 9, p. 11).¹³ Accordingly, in order to become moral judges and agents, people have, on the one hand, to learn to restrict their selfish passions in a process of socialization so that they can behave in a way that leaves a fair amount of space to others. And on the other, they have to learn to make their sympathy with the sentiments of others dependent on the propriety of these sentiments with respect to the circumstances under which they arise.

Smith’s particular focus is on social interaction and the passions and emotions and reflections by which it is guided, rather than on instruction by institutionalized authorities.¹⁴ He mainly distinguishes between two kinds of roles people can have in their interactions: they are either

¹³ On the ‘transfusion’ of sentiments see also below, p. 19. Carrasco has characterized this kind of sympathy as ‘mechanical sympathy’. See Carrasco 2010: 3.

¹⁴ See on this point Fleischacker 2004: 77.

persons concerned by circumstances to which they respond emotionally (mainly by feelings of gratitude or resentment), or they are spectators of persons concerned. Spectators respond to persons concerned with evaluative feelings either of sympathy or of ‘a want of sympathy’ or ‘antipathy’ (TMS II.i.5.4, p. 75).

The spectator, observing a person concerned, observing how this person emotionally responds to certain circumstances, uses his sympathy with this person as a criterion for judging this person’s emotional response (and the action motivated by this response) as being either right (proper) or wrong (improper). According to Smith, spectators do not blindly sympathize with those whom they observe, their sympathy is not simply empathic: they make their sympathy with a person concerned dependent on the *propriety* of these feelings and therefore pay a great deal of attention not only to the person concerned and her or his feelings but also to the circumstances to which this person emotionally responds (TMS I.i.1.10, p. 12 and I.i.3.1, p. 16).¹⁵ Only those emotional responses of the person concerned which are proper with respect to the circumstances to which this person responds deserve the sympathy of the spectator.

Propriety is to be understood as moral propriety or as what is morally right. The spectator, by sympathizing with the feelings and action of a person concerned, morally approves of this person’s feelings and action (TMS I.i.3.2, p. 17). What qualifies him to be the moral judge is that his sympathy is impartial and dependent on desert. The person concerned by circumstances responds to these circumstances in a way driven by selfish passions unconstrained by any concern about whether or not these passions actually deserve the sympathy of an impartial spectator. These passions make his response partial. He experiences the respective circumstances under a veil of selfishness, as I would like to put it. What makes the judgment of the spectator impartial is (a) that he is not himself either directly or indirectly concerned by the respective circumstances (negative impartiality) and (b) that his sympathy is well informed by all the relevant aspects of the respective circumstances which include the interests of all those persons who are, more or less directly, concerned by these circumstances and by the consequences of what anyone does under them (positive impartiality). This information allows him to make his sympathy dependent on considerations of desert – his sympathy is not just ‘imperfect sympathy’ or unconstrained empathy.

¹⁵ Note that the impartial spectator does not have to be a man, any person can be in the role of an impartial spectator.

With respect to the condition of positive impartiality one has to be aware of the possibility of understanding the ‘all’ in ‘all the relevant aspects’ and ‘all those persons ... concerned’ in a more or less inclusive way. Impartiality comes in degrees, and the actual degree of impartiality of a spectator’s judgment depends on how inclusive he understands the respective ‘all’. Actual standards of impartial propriety are products of interactive processes which are the driving forces of both the socialization of an individual and the civilization of a society. Any real spectator has gone through a process of socialization within a society that has actually achieved a certain stage of civilization. Thus, what shapes his feelings of sympathy depends not only on his witnessing a person concerned and the respective circumstances directly rather than under the veil of selfishness. It also depends on which aspects of the respective circumstances and whose interests he actually takes into account before sympathizing and making a judgment. This is where less than ideally impartial standards of propriety come into the picture, shaped by individually and culturally biased feelings of sympathy and moral judgments. As mentioned earlier, the shaping of impartial standards of moral judgment is, according to Smith, an ambivalent affair: On the one hand, the spectator, in order to be impartial, has to rely on *proper* sympathy according to impartial standards of propriety rather than on *imperfect* sympathy. On the other hand, no real person in the position of a spectator is omniscient. An ideally impartial judgment which takes strictly all aspects of the respective circumstances and strictly all people who will, sooner or later, be concerned into account, is humanly impossible. A human being, when making a judgment as an impartial spectator, will always rely on standards of propriety which are less than ideally impartial.

It seems, however, that Smith assumes that proper sympathy is better than just imperfect sympathy, even if the respective standards of propriety are less than ideally impartial. Accordingly, he says about his enterprise in the TMS:

We are not at present examining upon what principles a perfect being would approve of the punishment of bad actions; but upon what principles so weak and imperfect a creature as man actually and in fact approves of it. (TMS Iii.5.9)¹⁶

¹⁶ These are the sentences which immediately follow Smith’s famous claim according to which his TMS ‘is not concerning a matter of right ... but ... a matter of fact’. The passage is often referred to by those who deny any normative ambitions the author of the TMS has had. One of the more recent examples can be found in Haakonssen and Winch 2006: 386. However, the passage does not provide evidence for a merely sociological reading of the TMS as straightforwardly as some might wish. One should not overlook the sentence which

No real spectator is free from cultural prejudices, and such prejudices typically make him exclude certain people from those whose interests he takes into account when making his judgment. Cultural history is a history of exclusion of people from those whose interests count: women, racial or religious minorities, strangers etc. Therefore, no real spectator's impartial standards of propriety as underlying his feelings of sympathy and moral judgments can be taken to be ideally impartial moral norms. The impartial standards of a real spectator will always represent a 'communal morality', to use a term von Villiez has brought into the discussion. Communal moral norms are not free from cultural bias, their authority does not reach beyond the confines of a particular society.¹⁷

The spectator's feelings of sympathy (or antipathy) with other people's emotions as Smith understands them are representational and evaluative and their function is to provide evidence for making an evaluative judgment.¹⁸ But the (positive or negative) sympathetic feelings of a spectator also have a motivational function. Whenever a spectator witnesses a person concerned by particular circumstances, one of two possible scenarios will occur: either the spectator actually sympathizes with the person concerned or he does not. In the former case, both the person concerned and his spectator feel confirmed in their respective feelings; after all, the spectator's sympathy implies moral approval of what the person concerned feels and encourages this person to act accordingly. But in the latter case, neither the spectator nor the person concerned will just state this lack of sympathy and moral agreement, they will not just leave it there and then walk off in opposite directions, hoping that they will never meet again. On the contrary, they will both make an effort to overcome their lack of mutual sympathy, and the motivation for this ultimately originates in their social nature and their wish to agree on impartial standards of propriety, on standards which, if not ideally impartial, they can at least share.

