

Social Organization:
Essays on the Need of Institutions and their Design

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Introduction

Human beings are social beings. They form societies and manage to combine their individual skills for the advantage of the whole group. However, given a specific society, individuals have an incentive to free-ride on the effort provided by others and not contribute to the collective interests. Even more so, without restrictions, each individual has an interest to take from others what is not his.

Because of the incentive to free-ride, the existence of a society is somewhat puzzling. Thomas Hobbes analyzed this basic problem with reference to a “state of nature”.¹ It is well-known that for Hobbes the solution to the problem of exploitation is the consensus of the individuals to pass all their rights to an almighty state, which he called Leviathan. In the classical literature following Hobbes, alternative solutions to the same problem were presented. Broadly speaking two strands of theory exist. The one puts human self-interest into the centre of analysis. The other argues that people respect the well-being of others.²

A different approach was taken by some philosophers of the Scottish Enlightenment, especially Adam Smith. One of the main goals of the Scottish Enlightenment was to draw a realistic picture of human behavior. “They wish to build a truly balanced picture of social life as they found it and the forces which controlled it” (Macfie 1968: 29). Thus, for Smith it was not only self-interest which triggered human actions - although self-interest plays a major role in his philosophy. In his own, famous opening words to the *Theory of Moral Sentiments*: “How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it” (Smith 1982: 9). By stating that man is driven by self-interest as well as by interest in others, “Smith criticizes the polar approaches of Hobbes and Mandeville (an egoistical-rationalistic and utilitarian individualism) and the authors of the ‘happiness of others’ approach, although he shares the starting point of their reasoning” (Peukert 1999: 457).

Smith concedes that man is selfish, as the above quote clearly shows. However, the principles which interest him in others may be seen as constraining self-interest. For instance,

¹ For a recent analysis of this state of nature, see Airaksinen (2007). The author also puts forward the claim that the state of nature is not hypothetical but that Hobbes “intended to warn us about its possibility, if we do not play the game of politics in a rational manner” (p. 21).

² This classification may be seen as very simplified. For instance, social contract theory may be regarded as a third strand. However, the fact that contracts are only signed if it is in the interest of the signers relates social contract theory with self-interest.

people have an inclination to “sympathize” with each other and so control others’ and their own behaviors. Also, Smith regarded man as standing under the surveillance of an impartial spectator, at the same time being a moral institution and one of reason. Both constraints may be characterized as “natural”, since they are inherent to man and we have no direct control over them. But they are limited to the application to personal relationships, e.g. to families or friends. Consequently, especially in complex societies, the need for further, “artificial” arrangements arises, such as a legal system. In the literature the market and competition is also introduced as further artificial institution limiting human self-interest.

The idea that human self-interest faces several restrictions, some being natural, others being artificial, is taken up in the present analysis. More precisely, I will in the following investigate the need for social institutions and their design. On the whole, five papers are presented. Each of them is a self-contained article. The first paper with the title “Peace and the Sharing of Power: Contrasting Conquest and Non-Conquest Settings” is forthcoming in *Homo Oeconomicus*. The same holds true for the second paper with the title “Adam Smith’s Intuition Pump: The Impartial Spectator”. Both papers are single-authored. An early version of the third paper, co-authored with Mehmet Karacuka from Ege University, Turkey, was presented at the annual meeting of the European Public Choice Society 2006 in Turku, Finland. A revised version then appeared in the Working Paper Series of the Economics Department at the Ege University as Working Paper No. 06/10. The last two articles are both co-authored with Manfred J. Holler from the University of Hamburg. The first, titled “Impartial Spectator, Moral Community, and Some Legal Consequences” is forthcoming in the *Journal of the History of Economic Thought*. The second, titled “Jury on Stage: A Common Law Play”, has been presented at the Corsica Law and Economics Workshop 2008 in Reims, France. It is available as Discussion Paper No. 157, Beiträge zur Wirtschaftsforschung, Institute of SocioEconomics, University of Hamburg, 2008.

The papers constitute four hypothetical parts. Broadly speaking, the first part is interpreted as showing the need for social institutions. The remaining three parts offer an investigation of the design of three distinct forms of institutions, namely morality, social norms, and the law. Most parts take Adam Smith’s moral and legal philosophy as starting point.

The first chapter offers a mathematical model showing the importance of external institutions for the existence of a society. More specifically, it is an extension of a model dealing with strategic situations in which players share an asset. In the original model, both players have means to eliminate the opponent with some probability and, in case of

successfully eliminating him, gain the full share of the asset which was previously shared. Only after introducing damage in case of attacking but failing to eliminate the opponent and discounting of future periods is it rational for the players to abstain from attacking. The extension of the model brought forward in the present analysis limits the possibility to gain the opponents share of the asset. It is shown that the introduction of imperfect abilities to gain the opponent's share increases the probability of remaining peaceful. This result is interpreted as showing the need for external institutions.

The second chapter analyzes a specific concept of morality which may be regarded as playing the role of an institution in the aforementioned sense. To be more precise, one of the building blocks of Adam Smith's moral philosophy is analyzed, namely the impartial spectator. Smith apparently introduces the impartial spectator as personification of a value system. This hypothetical person is "the man within the breast" (e.g. Smith 1982: 130, 132, 147f), a synonym of our conscience if you wish. He constantly observes our conduct and makes us feel bad if we fail to act according to his standards.³ Simple as it may seem, Smith's impartial spectator is interpreted in rather different ways. For instance, some scholars argue that he is an epitome of a universal value system. In other words, all humans share the same impartial spectator. Others regard him as purely individual, implying that each person has "his own" impartial spectator or value system. Still others regard the impartial spectator as personification of the values of a specific society. The present analysis tries to disentangle these different meanings and find out where their justification may be found.