Thus, the spectator will make an effort to even better understand what the person concerned feels and what the circumstances are, implying that he might have overlooked something relevant when refusing to sympathize with this person and making a negative moral judgment

immediately follows the one I quoted above: 'The principles which I have just now mentioned, it is evident, have a very great effect upon his sentiments; and it seems wisely ordered that it should be so.' This sentence clearly ends with a normative statement. What Smith rejects is an ideal moral theory that ignores the human condition, but this is compatible with the project of a more modest, empirically informed normative moral theory.

¹⁷ Von Villiez 2010: 9.

¹⁸ See Griswold 1999: 116, 147; Otteson 2002: 3; Broadie 2006.

about his performance. At the same time, the person concerned will make an effort and try to look at the circumstances affecting his emotions from the point of view of the spectator – as if the spectator was concerned and he himself the spectator. Simply by making this effort this person might already achieve ‘to bring down his emotions to what the spectator can go along with’ (TMS I.i.5.1, p. 23), or he will at least calm down his emotions to some degree. In the latter case, he might be capable of looking at the circumstances and at himself as affected by them from the spectator’s point of view; he then might find his emotional response improper and try to change it so that the spectator will finally be able to go along with it.

In the course of such a ‘spectatorial process’, as Vivienne Brown has called it¹⁹, both the person concerned and the spectator may experience a change of feelings. And as the spectator is the moral judge, a change of his feelings represents a change in the standards of propriety underlying his moral judgments. Thus, it is this spectatorial process that represents the motor of moral development and moral learning, both individually and collectively.²⁰ But this process alone cannot bring forth anything but communal moral norms. The authority of these norms is both factual and justified: it is factual in so far as people actually rely on them in their decisions and actions, and without this factual authority these communal norms would not exist. Nevertheless, their authority is not exclusively factual, it is also justified, even though to a less than ideal degree. In so far as they have justified authority, they differ from all other social norms that regulate the behavior of the members of the respective society, from all those norms the origin of which cannot be explained in terms of spectatorial processes. And the degree of justification of the communal moral norms depends on the degree of impartiality of the underlying spectatorial processes and spectatorial judgments.

Communal moral norms as they exist in the social practices of various societies do not differ only with respect to their degree of impartiality. They also differ according to the various cultural prejudices that informed the underlying spectatorial processes and judgments. And there is still another source of differences between communal moral norms as adapted by different societies: there may well be more than one answer to the question what is, for a person concerned, the proper way of responding to circumstances of a certain kind. If pragmatically possible, a society can have a liberal attitude to the choice of one answer over the other and leave it to the taste of individuals which of these answers they chose. However,

¹⁹ Brown 1994.

²⁰ For a more detailed analysis of this process see Fricke 2005.

there may be pragmatic reasons which force people to actually make a choice and then collectively respect it. Such choices can bring forth further cultural differences. As for an example for the latter case one may think of traffic rules and the difference between driving on the right hand or on the left hand side of the road.

Smith provides evidence for the claim that spectatorial processes actually take place within societies. He does not mention any counterexample and might have concluded inductively that such processes can be found in all societies.²¹ His analysis of these processes can be read as a sociologically and psychologically convincing explanation of the way in which communal moral norms emerge and acquire factual and justified authority.²² But, according to all evidence for cultural pluralism, including moral pluralism, these norms will neither have universal authority (factual authority within all societies) nor absolute authority (normative authority for all people across cultures, independent of their factual authority).

The Rules of Justice and their Natural Authority

In Smith's theory of the judgment about the propriety of a person's feelings and action, be it the judgment of an external or that of an internal spectator (the voice of moral conscience), as it has been presented so far, norms of moral action and the corresponding rules to endorse them have not played a prominent role.²³ This can hardly be surprising as, according to Smith, a spectator, in order to judge the propriety of a person's feelings and action, relies on an evaluative *feeling* of sympathy as it arises in the context of a spectatorial process rather than on a conceptually explicit *norm*. It is only through such spectatorial processes that a social practice comes into existence which exhibits the kind of regularity characteristic of norm guided behavior. And only after such practices have come into existence can people use it as a source of data for extracting, via inductive generalization, the norms which correspond to the observed regularities.²⁴

²¹ There is a passage in the TMS where Smith mentions societies 'where great crimes frequently pass unpunished' (TMS VI.i.16, p. 217, see more extensive quote below, p. 29). But even in such an unfortunate society some spectatorial processes might still take place on a small scale, that is, within very small groups of people.

²² Forman-Barzilai stresses this aspect of Smith's moral theory. See Forman-Barzilai 2006 and 2010, chapter 7.

²³ Ryan Hanley speaks of Smith's 'ethical' rather than 'jurisprudential' approach to ethics, but he overlooks that the rules of justice as Smith understands them are part of his ethical theory. Hanley 2009: 65.

²⁴ See TMS VII.iii.2.6, p. 319.

Smith takes a skeptical attitude to the question whether and to what extent the norms that emerge from observation of the regularities of a social practice and from inductive reasoning and the corresponding rules of behavior can be made conceptually explicit. He rejects ‘casuistic rules’, as ‘it is often impossible to accommodate to all the different shades and gradations of circumstance, character, and situation, to differences and distinctions which, though not imperceptible, are, by their nicety and delicacy, often altogether undefinable’ (TMS VI.i.1.22, p. 227).²⁵ Thus, even where explicit norms are available for making judgments of propriety of feelings and actions, they cannot and should not replace the spectatorial process as a process to go through before making such judgments.

Only for the judgments of conscience (judgments of an internal spectator) does Smith consider the reliance on norms and rules as particularly useful: where a person depends, for the judgment of the propriety of his feelings and actions, on his internal spectator alone, the danger of making a judgment based on appearances rather than reality, a judgment subject to the distortions of selfishness and self-deceit, is very great indeed; therefore, a person who, in his judgments of conscience, does not rely on explicit norms, cannot ‘be much depended upon’ (TMS III.5.2):

Those general rules of conduct, when they have been fixed in our mind by habitual reflection, are of great use in correcting the misrepresentation of self love concerning what is fit and proper to be done in our particular situation. (TMS III.4.12, p. 160)

But the usefulness of the norms and rules for the judgments of conscience does not provide them with absolute authority, an authority which is ultimately independent of factual authority or existence in a social practice.