The third chapter of the analysis takes up the idea that, within a society, its members observe other members. In addition to the mere observing, information gained by observing others is also communicated within the society. Hence, a social group may provide a frame for signaling and exchanging information about and via others. As an increasing amount of literature on signaling implies, the quality of signals may also contribute to the economic success of the respective group. In the present analysis it is shown that the quality of signals, and hence the economic success of the group, may depend on the size of the group. However, there is a trade-off. On the one hand, a smaller group may provide a higher signal value. On the other hand, a larger group may provide more information and trading opportunities. It seems that there should be an economically optimal group size. As evidence for this hypothesis it is referred to the economic success of religious groups in the past.

³ At first glance, analyzing morality may seem odd for economists. However, "social and economic patterns of interactions also affect moral enforcement mechanisms, that is, the enforcement based on the tendency of humans to derive utility from acting according to their values" (Greif 1994: 916).

In the philosophy of Adam Smith legal institutions evolve due to the imperfections of the natural institutions, as was briefly mentioned above. Chapters four and five of this thesis discuss this argument. Moral attitudes and social norms give rise to punishment. In other words, the enforcement of values and norms is set through via punishment. Smith notes in the *Theory of Moral Sentiments*, as “Society cannot subsist unless the laws of justice are tolerably observed, as no social intercourse can take place among men who do not generally abstain from injuring one another; the necessity ... was the ground upon which we approved of the enforcement of the laws of justice by the punishment of those who violated them” (Smith 1982: 87).

However, for Smith punishment is not based on a welfare analysis but the resentment felt by those affected and those watching an unjust (or in another manner improper) action. Put differently, punishment arises out of passions or sentiments. “All men, even the most stupid and unthinking, abhor fraud, perfidy, and injustice, and delight to see them punished” (Smith 1982: 89). Yet, as the quote in the previous paragraph suggests, punishment may also be regarded as a necessary instrument in order to prevent misbehavior in various forms, though it remains based on emotions or passions. But passions are easily distorted and punishment may hence fail to fulfill this preventing role in an adequate manner. At some times, for instance, the wrong people may be punished, at other times punishment may be too harsh.

In order to correct for these problems the right to punish is passed on to more impartial, external institutions such as legal institutions. But although legal institutions are “external” to a certain degree, they are not completely independent from the natural institutions. In order to function well, legal institutions have to respect the moral values and social norms of the society they are to regulate. As Malloy (1994: 115) observes, “Smith always postulated a framework for social cooperation in which the rule of law was understood. The general rules of law and social cooperation were seen as positive attempts to articulate the governing standards of morality, and social norms within the community.”

In the two papers which constitute the fourth part of the thesis, it is argued that a jury system may offer a potential for advantages over other forms of legal settlement. This advantage occurs in the form that a jury may include the “social perspective” into the verdict in a better way. However, this advantage faces the disadvantage of unintended social dynamics within the jury, which may distort the verdict. As one of the main factors affecting the advantage or disadvantage, homogeneity of the society and the jury is identified. A homogeneous society may, with higher probability than a heterogeneous society, bring about

a homogeneous jury. On the one hand, the positive side, homogeneous juries may communicate well and hence overcome partiality of the individual jurors. Also, a homogeneous jury can rather easily agree upon a verdict. On the other hand, the negative side, homogeneous groups tend to polarize due to group dynamics. Further, the “argument pool” is limited (Sunstein 1999: 4). This implies that there is a greater chance that relevant information is not taken into account as compared to heterogeneous groups.

On the whole, the present analysis mostly relies, as was outlined above, on the moral and legal philosophy of Adam Smith. Recent findings, for instance from the field of neuroscience, indicate that Smith drew quite a good picture of what is going on in humans when they make decisions. But as Smith’s philosophy itself is not completely straightened out, it may prove useful to analyze those parts of it that remain and add to it modern components. This is the aim of the following articles.

CHAPTER 1

Peace and the Sharing of Power: Contrasting Conquest and Non-Conquest Settings^o

Abstract: Models of deterrence often assume that ‘winner takes all’. I call these models conquest models of power. Models in which the winner of a ‘duel’ only gains a share of the other’s assets will be called non-conquest models of power. In this paper, I present a mathematical model showing that non-conquest settings may be more likely to lead to states of peace than conquest models. Also, the deterring effect of a ‘strong’ opponent increases.

Key Words: Deterrence, Power Sharing, Institution-Building

JEL-Classification: D02, D74

1. Introduction

Deterrence has been a major issue for both political and economic theory in the post-World-War II era. Consequently, a huge literature has arisen, analyzing the circumstances which help avoid war and sustain peace.⁴ Further applications to, e.g., crime deterrence followed. In general, the literature on deterrence theory focuses on situations in which the parties have no common interest. They are ‘completely opposing’ each other and corresponding models are hence ‘completely competitive’. Sometimes however the parties do (initially) share some assets. Starting a fight over these assets could lead to the complete loss of what one had before. Thus, all parties face the risk of losing something in case of war, in contrast to situations in which no asset was initially shared.

In a recent paper, Brams and Kilgour (2008) tackle this issue. They develop a model of initial power sharing, i.e. a situation in which two parties initially share some asset. Somewhat intuitively they find that an initial distribution of power, defined as de facto control over the underlying asset,⁵ is not necessarily stable; each party has an incentive to eliminate the opponent, as will be shown below. In order to deter the parties from attacking the respective other and thereby to stabilize peace, their model shows that very restrictive

^o Forthcoming in *Homo Oeconomicus*.

⁴ For an overview of this literature, see e.g. Mearsheimer (1990) and Zagare and Kilgour (2000).

⁵ The authors use the share of the asset that each player controls as a surrogate for his power. I will follow this practice throughout the text, using the terms power and share synonymously.

conditions have to be met. Accordingly, one condition under which stability of peace may arise is, for instance, that the initially shared asset will ‘shrink’ if one tries to eradicate the other but fails to do so. But even satisfying this condition does not necessarily lead to stability of peace: Only for the case that both parties have a relatively small likelihood of hitting the other mutual docility can be sustained.

Several applications of this model are straightforward. Brams and Kilgour (2008) refer to, e.g. civil wars and the cold war. An application to political systems could help to explain why autocracies are sometimes rather unstable and the sovereign has to constantly worry about (potential) opponents. The Sultans of the Ottoman Empire, for instance, practiced fratricide in order to avoid deleterious quarrels about the throne. Cases in which no similar practice could be established, i.e. where opponents could not be eliminated (in advance), suggest that war will be the consequence: Romulus killed Remus, the breakup of former Yugoslavia ended in civil war and numerous marriages end in a ‘war of roses’.

However, it is well observed that assets can indeed be shared peacefully. One of the most striking examples, at least to me, is democracy. In most democracies at least two parties form a governing coalition, i.e. they share the power of government. Further, although political debates are sometimes lead in rather rough language, it is generally considered as peaceful, even in cases in which the government changes. What distinguishes democracies from autarchies such that the former seem to work more peacefully than the latter? It appears that the answer can in part be found in the institutional setting. In democracies it is not (only) in the hands of the political leaders how much power they have. In general, voters decide on which party has what amount of power. The people act as a third party, which takes the division of power out of the hands of the politicians, at least partly. Thus, the parties can only win an additional *portion* of power, as opposed to the remaining rest of power which was initially held by the other party. Accordingly, if it is not in the power of the parties to gain full control over the shared asset, this may contribute to the affirmation of peace.

In what follows I will support the claim that a reduction of the capacity to gain power from others will decrease the propensity to eliminate opponents. I will do so by presenting a formal model which captures the difference between two settings that have in common that two parties initially share an asset. In the first setting both parties will be assumed to possess means to get hold of the *total asset* by eliminating the opponent. This *conquest model* of power will be presented in section 2. In the second setting, both parties will be assumed to possess means to *increase their share* of the asset, but, in contrast to the conquest model, have no means to get hold of the total asset. Some share will remain in the hands of the opponent. I

will call this the *non-conquest model* of power. It will be presented in section 3. Section 4 contrasts the two models and interprets some differences in results. In the conclusion I will relate the model to the need of institutions.

2. A Conquest Model of Power

The conquest model of power presented in this section is introduced in Brams and Kilgour (2008). Assume two opposing players, P and Q, who are involved in a conflict about how to divide a specific asset. Payoffs are assumed to be von Neumann-Morgenstern utilities and linear in assets. More specifically, it is assumed that $u(x)=x$.⁶ Assume further that the asset, the size of which is normalized to 1, is initially shared in the proportion a and $(1-a)$ respectively. Both players have means to eliminate their opponent with the probabilities p and q , respectively. To illustrate, both players could be regarded as gunmen with different shooting skills. If one player, P for instance, decides to open fire at his opponent, he will eliminate him with probability p , in which case P will capture the whole asset. The defeated player Q is ‘dead’, i.e. he has no chance of trying to recapture any share. p and q are exogenously given and it is assumed that $p, q \in (0,1)$. Each player is allowed to draw once, i.e. both gunmen have their guns loaded with one bullet only. In case that the opponent survives the attack, it is thus rational to start a counterstrike and fire back. This gives the player fired at the chance to increase his share without the threat of being hit (the opponent already fired his bullet).

But when will a player open fire at the other if his opponent remained docile so far, i.e. if his gun is still loaded? In order to answer this question, assume that each player believes to ‘draw faster’ than the other. In other words, each player sees the game as a sequence of actions, in which it is undetermined who will make the first choice.⁷ Again, the reaction to a failed attack can be a counterstrike; if one player is successful in eliminating his opponent, he will gain the total asset. If both players fire but fail to hit each other, this case occurring with probability $(1-p)(1-q)$, it is assumed that the asset will ‘take damage’. Damage means that the total asset will, in the next period, be reduced by some share $(1-s)$, where $0 \leq s \leq 1$. s is therefore similar to a discount rate, but it reflects ‘real damage’ instead of the players’ time preference. The reduced asset will again be shared in the initial proportion of a and $(1-a)$.

⁶ Note that the model presented in Brams and Kilgour (2008) does not include utilities but only expected amounts of the asset. Thus, defining payoffs in utilities makes these strict assumptions necessary.

⁷ In a second paper, Brams and Kilgour (2007) contrast this sequential interaction with a simultaneous interaction in which there is no accumulation of payoffs. They show that the simultaneous setting yields more states of peace than the sequential one.