There is only a small number of rules which can be made explicit with accuracy and which have to be observed by all people, namely ‘the sacred rules of justice’ as Smith calls them (TMS VI.iii.11, p. 241). These rules are ‘accurate in the highest degree, and admit of no exceptions or modifications’ (TMS III.6.10, p. 175).²⁶ It is to these rules, I want to argue, that Smith attributes absolute authority. Which are the rules of justice? These rules are not

²⁵ For another passage of the same spirit see TMS VII.iv.7, p. 329.

²⁶ See also TMS VII.iii.3.17, p. 327.

numerous, and, within the TMS, Smith does not make the exact content of these rules very explicit:

The most sacred laws of justice, therefore, those whose violation seems to call loudest for vengeance and punishment, are the laws which guard the life and person of our neighbour; the next are those which guard his property and possessions; and last of all come those which guard what are called his personal rights, or what is due to him from the promises of others.’ (TMS II.ii.2.2, p. 84)²⁷

To put it briefly, the rules of justice include the rule not to kill or harm another, be it physically or psychically, not to steal, that is, to respect property, and to keep contracts. In one passage, Smith speaks about these rules in terms of the ‘rules of fair play’ (TMS II.ii.1, p. 83). Rather than positively prescribing people what to do under circumstances of a certain kind, these rules prohibit certain kinds of action in order to prevent injustice. Smith characterizes his conception of justice accordingly, namely in terms of ‘a negative virtue’ (TMS II.i.9, p. 82).²⁸ In another passage, he describes the attitude of a person who actually acts in accordance with the rules of justice in the following way:

We thus naturally lay down to ourselves a general rule, that all such actions are to be avoided, as tending to render us odious, contemptible, or punishable, the objects of all those sentiments for which we have the greatest dread and aversion. (TMS III.4.7, p. 159)

Given the perspective of the present paper, I am inquiring into the authority of the ‘sacred rules of justice’ within Smith’s moral theory in general and within his theory of the spectatorial process in particular.²⁹ I take my starting point from a distinction between the basic motivation not to harm other people and the explicit endorsement of the rules of justice as normative principles. According to Smith, human beings are naturally disposed to

²⁷ See also TMS III.4.8, p. 159, VII.iv.1., p. 327 and VII.iv.7, p. 329.

²⁸ See also TMS VII.ii.1.10, p. 269.

²⁹ I exclude all further reaching questions concerning Smith’s theory of jurisprudence. My focus will be on those of the rules of justice which forbid harming another person either physically or psychically. I shall not discuss Smith’s theory of property rights and why he inserted the respect of a person’s property into the list of things that are protected by the rules of justice. I do not read Smith as implying that the institution of property is an absolute moral requirement; rather, his claim seems to be that, if there is the institution of property, property should be considered as inviolable. For a discussion of Smith’s theory of jurisprudence and his theory of property in particular see Fleischacker 2004 (esp. part IV), Haakonssen 1981, 1996 (chap. 4), Haakonssen and Winch 2006, Winch 1978 (esp. chap. 4) and Schliesser 2006.

emotionally respond to whatever affects them by feelings of gratitude or resentment. Our gratitude and resentment is not restricted to our fellow-humans, it includes non human animals (II.iii.1.3, p. 94/5) and even inanimate objects (II.iii.1.1, p. 93). But as with all feelings of resentment and gratitude, there is the question whether these feelings are proper. As it turns out, this question cannot only be asked from the point of view of a spectator (be it an external or an internal spectator). Before any spectator judgment comes in, a person can ask whether his feelings of gratitude or resentment are proper in the sense of addressing proper objects of such feelings. Only those objects can be proper objects of gratitude or resentment which can 'likewise be capable of feeling them' (III.iii.1.3, p. 93). Non human animals can be such objects (TMS II.iii.1.3, p. 94/5). Such animals are, however, 'far from being complete and perfect objects, either of gratitude or resentment', and Smith argues for this in the following way:

What gratitude chiefly desires, is not only to make the benefactor feel pleasure in his turn, but to make him conscious that he meets with this reward on account of his past conduct, to make him pleased with that conduct, and to satisfy him that the person upon whom he bestowed his good offices was not unworthy of them. (TMS II.iii.1.4, p. 95)

...

The object, on the contrary, which resentment is chiefly intent upon, is not so much to make our enemy feel pain in his turn, as to make him conscious that he feels it upon account of his past conduct, to make him repent of that conduct, and to make him sensible, that the person whom he injured did not deserve to be treated in that manner. (TMS II.iii.1.5, p. 95/6)

In the context of the present argument, two aspects of our natural emotional dispositions have to be underlined: on the one hand, our emotional responsiveness is unrestricted, it can be triggered by everybody and even by non human animals and inanimate things; and on the other hand there is a natural concern about propriety of our emotional responses that precedes any interaction with an impartial spectator. Only fellow-humans are proper objects of our gratitude and resentment. Whenever we feel gratitude or resentment towards another human being, we address her or him as a fellow-human being, requesting her or his respect for us as fellow-human beings in return. Our natural social disposition brings into our emotional responses to other human beings a desire for recognition and respect as an equal human being.

Smith is here anticipating an argument that Stephen Darwall developed, discussing himself Peter Strawson's famous essay on 'Freedom and Resentment'³⁰:

... Two ideas seem to be utterly essential to reactive attitudes. The first is that of a claim or demand, and the second is that of the corresponding statuses of addresser and addressee: The authority to address the demand and the standing to be thus addressed and, consequently, to have to answer to the addresser, to be accountable or responsible to her for acknowledging and discharging the demand. Beyond these two essential elements, however, everything else seems, in principle, up for normative discussion and debate.³¹

According to Smith's conception of human nature, humans, in so far as they are social beings, are originally disposed to address other humans as fellow-creatures rather than as competitors for scarce resources and as enemies who should be eliminated in the struggle for survival. And that means that they are naturally disposed not to harm or hurt each other. The request for recognition and respect as an equal human being is part of our natural emotional disposition; it is originally unrestricted by any cultural prejudices and antecedes all further 'normative discussion and debate', as Darwall rightly underlines. For Smith, this is the motivational basis of our human morality and, as I shall argue, the source of the absolute authority of the rules of justice. But it does not alone make our emotional responses to other people and the circumstances in which we interact with these people morally proper – for the reasons I have mentioned already: Our emotional request for recognition and respect as an equal human being comes from under a veil of selfishness and has to be properly shaped. The normative shaping of proper moral feelings and behaviour, however, has as its psychologically inevitable consequence the loss of our natural open mindedness and the introduction of culturally diverse prejudices about whose emotions we should care.