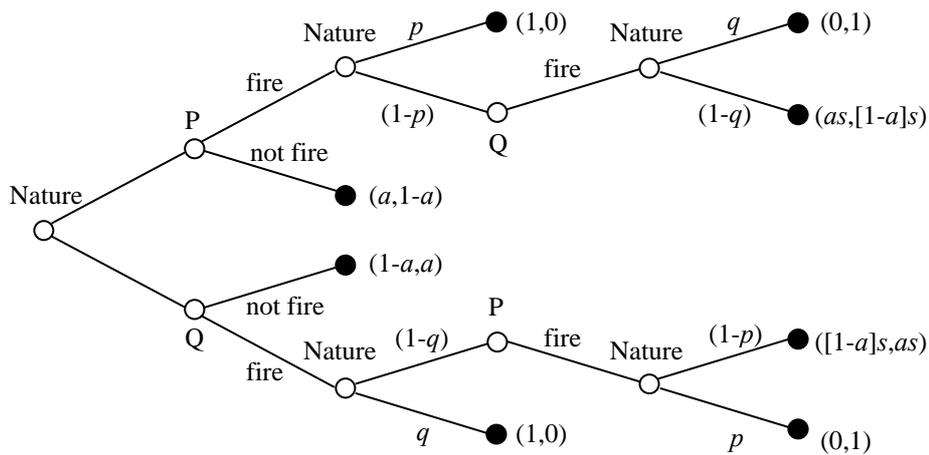


Figure 1: *The sequence of possible events in the conquest model*

For the sake of clarity about the possible events, figure 1 illustrates one hypothetical stage of the basic setting as it was just outlined. Note, however, that figure 1 illustrates the situation as an ‘event tree,’ as opposed to a game tree. In other words, figure 1 does not intend to incorporate the strategic nature of the interaction. Rather, it is the attempt to illustrate possible events and their (hypothetical) sequence.⁸ Nature initially chooses which of the two players will be in the position to open fire first and hence to make the opponent fire back. If the one who is in this position decides not to fire, the situation remains unchanged and both players continue to share the asset. Take for instance the case that P is the one to choose between firing and remaining docile. The players hence find themselves in the upper half of the event tree in figure 1. If P does not fire, Q will remain docile. (Otherwise the players would find themselves in the lower half of the event tree.) Since both hold their fire, the initial distribution of the asset will in this case remain unchanged. In case that P opens fire, nature will ‘decide’ whether Q will be hit or not, the former case occurring with probability p , the latter with $(1-p)$. If Q gets hit, P will gain the full asset of size 1. If P misses Q, Q will automatically fire back, as was assumed above. Again nature ‘decides’ whether Q hits P, this being the case with probability q , or whether Q misses P, this case occurring with probability $(1-q)$. If Q hits P, Q will gain the full asset. If Q misses P, the asset is assumed to have taken damage. The initial shares are now reduced to $(a \cdot s)$ for P and to $(1-a) \cdot s$ for Q.

Starting from this basic setup, Brams and Kilgour (2008) in a second model assume that players live for multiple periods (if they are not eliminated by the opponent) and discount

⁸ Note that the illustrated ‘event tree’ does, for the reason outlined in the text, not represent the *game* described in Brams and Kilgour (2008).

future payoffs by some factor r , where $0 \leq r < 1$. Given this scenario, both parties now evaluate whether to try to eliminate the counterpart, or to share the asset.

Obviously, each party will only try to eliminate the other if his payoffs from attacking will be higher than when remaining docile and being content with the shares given initially. It is assumed that the players will not attack if the payoffs from doing so are equal to the ones they could capture from attacking. If neither player attacks, player P will yield a discounted payoff of $\frac{a}{(1-r)}$. The utility of attacking for player P then takes the following recursive form:

$$u_p = p(1) \sum_{i=0}^{\infty} r^i + (1-p)[q(0) + (1-q)(a + rs \cdot u_p)]$$

Solving for u_p yields:

$$(1a) \quad u_p = \frac{p + (1-p)(1-q)(1-r)a}{(1-r)(1-(1-p)(1-q)rs)}$$

P will remain docile if $\frac{a}{(1-r)} \geq u_p$, i.e.:

$$(1b) \quad \frac{a}{1-r} - u_p = \frac{a - p - a(1-p)(1-q)(1-r(1-s))}{(1-r)(1-(1-p)(1-q)rs)} \geq 0.$$

As, by definition, $p, q \in (0,1)$, $r \in [0,1)$, and $s \in [0,1]$, the denominator is non-negative. Therefore, in order for this inequality to hold, the numerator has to be non-negative as well. Thus, in order for P to remain docile, the p -values have to satisfy the following condition:

$$(2) \quad p \leq \frac{aq + a(1-q)r(1-s)}{1 - a(1-q)(1-r(1-s))}.$$

By the same logic, Q will remain docile for p -values satisfying:

$$(3) \quad p \geq \frac{aq - (1-a)(1-q)r(1-s)}{1 - (1-a)(1-q)(1-r(1-s))}.$$

The gray region in figure 2 illustrates all pairs of p and q that satisfy conditions (2) and (3) simultaneously for the given values of r , s , and a . In other words, for the values in this region, both players will abstain from attacking one another such that peace will be an equilibrium outcome.

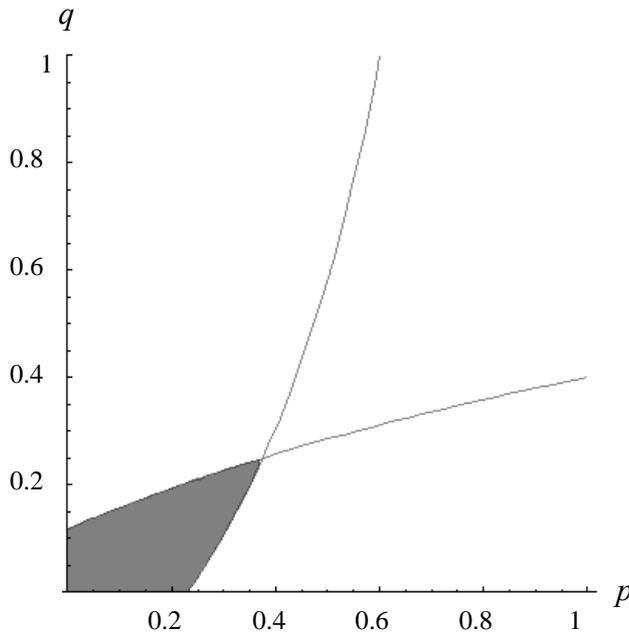


Figure 2: *Mutual docility for the case of discounting and damage factor for $a=0.4$, $r(1-s)=0.2$*

It seems somewhat striking that peace can only be obtained if both players have a ‘small’ probability of eliminating the other. This implies that the main reason for keeping peace in the conquest model is that the players’ expected gain from attacking is small. That is, the players are not deterred from firing by the threat of the other’s strength but their interest in firing is small due to the small probability of hitting the opponent, i.e. due to their own ‘weakness’.

3. A Non-Conquest Model of Power

Note that the conquest model as it was outlined above was characterized by the initial sharing of an asset. This implicitly suggests an ‘earlier stage’; a stage which lead to this sharing of the asset. Apparently, in this earlier stage neither party was able (or willing) to take hold of the complete asset. If the sharing of the asset was due to lacking ability to eradicate the other party, the previous stage would, according to the definition given above, be characterized as a non-conquest setting. Thus, the Brams-Kilgour model can be interpreted as reflecting a switch from a non-conquest to a conquest setting.

In this section I will stick to the idea that neither party can fully eliminate the other. Therefore, assume that player P has means to increase his share by grabbing a portion β of Q's share. Similarly, player Q has means to increase her share by grabbing some portion γ of P's share. Thus, P can potentially, in absolute terms, add $\beta(1-a)$ to his share, while Q can gain γa . Assume further that β and γ are exogenous. If both players successfully make use of their means, each player will receive the respective difference between his own gain and the gain of his opponent. Thus P will receive $(a + \beta(1-a) - \gamma a)$ in the case that he hits Q and is simultaneously hit by Q himself.

Contrary to the conquest model, the non-conquest model assumes that the opponent will survive an attack in any case. He will thus always be able to start a counter-attack. Hence, it is reasonable to assume that the players are able to fire once each period, i.e. they have new ammunition after having fired in one period, although they can only fire once each period. Also, the underlying asset will be discounted with the factor s if either of the firing players misses the other. Note that the potential for damage is thus increased as compared to the conquest model. Damage now already occurs if one player misses the other. In the conquest model *both* players had to miss each other in order for the asset to take damage. The basic idea is, however, the same since Brams and Kilgour (2008: 14) introduce damage in the following way: "In the event that a player fires at but does not eliminate its opponent in any period, the total assets of that period are reduced by a damage factor s , where $0 \leq s \leq 1$. The reduced assets are shared in the ration $a:(1-a)$ if nobody is eliminated, regardless of which player or players fired a shot." Since in the conquest model, each player would like to draw faster than its opponent, it will suffer as a result of this damage only if it misses and survives. This explains the mathematical differences between the conquest and the non-conquest models.⁹

Given this setup, define the expected assets the players will have in case of an attack in period t as C_t^i , where $i=P,Q$. Player P's assets in period $t+1$ will then be a function of the assets in period t . To be more precise, C_{t+1}^i takes the following form:

$$(4) \quad C_{t+1}^P = pq[C_t^P + \beta C_t^Q - \gamma C_t^P] + p(1-q)[C_t^P s + \beta C_t^Q s] + (1-p)q[C_t^P s - \gamma C_t^P] + (1-p)(1-q)[C_t^P s]$$

For the following calculations, it is adequate to reformulate (4) into:

⁹ It should, however, be mentioned that the qualitative results obtained in the following also hold for a non-conquest model in which damage only occurs if both players miss.

$$(5) \quad C_{t+1}^P = C_t^P [pq(1-\gamma) + p(1-q)s + (1-p)q(s-\gamma) + (1-p)(1-q)s] + C_t^Q [pq\beta + p(1-q)\beta s]$$

In a similar manner we yield Q's expected assets in period $t+1$, which are:

$$(6) \quad C_{t+1}^Q = C_t^P [pq\gamma + q(1-p)\gamma s] + C_t^Q [pq(1-\beta) + p(1-q)(s-\beta) + (1-p)qs + (1-p)(1-q)s]$$

Note that the assets of both players in any period are a function not only of their own share in the previous period, but also the share of their opponent. We can thus define a system of equations as follows:

$$(7) \quad \begin{bmatrix} C_{t+1}^P \\ C_{t+1}^Q \end{bmatrix} = A \cdot \begin{bmatrix} C_t^P \\ C_t^Q \end{bmatrix} = A^t \cdot \begin{bmatrix} C_1^P \\ C_1^Q \end{bmatrix} = A^{t+1} \cdot \begin{bmatrix} C_0^P \\ C_0^Q \end{bmatrix},$$

A being the following 2x2 matrix:

$$(8) \quad A = \begin{bmatrix} pq(1-\gamma) + p(1-q)s + & pq\beta + p(1-q)\beta s \\ (1-p)q(s-\gamma) + (1-p)(1-q)s & \\ & pq(1-\beta) + p(1-q)(s-\beta) + \\ & pq\gamma + q(1-p)\gamma s & (1-p)qs + (1-p)(1-q)s \end{bmatrix}$$

The utilities of the players are again assumed to be linear in assets. If an infinite number of future periods are each discounted by the factor r , where $0 \leq r < 1$, the expected utilities take the following form:

$$(9) \quad \begin{bmatrix} u^P \\ u^Q \end{bmatrix} = \sum_{t=0}^{\infty} r^t \begin{bmatrix} C_t^P \\ C_t^Q \end{bmatrix} = \sum_{t=0}^{\infty} (rA)^t \begin{bmatrix} C_0^P \\ C_0^Q \end{bmatrix} = (E - rA)^{-1} \begin{bmatrix} C_0^P \\ C_0^Q \end{bmatrix},$$

where E is the unit matrix. As in the conquest model, both players start with the shares a and $(1-a)$, respectively. In other words, $C_0^P = a$ and $C_0^Q = (1-a)$. Thus, the expected utilities from attacking are a function of their initially held shares.

Following the procedure of the conquest model, the players will remain docile if their respective utility for attacking, over infinitely many periods, is smaller than the present value, i.e. a or $(1-a)$ respectively. Thus, the following inequality will have to hold:

$$(10) \quad \begin{bmatrix} u^P \\ u^Q \end{bmatrix} - \frac{1}{(1-r)} \cdot \begin{bmatrix} a \\ (1-a) \end{bmatrix} \leq \begin{bmatrix} 0 \\ 0 \end{bmatrix}.$$

Figure 3 illustrates all combinations of p and q which satisfy condition (10) and hence imply mutual docility for both players as regions in lighter gray.¹⁰ For matter of comparison, the corresponding region of mutual docility derived from the conquest model is illustrated as region in darker gray.