Someone who, in his dealings with another person, makes an effort not to harm this person, has to rely on certain assumptions as to what would represent a case of harm. Physical injury, unless undertaken for a medical purpose of healing, seems to represent a clear case of harm. But there are many ways of harming another person that cannot easily be accounted for in terms of the infliction of physical pain. Much of what it means to harm a person psychically,

³⁰ Strawson 1968.

³¹ Darwall 2006: 82/3. Darwall refers back to Adam Smith in the context of this argument.

to damage or destroy his mental health or social status underlies cultural determination and variation.³² The motivation not to hurt or harm another person does not, however, depend on any specific determination of what counts as harm and what does not. And it is not by chance that Smith, at least within his moral theory, prohibits harm in such general terms. An agent is welcome to initially set his own, personal standards of harm. He would, by doing so, act in accordance with the ‘Golden Rule’ (a term, though, that Smith does not use himself in this context), an ethical principle of reciprocity which is part of many different cultures, according to which one should not do unto others what one would not have them do to oneself.³³

Rather than assuming the monopoly of defining harm, an agent who intends to avoid harming another person and, given the lack of any generally accepted standards, sets his own standards of harm, thereby recognizes and respects the other person as a fellow-human being. The agent simply assumes that what is harm towards him will be harm towards the other person in much the same way, implying that the other person is as vulnerable and sensitive to harm as he himself is. This assumption is an assumption of equality. The equality in question is to be understood in terms not only of the equality of physical and psychic vulnerability (which we share with the higher developed non human animals) but also of equal accountability.³⁴ It is constituted by natural facts about human beings, their embodiment, and their natural emotional dispositions. There is the question whether and to what extent this equality of vulnerability and accountability is compatible with inequalities on other levels, like inequalities of social class or economic inequalities, but for the argument I want to make I can leave this open.³⁵

It is because of our natural emotional dispositions, as conceived by Smith, that we care about the feelings of others and try to avoid harming them. Thus, with his theory of human gratitude, resentment and sympathy Smith provides a naturalistic explanation of a universal human motivation to recognize all other people as equals, namely as equally vulnerable and equally accountable, and a universal human motivation to avoid harming each other.³⁶

³² See Fleischacker 2004: 158.

³³ On the cultural history of the Golden Rule see Wattles 1996. See also Darwall 2006: 115-17.

³⁴ Here again, I read Smith as anticipating Darwall’s account of equality as part of moral respect. See Darwall 2006: 146.

³⁵ For a further discussion of this aspect see Fleischacker 2004: 78 and Griswold 2005.

³⁶ Clearly, Smith’s account of sympathy does not cover all motivational drives humans naturally have. Dispositions to aggression and cruelty seem part of human nature as much as sympathy is. There is the question whether all human behaviour which ignores the demands of sympathy can be explained in terms of human self-love or selfishness. I rather doubt it, but cannot go into this debate here.

Whenever we address other people as equals and hold them accountable, we expect their sympathy with us in return; we expect them not to harm us; and we are ‘shocked as by the appearance of the contrary’ (TMS I.1.2.1, p. 13). The recognition of equality gives rise to mutual expectations of respect and of abstention from harm. Our natural disposition to emotionally relate to other people, to care about them, to share their feelings if these seem to be proper and thereby rely on our own standards of propriety is at the core of what Fleischacker has called ‘Smith’s normative egalitarianism’.³⁷ Human emotional dispositions as conceived by Smith are at the core of human morality. The recognition of the equal vulnerability and accountability of others to which we respond sympathetically and the expectation of their recognition of us as equals implies the recognition of them as moral persons whose interests are to be taken into account as much as our own.³⁸ We can conclude from Smith’s normative egalitarianism that he endorsed an essentially natural, non-meritocratic understanding of human morality, a trait of his theory in which Fleischacker has recognized an anticipation of Kant’s moral theory.³⁹

In so far as the rules of justice in their most general form, namely as prohibitions of only minimally specified harm, articulate the normative standards which emerge from our behaviour as driven by our natural emotions, their authority for people is natural. The authority of these rules has its source in human nature and in human emotional nature in particular. In virtue of this, it reaches across all times and cultures, it is part of the

³⁷ See Fleischacker 2004: 80. A similar point has been made by MacIntyre; in the respective argument, MacIntyre refers back to Thomas Aquinas. See MacIntyre 1999: 125. On universal features of humans that prevail across cultures see also Haakonssen 1996: 131.

³⁸ There is the question whether and to what extent we can and should include non human animals into the realm of those whose vulnerability and interests we have a moral obligation to respect. From what Smith says about our natural disposition to emotionally respond to animals (see above, p. 14), one would expect that, in the realm of human beings, the obligation to respect the vulnerability of the other is not conditional on the other’s accountability. Furthermore, the moral obligation of respect extends beyond the mentally and emotionally healthy adults. According to MacIntyre, ‘there is no significant difference in the case of the relationship of human beings to members of certain other animal species’. (MacIntyre 1999: 15). But there is a long way to go from an emotional disposition to care which humans share with other kinds of animals to the attribution of moral obligations to non human animals, and there may well be a gap impossible to bridge. And the way Smith describes the details of a spectatorial process through which a person concerned and his spectator have to go before they can reach a state of mutual sympathy in accordance to shared standards of propriety presupposes intellectual capacities (of imagination and reasoning) that we cannot expect non human animals to share. Even humans do not all have developed these capacities to the same amount of sophistication

³⁹ Fleischacker 2004: 74. Kant, however, disqualified a moral theory of the kind Smith develops in the TMS as ‘tenuous’ (AAVI: 216). He saw clearly that, within Smith’s moral theory, any person who was not emotionally disposed to respect other people as equals and enter into spectatorial processes with them had to be considered as emotionally handicapped and could not be considered as morally accountable, even if this person was otherwise intelligent. It seems that Kant’s account of moral accountability in terms of pure practical reason provides the only way of dealing with the amoralist: According to Kant, the amoralist’s behaviour is internally contradictory in so far as he claims to speak in the name of rationality and refuses at the same time to do what is rationally required of him.

motivational drives of all people. But in virtue of what do these rules also have normative authority?

One can read Smith's theory of human emotions in general and of sympathy in particular as an attempt at naturalizing the absolute moral duty to respect other people as equals.

Especially the examples for cases of sympathy Smith uses in the very beginning of the TMS suggest such an interpretation:

Upon some occasions sympathy may seem to arise merely from the view of a certain emotion in another person. The passions, upon some occasions, may seem to be transfused from one man to another, instantaneously and antecedent to any knowledge of what excited them in the person principally concerned. (TMS I.i.1.6, p. 11)

The phenomenon of a transfusion of emotions Smith describes here seems to anticipate recent findings about the working of mirror neurons.⁴⁰ Smith's examples for cases of transfusion of emotions include not only grief and joy (TMS I.i.1.6, p. 11), but first and foremost physical pain (TMS I.i.1.2, p. 9). And one might want to conclude that people will refrain from hurting other people just as much as they are subject to a transfusion of the physical and mental pain of the latter. Hume seems to have read Smith's theory of sympathy in terms of such a transfusion when he objected to him that his claim that 'all kinds of Sympathy are necessarily Agreeable' was inconsistent.⁴¹ After all, the transfusion of physical or mental pain cannot be agreeable at all. In his response to Hume Smith rejects this understanding of sympathy. He does not reduce the absolute duty to act in accordance with the rules of justice to a psychological condition that all humans naturally share, even though he refers to this condition in his psychological explanation of our habitual motivation to act in accordance with these rules, or rather to do so at least to some extent.

In one passage Smith says that 'we may often fulfil all the rules of justice by sitting still and doing nothing' (TMS II.ii.1.9, p. 82).⁴² This sounds as if it took little to follow the rules of justice.⁴³ But this is not the case. After all, given the lives most people live, sitting still and doing nothing is not very often an option. Of course, our absolute duty to follow the rules of justice in our interaction with other people, whoever they may be, does not imply that we

⁴⁰ See Rizzolatti and Sinigaglia 2008.

⁴¹ See the quotation in the editorial note 2 in TMS, p. 46.

⁴² Forman-Barzilai 2010: 225.

⁴³ See Forman-Barzilai 2010: 225.

have to constantly interfere in their everyday lives. And one should not overlook the ‘often’ in this phrase which limits its universal applicability. Smith’s view of justice as a negative virtue is compatible with the claim that there are cases when ‘sitting still and doing nothing’ is not in accordance with the demands of justice, cases where lack of interference would be an expression of a lack of sympathy with regard to someone whose need of help we are witnessing. As far as I recall, Smith nowhere makes this point very explicit. But it is implicit in his universal rejection of infanticide. Infanticide does not only show a ‘perversion of natural sentiment’ (TMS V.2.13, p. 209) of those who actually abandon or kill new-born infants; it shows a similar perversion of sentiments of those who witness it and don’t interfere or raise moral objections against it.⁴⁴ Refusing to help can be a violation of the rules of justice as much as actively hurting someone. In both kinds of cases the violator of the rules of justice will be an object of public disapproval:

The violator of the more sacred laws of justice can never reflect on the sentiments which mankind must entertain with regard to him, without feeling all the agonies of shame, and horror, and consternation. (TMS II.ii.2.3, p. 84)⁴⁵

Acting in accordance with the rules of justice means to care about the consequences of our actions for other people, to look at circumstances and possible outcomes of our actions from their point of view in order to avoid harming them in any improper way. Such an attitude expresses a desire not to be deprived of their sympathy and approval, a desire for recognition and respect as a moral person in Smith’s sense of the term. And is not the disdain for the feelings of others and, in particular, for what they think and feel about us the clearest indicator of our lack of respect for them? It is this respect as either paid or respected to be paid that motivates us to engage in spectatorial processes. Where, in the course of such a spectatorial process, we experience at some point mutual antipathy but continue with our engagement in this process nevertheless, our attitude exhibits our concern about this antipathy and the desire to overcome the moral disagreement underneath. And this desire is shared by the person principally concerned and his spectator because of their natural emotional dispositions.

Now, this still is no more than a psychological account of mutual respect as it is imposed on us by our natural emotional dispositions. It does not yet justify my claim that Smith

⁴⁴ See TMS V.2.15, p. 209f.

⁴⁵ See also TMS VI.ii.intro.2, p. 218 and VI.concl.1, p. 262.

convincingly attributes absolute authority to the rules of justice. Apart from his psychological explanation of the origin of respect for other people and the corresponding motivation to act in accordance with the rules of justice, Smith provides a functional account of the rules of justice:

... society cannot subsist unless the laws of justice are tolerably observed, ... no social intercourse can take place among men who do not generally abstain from injuring one another ... (TMS II.ii.3.6, p. 87/6)⁴⁶

But even though Smith endorses this functional account of the rules of justice, he rejects Hume's claim according to which our only motivation to follow the rules of justice is originating in our selfishness, completed by instrumental reasoning about the fact that our respecting these rules represents a necessary condition for the well functioning of a society and thereby for our individual well being:

... so when 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. It is to be observed, however, that this concern does not necessarily include in it any degree of those exquisite sentiments which are commonly called love, esteem, and affection, and by which we distinguish our particular friends and acquaintance. 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. (TMS II.ii.3.10, p. 90)

According to Smith, human beings are naturally driven not to harm other people, to care about their well being, to respect them and to hold them accountable, quite independently of who they are. It is in light of this natural disposition that the impact of socialization within a particular culture is seen partly as a distortion, a distortion of our naturally egalitarian attitude to other people. And it is because of this disposition that people are motivated to act in accordance with the rules of justice in their intercourse with others. Cultural prejudice may restrict these others to those they recognize as members of their own culture. But this does

⁴⁶ Smith repeats this claim often. See II.ii.3.3, p. 86, II.ii.3.8, p. 89/8, V.2.16, p. 211.

not mean that their general motivation to act in accordance with the rules of justice undergoes a profound transformation.