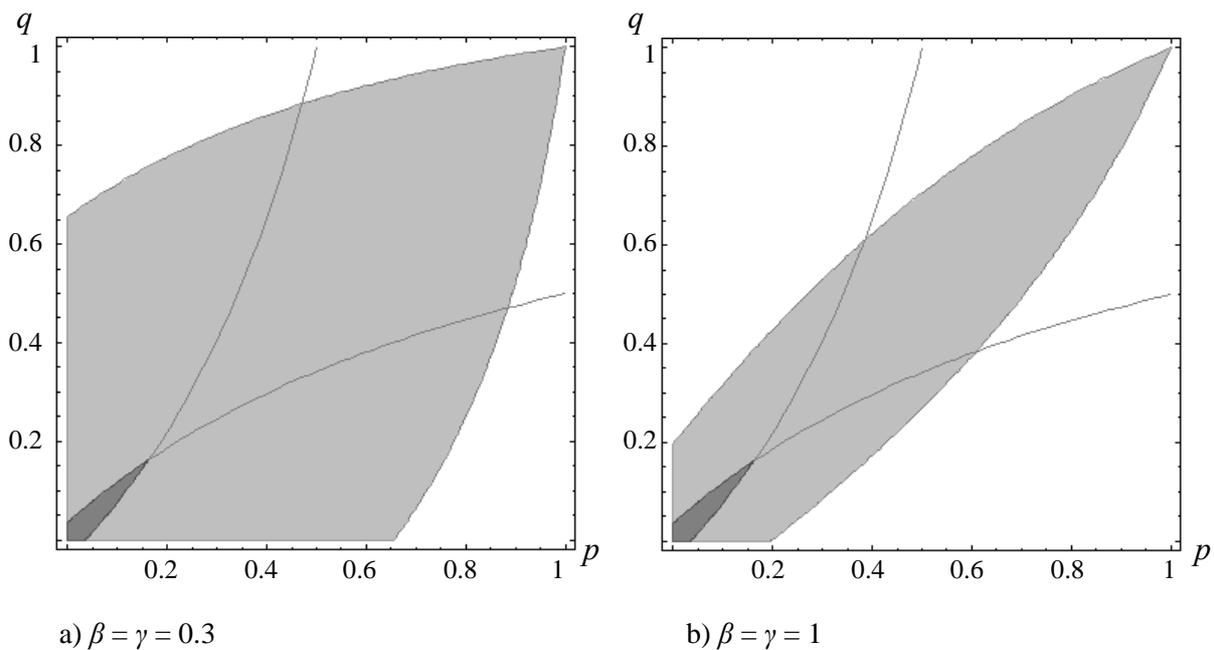


Figure 3: The iterated case with damage factor for $a=0.5$, $r=0.25$, $s=0.85$

¹⁰ Figure 3 was generated with Mathematica 6.0.

4. Comparing Conquest and Non-Conquest Settings

As can be seen in figure 3, the introduction of the non-conquest setting increases the set of p and q values for which both players will remain docile: The region of peace of the conquest model is a strict subset of the one from the non-conquest model. Note that the values of s and r for the derivation of the non-conquest region of peace in figure 3 are *not* chosen such that $r(1-s) = 0.2$, the values used in section 2. The reason is simple. For any combination of r and s satisfying $r(1-s) = 0.2$ the whole unit space would imply peace. Thus, only for smaller damages (i.e. larger values of s) peace can result. Approximately, for $s > 0.7$ the shape of the region of peace becomes similar to the one in the conquest model.

Besides the size of the peace regions, there is another major difference between the conquest and the non-conquest model. If the players are ‘equally strong’, i.e. $a = 0.5$ and $\beta = \gamma$, the region of peace in the non-conquest model always expands to the point $(p,q) = (1,1)$.¹¹ This implies that the deterring effect is larger than in the conquest model. Given that both players have very effective means of eliminating their respective opponent, i.e. p and q are both large, neither player will risk attacking because of the threat to lose. Visually speaking, whereas even two virtually infallible gunmen were not able to deter each other from attacking in the conquest setting, the non-conquest setting introduces an incentive not to attack. Apparently this incentive stems from the combination of infinitely many periods and damage. Even if there is only a minimal chance of missing the opponent, i.e. $p,q < 1$, both players face the risk of losing some of their asset due to damage.

The risk of loss due to damage also gives rise to another difference between the conquest and non-conquest settings. The results obtained in the non-conquest model are sensitive to changes in the *absolute values* of r and s , and not merely to changes of their ratio. Thus, time and damage are two distinct factors pacifying the players. Changes in both s and r affect the shape of the area – its ‘thickness’. The same holds true for changes in a , β and γ . As can be seen from comparison of figures 3a) and 3b), an increase in β and γ reduces the size of the region of peace. Since the players now have more to win, they are more likely to attack. Note, however, that even in this case the region of peace is larger than in the conquest setting because the duel will be repeated forever and neither player can be eliminated.

If a , β and γ , however, change in such a manner that the game becomes asymmetric, i.e. one player is ‘stronger’ than the other, the region of peace not only changes its size but also tilts around the origin. The more powerful player then has less incentive to remain docile, while the weaker one has more incentive to do so.

¹¹ In case that $a > (1-a)$ the region of peace is tilted westwards around the origin. P will then have a greater incentive to attack as compared to the case of equal strength.

5. Conclusion

It has been shown that, given that two parties share an asset, reducing the opportunity of each party to increase its share at the expense of the other will increase the chance that they live together peacefully. This result is far from new, though it is, to the best of my knowledge, not been shown with the help of a formal model.

What I have termed conquest model of power resembles Hobbes' state of nature. For Hobbes ([1651] 1997: 62), the power of a man "is his present means, to obtain some future apparent Good". In the state of nature, with no sovereign to fear, each individual will try to materialize this power. "[T]here be no Propriety, no Dominion, no Mine and Thine distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it" (Hobbes [1651] 1997: 90).