By acting in accordance with the rules of justice, people also contribute to the well functioning of society; after all, the latter depends on the rules of justice being widely endorsed. But this is only a side-effect of their acting in accordance with the rules of justice – even though a side effect which is most welcome. The functional account of the rules of justice is not supposed to replace the psychological account of the motivation to respect them in terms of natural human emotions.⁴⁷ Contrary to Hume, Smith can thus avoid the free-rider objection. Smith's examples of free-riding behaviour include a 'thief' who 'steals from the rich' and an 'adulterer' who 'covers his intrigue from the suspicion of the husband', both of whom imagine that they do 'no evil'. But they are wrong, and for this Smith provides a slippery slope argument: 'When once we begin to give way to such refinements, there is no enormity so gross of which we may not be capable.' (TMS III.6.10, p. 175).

Another point which Smith makes in the passage quoted above is that our willingness to respect others and to enter into sympathetic relations with them does not depend on our previously having established particular emotional relationships with them, relationships as they typically exist between family members, friends or lovers. Such emotional bonds between people may well grow out of frequent interaction and the engagement in spectatorial processes with each other. But whereas such bonds may be to some extent constituted by spectatorial processes, the respect for another person and the willingness to follow the rules of justice in all relations with this person cannot be constituted in this way.

The Rules of Justice and their Absolute Authority

⁴⁷ I am here in full accordance with D.D. Raphael who, in an early paper, explored and compared Hume's and Smith's accounts of justice. See Raphael 1972/73. See also Forman-Barzilai 2010, p. 224. Raphael draws attention to an inconsistency in Smith's account of justice: on the one hand, Smith rejects the utilitarian view of justice and says that no individual may be sacrificed for the sake of a sufficiently large number of people; on the other hand, he defends the death penalty for a sentinel who, while on duty, has fallen asleep as just – on utilitarian grounds. See Raphael 1972/73: 96/7. Rather than seeing the case of the sentinel as evidence for an inconsistency in Smith's theory, one can try and understand it in terms of a moral dilemma. Letting the sentinel sleep would imply to expose large numbers of people to great danger. Smith might have pointed out that, even though the rules of justice have absolute authority, how challenging it is for an agent to always act in accordance with these rules depends on how civilized, how peaceful and happy his social environment is (see further below). A state of war represents a particular challenge. Violations of the rules of justice under challenging external conditions are, even though not morally justifiable, explicable – and to some extent acceptable – in pragmatic and prudential terms.

Smith is aware of the anti-egalitarian and anti-cosmopolitan effects of socialization and acculturation: our natural ‘sense of propriety and justice’ (TMS III.3.3, p. 136) and the ‘natural principles of right and wrong’ implicit in it can be ‘warpt’, even though it ‘cannot be entirely perverted’ (TMS V.2.1, p.200). Furthermore, our sentiments ‘are ... influenced by custom and fashion’ (TMS V.2.1, p.200) and may be ‘altered by habit and education’ (TMS V.2.1, p. 200). As a consequence, our motivation to respect all others as equals and to relate to all of them in accordance with the rules of justice may become restricted to the members of our own society or culture, to those with whom we enjoy at least some degree of familiarity. Spectatorial processes, given the contingent conditions under which they inevitably take place, tend to have an anti-cosmopolitan side effect: they restrict the kinds of people a person is willing to recognize as equals. But Smith provides a defence against it: there is a way to prevent our cultural prejudices from making us indifferent to all those with whom we have not had the opportunity of building up relations of familiarity. And with this argument we finally leave the realm of motivational psychology and enter the realm of moral motivation as guided by normative thought. According to Smith, engagement in spectatorial processes is common in all societies, and the more civilized a society is the more common this engagement is because the material and political achievements of civilization facilitate the engagement in spectatorial processes. As we have seen, people who have been socialized in a particular society have acquired cultural prejudices, and this is a fact independent of how low or high the degree of civilization is that the respective society has acquired. All people tend to actually engage in spectatorial processes only with those who share their prejudices. This is because all cultures are essentially exclusive: they distinguish between those people who belong to it and those who don’t. It is easier to recognize someone as an equal, as someone who deserves to be respected as such and about whose opinions about oneself one should care if there is no cultural boundary to be crossed.

But even though habitual familiarity with someone makes it easier to care about this person and to engage in spectatorial processes with him, Smith explicitly says that familiarity is not a necessary condition for such an engagement. Acting in accordance with the rules of justice however is such a necessary condition – even though this does not mean that these rules have to be endorsed explicitly or intentionally; one can act in accordance with the rules of justice without even having heard of them. These rules do not restrict the obligation to respect people as equals and therefore not to harm them to those with whom we share our cultural

prejudices. But whereas some ideally moral person who is disposed to act in accordance with the rules of justice anyway does not need to know and explicitly endorse them, a real person whose cultural prejudices induce him to restrict the number of people he is disposed to recognize as equals will have to think about these rules and actively endorse them.

Otherwise, he would not be able to overcome his cultural prejudices: anyone who is actually disposed to engage in spectatorial processes with some people cannot reasonably limit the possible participants in these processes to the members of his own culture or social community, even though he might be emotionally disposed to do so, due to his socialization and the then acquired cultural prejudices:

... our good-will is circumscribed by no boundary, but may embrace the immensity of the universe. We cannot form the idea of any innocent and sensible being whose happiness we should not desire, or to whose misery, when distinctly brought home to the imagination, we should not have some degree of aversion. The idea of a mischievous, though sensible, being, indeed, naturally provokes our hatred: but the ill-will which, in this case, we bear to it, is really the effect of our universal benevolence. It is the effect of the sympathy which we feel with the misery and resentment of those other innocent and sensible beings, whose happiness is disturbed by its malice. (TMS VI.ii.3.1, p. 235)⁴⁸

The argument for the absolute authority of the rules of justice as implicit in Smith's account of the spectatorial process can be reconstructed as follows:

Driven by their natural emotional dispositions and by their natural sympathy in particular, people engage in spectatorial processes. It is through such processes as taking place among members of a society that communal moral norms come into existence. These norms acquire factual authority, and this authority is justified in virtue of the spectatorial processes that brought them about. Even though justified, the authority of these norms does not reach beyond the circles of those who have been involved in the processes of constituting them.

⁴⁸ See also TMS VII.ii.1.18, p. 274: 'Among those primary objects which nature had recommended to us as eligible, was the prosperity of our family, of our relations, of our friends, of our country, of mankind, and of the universe in general.'

However, people who actually engage in spectatorial processes thereby already accept to act in a certain way, in a way that exhibits a kind of regularity as it is typical for rule governed behaviour. They act in accordance with the rules of justice, even though they may not be aware of this. The rules of justice represent those rules people have to endorse if they want to engage in spectatorial processes, they have to care about the other and about the other's opinion about what they are doing; they have to respect them as equally vulnerable and equally accountable and try not to harm them.

The rules of justice are the rules governing spectatorial processes; the authority of these rules cannot be constituted by people interacting in spectatorial processes; any constitution of communal moral norms with some degree of justified authority through spectatorial processes depends on people having previously endorsed the rules of justice. And even though this endorsement can be implicit or unconscious, it can take the form of an emotion based recognition and respect. The rules of the spectatorial process are transcendental, even though not deducible from reason; rather, they are deducible from human nature and the emotional dispositions it includes. They represent the conditions of the possibility of constituting communal moral norms through spectatorial processes.⁴⁹

Where a person concerned and his spectator have not achieved a state of mutual sympathy and one of them refuses to get further involved in the respective spectatorial process, this refusal implies a denial to respect the other as an equal, as someone with whom he wants to be in a state of mutual sympathy. But reflection will teach him that there is no good reason for such a refusal. A person who has acquired conscience and can rely on an internal judge of the propriety of his feelings and actions will have to conclude from internal reflection that the social tastes and preferences he has acquired during his socialization within a particular community and which make him inclined to disrespect certain people and refuse to engage in

⁴⁹ Haakonssen has already drawn attention to the special status of the negative virtue of justice among the other virtues: '...the rules of justice arise from spectator disapproval of injustice, of the non-performance of the virtue'. (Haakonssen 1981: 86/7) Whether and to what extent I disagree with him depends on the interpretation of 'arise' here. People engaged in spectatorial processes act as if they explicitly followed the rules of justice. But their engagement in spectatorial processes does not depend on their having previous knowledge of these rules or on having explicitly endorsed them. And if knowledge of these rules is a condition for following them, then one can say that people have to engage in spectatorial processes and practice justice before they can know the rules of justice and explicitly follow them. But what I am arguing here is that the authority of the rules of justice does not depend on their factual authority, neither does it depend on these rules being known. On the particular status of the negative virtue of justice among the other virtues see also Lieberman 2006.

spectatorial processes with them by no means provide an excuse for ignoring the feelings of these people; he has no excuse for just ignoring their resentment:

It is he [the internal judge] who, whenever we are about to act so as to affect the happiness of others, calls to us, with a voice capable of astonishing the most presumptuous of our passions, that we are but one of the multitude, in no respect better than any other in it; and that when we prefer ourselves so shamefully and so blindly to others, we become the proper objects of resentment, abhorrence, and execration. (TMS III.3.4, p. 137)

Smith accords absolute authority to the rules of justice: every human being has an obligation to follow them, quite independently of his cultural identity and of his choice of friends. This obligation remains present in his motivational dispositions, even though the respective dispositions may have undergone a weakening of their motivational force in the process of socialization:

... we feel ourselves to be under a stricter obligation to act according to justice, than agreeably to friendship, charity, or generosity; that the practice of these last mentioned virtues seems to be left in some measure to our own choice, but that, somehow or other, we feel ourselves to be in a peculiar manner tied, bound and obliged to the observation of justice. We feel, that is to say, that force may with that utmost propriety, and with the approbation of all mankind, be made use to constrain us to observe the rules of the one, but not to follow the precepts of the other.' (TMS II.ii.1.5, p. 80)⁵⁰

In so far as the authority of the rules of justice is absolute, force may be used on people who do not otherwise respect them:

There is, however, another virtue, of which the observance is not left to the freedom of our own wills, which may be extorted by force, and of which the violation exposes to resentment, and consequently to punishment. This virtue is justice: the violation of justice is injury: it does real and positive hurt to some particular persons, from motives

⁵⁰ Smith attributes this thought which he endorses to 'an author of very great and original genius', and the editor suggests that the author Smith has in mind here is Henry Home, Lord Kames. (TMS II.ii.1.5, p. 80 and editorial note 1).

which are naturally disapproved of. It is, therefore, the proper object of resentment, and of punishment, which is the natural consequence of resentment. (TMS II.ii.1.5, p. 79)⁵¹

Given that respect of the rules of justice is indispensable for the functioning of a society, any legislator will make them part of his legislation.⁵² But whereas it is of crucial importance to impose the rules of justice in order to provide everybody's security, it is equally important that the legislator respects everybody's liberty:

Of all the duties of a law-giver, however, this, perhaps, is that which it requires the greatest delicacy and reserve to execute with propriety and judgment. To neglect it altogether exposes the commonwealth to many gross disorders and shocking enormities, and to push it too far is destructive of all liberty, security, and justice. (TMS II.ii.1.8, p. 81)

The business of the lawgiver is, of course, not limited to the legislation of the rules of justice. But further specification of the rules which help a society to be peaceful and flourish is not the business of a moral theory:

The wisdom of every state or commonwealth endeavours, as well as it can, to employ the force of the society to restrain those who are subject to its authority, from hurting or disturbing the happiness of one another. The rules which it establishes for this purpose, constitute the civil and criminal law of each particular state or country. The principles upon which those rules either are, or ought to be founded, are the subject of a particular science, of all sciences by far the most important, but hitherto, perhaps, the least cultivated, that of natural jurisprudence,. Concerning which it belongs not to our present subject to enter into any detail. (TMS VI.ii.intro.2, p. 218)

Ideally, the legislation of the rules of justice by a legislator is not a top down procedure. But in those societies in which the members do not even practice any kind of spectatorial process the legislator can only come as a stranger and impose the rules of justice from the top. In such cases, the habits people have adopted will favour neither their disposition to respect each other nor their disposition to act in accordance with the rules of justice. The legislator will

⁵¹ See also TMS VI.ii.intro.2, p. 218 and VII.ii.1.10, p. 269.

⁵² See TMS VII.iv.37, p. 341.

have to rely on a strong police to impose the laws of justice by force. However, where the legislator addresses a society whose members habitually engage in spectatorial processes his legislation can be a bottom-up procedure. The main function of the legislation in such a scenario is to institutionalize rules for which respect is already habitual in social practice. People would already be habitually motivated to act in accordance with the rules of justice anyway, and less force would be needed to impose their authority.