Switching from the non-conquest model to the conquest model concurs with Locke's description of how a state of nature turns into what he calls a state of war. "[I]n the State of Nature, one Man comes by a Power over another; but yet no Absolute or Arbitrary Power, to use a Criminal when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own Will, but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for Reparation and Restraint" (Locke [1689] 1999: 272). This implies that the ability to gain the resources or take the life of somebody else is limited by reason and conscience. Apparently, including reason and conscience as 'institutional setting' creates some stability. According to Locke ([1689] 1999: 279), a state of war arises, when one (seemingly unreasonable) man tries to gain full control over the other. "And hence it is, that he who attempts to get another Man into his Absolute Power, does thereby put himself into a State of War with him."

The institutional setting implicit to Locke had the effect that some authority beyond the opposing parties influenced the ability of these parties to gain control over the asset. Locke identified reason and conscience as these authorities. However, there are alternative arrangements which could have the same effect, for instance, the introduction of additional players as is the case in a republic. Niccolò Machiavelli, e.g., seemed to have favored the republic on grounds of its ability to sustain stability (see Holler 2007: 4). Machiavelli argues that, "although one man alone should organize a government, yet it will not endure long if the administration of it remains on the shoulders of a single individual; it is well, then, to confide this to the charge of many, for thus it will be sustained by the many" (Machiavelli 1882: 18). In a similar manner, Montesquieu argued in favor of republics. "If a single member should

attempt to usurp the supreme power, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great an influence over one, this would alarm the rest; were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped, and overpower him before he could be settled in his usurpation” (Montesquieu [1752] 1914, IX.i.).

The model presented in this paper highlights the importance of the setting in which the players are operating. If players are bound together, in the sense that they cannot (legally or morally acceptably) get fully rid of the other, they will have an incentive to cooperate to a certain degree. Cooperation understood this way only means not to undertake an action trying to ‘harm’ the other. This incentive stems from the fact that one could be ‘harmed’ by the other as well. In a similar manner, Brams and Kilgour (2007) modify the model outlined in section 2 to eliminate the accumulation of payoffs and allow for a simultaneous rather than a sequential scenario and thus increase the ‘chance of peace’. This is due to the fact that simultaneous shooting is more fearsome and therefore more likely to deter the players from firing.¹²

These findings point towards the importance of the building of institutions and constitutions or, more generally, the design of political and social mechanisms. Institutions and constitutions define the ‘frame’ in which the players or citizens then make their moves. Apparently, a frame which reduces the gains from trying to take what is the other’s can be mutually beneficial. Both parties face a reduced probability of being ‘attacked’. It is under these conditions that something like a social order can arise. “In Hobbesian anarchy, ‘anything goes’ is the order of the day; that is, there are no effective constraints on the ways and means by which persons compete. What we call ‘social order’ is made possible by effective limits being put on the strategies allowed in competition. Social order means, in other words, that competition is effectively constrained by rules.” (Vanberg 1999: 143)

¹² Recall that in the model of section 2 a sequential setting was introduced in which each player was motivated to attempt to draw faster than the opponent, thereby achieving an advantageous position. In the modified model, this assumption is dropped.

CHAPTER 2

Adam Smith's Intuition Pump: The Impartial Spectator[°]

Abstract: Together with sympathy, the impartial spectator is a central concept of Adam Smith's moral philosophy. It has, however, been largely neglected as subject of explicit analysis in Smith's scholarship. That part of the literature that does deal with it offers very different interpretations. The aim of this paper is to disentangle the different meanings, derivations and applications of the impartial spectator. It is argued that distinguishing an ideal version of the impartial spectator and a real world application could help understand the different interpretations and their origins.

Key Words: Adam Smith, Moral Philosophy, Impartial Spectator

JEL Classification: A13, N0, Z19

1. Introduction

On the occasion of the bicentennial of Adam Smith's *Wealth of Nations*, Unger (1980) spoke of a "resurgence of Smithian scholarship". Some time later Darwall (1999: 139) made a similar observation. "[W]e have benefited from a significant renewal of scholarly interest in Smith that has begun to illuminate the interrelations between different aspects of his voluminous corpus". Smith's work has now even taken on importance in disciplines beyond economics and moral philosophy. For instance, "[c]ontemporary work on imaginative simulation in mental-state attribution ... derives directly from Smith" (Darwall, 1999: 140). Yet, despite these contributions, much of Smith's thought is anything but straightforward and requires careful interpretation. In some places he leaves us with more holes than cheese.

What needs no debate is that sympathy and the impartial spectator are two central concepts in Smith's moral philosophy. Of the two, sympathy has received the most attention. Roughly speaking, it can be interpreted in two different ways. In its *weak form* it means merely putting oneself into the shoes of another, i.e. it is an imaginary change of position. In general, this change of position is not accompanied by a change of values. That is, I put myself into your shoes and look at the world through *your eyes*, but with *my values*. In its *strong form*, it entails the congruence of feelings after having considered a specific case from

[°] Forthcoming in *Homo Oeconomicus*.

the perspective of another.¹³ Unfortunately, Smith does not clearly delineate these meanings. Rather, the different usages only become clear after considering the context of his discussions. In contrast to sympathy, the concept of the impartial spectator has been largely neglected. It is not clear why this is so but it may in part be due to the fact that it is less 'naturalistic' than the concept of sympathy and this complicates the classification of Smith as empiricist.¹⁴ However, the impartial spectator is central to Smith's canon of thought and thus needs explicit attention.

Despite this neglect, or maybe because of it, numerous implicit and vague interpretations of the impartial spectator have evolved. A prominent exception is D.D. Raphael (1975), who was probably the first to attempt a concise and coherent description of this concept of Smith. However, his view is not without dispute. The problem basically concerns the role of individual, social, and universal ideas in Smith's conception of the impartial spectator. That is, at once the impartial spectator can be interpreted as individual value system (e.g. Fleischacker 1999), social value system (e.g. Morrow 1927 and Raphael 1975) or universal value system (Young 1986 and Fitzgibbons 1995).