Our actual disposition to care more and more easily about those with whom we entertain relations of familiarity is explicable in psychological terms. But this culturally shaped psychological disposition does not affect our absolute duty to respect others as equals and to care about them, independently of who they are. Making these rules explicit and understanding their absolute authority cannot be a matter of sympathetic feelings alone, it depends on reasoning:

It is by reason that we discover those general rules of justice by which we ought to regulate our actions ... (TMS VII.iii.2.6, p. 319)

But this does not mean that Smith is here anticipating Kant's transcendental philosophy, the account of morality in terms of pure practical reason. In the passage quoted above, he continues by explaining that the kind of reasoning he has in mind is inductive in kind and that the data from which conclusions are drawn by inductive reasoning can only be found in human practice, in social interaction driven by the natural disposition of sympathy, that is, in spectatorial processes:

The general maxims of morality are formed, like all other general maxims, from experience and induction. We observe in a great variety of particular cases what pleases or displeases our moral faculties, what these approve or disapprove of, and, by induction from this experience, we establish those general rules. But induction is always regarded as one of the operations of reason. From reason, therefore, we are very properly said to derive all those general maxims and ideas. (TMS VII.iii.2.6, p. 319)

But though reason is undoubtedly the source of the general rules of morality, and of all the moral judgments which we form by means of them; it is altogether absurd and unintelligible to suppose that the first perceptions of right and wrong can be derived

from reason, even in those particular cases upon the experience of which the general rules are formed. These first perceptions, as well as all other experiments upon which any general rules are founded, cannot be the object of reason, but of immediate sense and feeling. (TMS VII.iii.2.7, p. 320)

Inductive reasoning alone, however, cannot provide an argument for the absolute authority of the rules of justice. But, as I have argued above, there is a transcendental argument implicit in Smith's account of the rules of justice according to which they have absolute authority.

Conclusion

I have argued for the claim that Smith, in his TMS, provides a normative moral theory; the core part of this theory is his account of the 'sacred rules of justice'. According to Smith's conception of human nature, we are naturally disposed to act in accordance with these rules, quite independently of our actual knowledge and explicit endorsement of them. Socialization typically has the effect of restricting the realm of people with whom we are disposed to interact in accordance with the rules of justice. But reflection can make us aware of there being no good reasons for such a restriction.

The source of the absolute authority of the rules of justice is to be found in human nature as conceived by Smith, and in human beings' emotional nature in particular. Humans are by nature emotionally disposed to respect others as equals and to hold them accountable. At the same time, however, they are by nature too selfish and passionate and partly blind to relevant circumstances and therefore do not always properly understand what it means to judge and act in accordance with the rules of justice.⁵³ The rules of justice are the rules governing spectatorial processes; they have the status of absolute obligations; their authority does not depend on their actually being respected by people. Thus, their authority differs from the authority of communal moral norms which are constituted by people as outcomes of spectatorial processes; the authority of communal moral norms is justified, but it depends on factual authority nevertheless. Even if there were no people in the world who had the opportunity of engaging in spectatorial processes with others and even if there was no practice

⁵³ This is the reason why Smith rejects the claim that humans do, by nature, have a moral sense. See TMSIII.4.5, p. 158.

in accordance with the rules of justice, the rules of justice would still have absolute authority. People would still be obliged to act and interact in accordance with these rules.

Whether people actually have the chance to participate in spectatorial processes or not depends on contingent factors. Even though they are naturally disposed to do so, there may be contingent factors that considerably reduce the opportunities to act in accordance with this disposition. Smith mentions the case of a person who is unfortunate enough to be born into a society where such processes are not common. But even a person who is unfortunate in this sense is not exempt from the rules of justice, because these rules are absolutely valid:

In countries where great crimes frequently pass unpunished, the most atrocious actions become almost familiar, and cease to impress the people with that horror which is universally felt in countries where an exact administration of justice takes place. *The injustice is the same in both countries;* but the imprudence is often different. (TMS VI.i.16, p. 217, italics CF)

Social stability and human happiness cannot be achieved without relying on spectatorial processes. Where these processes actually take place, the communal moral norms emerging from them acquire a certain degree of justification. Different communities, however, even though equally relying on spectatorial processes for their judgements of the propriety of feelings and actions, may constitute different sets of communal moral norms. All sets of communal moral norms whose origin is explicable in terms of spectatorial processes can be considered as justified, even though their degrees of justification may vary. These norms have been constituted in the same, the right way, the way that is most in accordance with human nature. But this does not provide them with universal authority. Thus, there is room for culturally induced moral pluralism in Smith's moral theory. Nevertheless, there are norms which all people have to respect, namely the norms underlying the rules of justice.

According to my reading of the TMS, Smith's answer to the moral question: 'What should I do?', does not anticipate the Kantian answer. In his moral theory, Kant relies on the assumption of there being a point of view – accessible to reason – from where to make moral judgments the normative standards of which are free from all kinds of perspectival constraints or cultural prejudices. Accordingly, Kant's answer to the moral question can – without relying on the conceptual details of his philosophy – be formulated like this: 'Find out what is

proper from an ideally impartial point of view!’ I do not see how a moral person as conceived by Smith, a person whose morality originates in his natural emotional attitude to other people and has taken particular shape in a process of socialization, could find an objectively true answer to this question. It seems to me that Smith’s answer to the moral question ‘What should I do?’ should be phrased like this: ‘Get engaged in spectatorial processes with as many people as possible who might – directly or indirectly – be concerned by the consequences of your action and make sure, with their help, that what you do does not harm anyone of them in any way. There are pragmatic limits to how many people’s point of view you can actually take into account. But, in any case, you should never exclude from your consideration anyone of whom you can anticipate that his interests will be affected. Furthermore, you should be aware of the possibility of shortcomings of any of your moral judgments about what you should do and listen to those who raise objections.’

Rather than relying on moral deliberation alone, the moral agent as conceived by Smith relies on interaction with others in spectatorial processes in order to answer the moral question. The rules of justice do not prescribe what to do under particular circumstances; they prescribe an attitude that the moral agent has to take towards other people, independently of who they are.⁵⁴

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⁵⁴ I would like to express my deep gratitude to Vivienne Brown who has given me extensive feedback on a former version of this paper. Furthermore, I would like to thank Maria A. Carrasco, Peter Railton and an anonymous commentator for very inspiring criticism. This said, I underline that all errors and shortcomings in this paper are mine.

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