How could this happen? Is there an equally reasonable basis for each of these interpretations? Though it seems an overly difficult task to gather together all interpretations, I believe that the reason for differences lies in Smith's usage of the term. The impartial spectator seems to be one of the cases that brought Evensky (2005: 22f.) to state that Smith is "all too often maddeningly imprecise or sloppy in his use of terms as he presents his vision. ... The terms Smith uses must always be read relatively to their context because he is not always consistent in usage across contexts."

The task of this paper is to disentangle these contexts and help clarify what Smith meant when he refers to 'the impartial spectator'. In particular I wish to correct a major mistake I believe most authors have made when interpreting the concept. Contrary to most authors, I believe the impartial spectator per se not to be a 'value'; it 'adds nothing' to those being evaluated. That is, he should be seen as an instrument, similar to Rawls' veil of ignorance or the original position of Hobbes; something that Dennett (1995: 182) has called "'intuition pumps' – lovely thought experiments." These thought experiments "are designed to lift (pump) the flow of thought out of the cycles of debate reinforced by our starting

¹³ Haakonssen (1981: 51) identifies four different usages of the term. It can refer to the *imagining* in somebody else's situation, the *reactions* of the spectator, a *comparison* of the original and the 'sympathetic' sentiments, and the *emotion* arising from this comparison. For the purpose of the present paper, I believe it is sufficient to summarize these four conceptions in the manner I have done above.

¹⁴ See for instance Binmore (2005: 50): "Adam Smith, for example, contradicts the basic naturalism of his Moral Sentiments when he appeals to an invented Impartial Spectator."

intuitions” (Dorbolo, 2006: 83). As Dennett (1993: 440) says, “intuition pumps are ... intended to help you imagine new possibilities, not convince you that certain prospects are impossible.”

Now, how does the impartial spectator pump our intuitions? He pumps our intuitions by showing us that ethical judgment is a matter of those being affected – only those people and nobody else. It is not God or a God-like person who judges what is right and wrong but some abstract conception of ‘us’.¹⁵ The metaphor of some hypothetical real person therefore shoots ethical judgment down from the skies and grounds it in the middle of society. This abstract human being evaluates our conduct by finding the intersection of the values of the parties concerned, and then judges whether the action under consideration is in line with these shared values. Thus I concur with Raphael (1975: 98) and believe that Smith’s theory “was meant to provide a satisfactory alternative to a priori accounts of conscience and morality generally.” Though this idea was not new in Smith’s days, neither of the two philosophers who were probably closest to Smith, David Hume and Francis Hutcheson, had developed such a vivid metaphor as to how ethical judgments come about. Yet, a great deal of the literature that mentions the impartial spectator seems to view him as a judge that applies some external criterion (see, e.g., Morrow 1927 and Young 1986). In other words, the inputs and outputs of the machine called the ‘impartial spectator’ are conflated with the machine itself.

However, Smith seems to have been aware of the fact that in real life things are a little more complicated. To be more precise, I believe Smith introduced the impartial spectator in two components. The first is an ideal component which carries Smith’s normative philosophy. The second is a real world component which is a positive analysis of how people make ethical judgments. The ideal component is the one I have just outlined. This component does not add any external values to a moral judgment. But in real life people are not able to fully abstract themselves from their own values. In other words, they will always partly include their own values when making moral judgments. In the following I will give a more precise definition of both of these components. I will begin by describing the former, the ideal one, and then follow on to the latter, the real one. But before the discussion starts, I will disentangle three contexts in which the impartial spectator is mentioned, each containing what I will call a distinct concept of the impartial spectator.

¹⁵ Raphael (1975: 88) highlights the fact that Smith initially, i.e. in the year 1752, seven years before the first publication of the *Theory of Moral Sentiments*, used the term impartial *person*. It appears as if by substituting the term “person” by “spectator” the underlying concept was located even closer to the actors, as it highlights the need for observing an action. Further, at least to me, a spectator seems somewhat ‘less involved’ than a person.

2. Three Contexts of the Impartial Spectator

The impartial spectator is central to Smith's moral judgment process, in that he is the method of evaluating the virtue or wickedness of an action. It is he who decides whether and when an action is worthy of praise or blame, and this is the main feature of actions that humans should focus on. Yet, as mentioned above, it is not always clear who this moral judge is. I believe Smith to have used the term 'impartial spectator' in three different contexts. Each of these contexts provides what seems to be a separate concept. As will be explained later, these concepts describe the impartial spectator either as a 'real person impartially entering others', as the 'man within the breast' or as a 'demigod'.

Before proceeding, we need to briefly recap Smith's view on moral judgment. One major aspect of his moral philosophy is that, when making moral judgments about a certain action to be judged of, one should include the perspectives of all people involved in it. This holds true for the observers as well as for those involved, i.e. the actors and the recipients of an action. *All* people have to take up the perspectives of *all* others. That is, one has not merely to consider the motives of an *agent* when evaluating his action, but also the perspective of those who were being *acted upon* (Darwall 1999: 143). Respecting these perspectives means sympathizing with them, sympathy understood in the weak form, i.e. as putting oneself in another's shoes. Consequently, as we have seen the case under consideration from the point of view of the actors and those being acted upon, the outcome of the judgment process reflects these perspectives to a certain degree. And, as the others will have to sympathize with me as well, they will respect my perspective too. Therefore Darwall (1999: 160) calls the collection of those involved in such an action to be judged, and mutually sympathizing with each other, a "moral community".¹⁶

However, sympathy for Smith is not all-embracing. According to Smith, we should not (and actually cannot) 'fully' sympathize with the parties. Certain aspects have to be left out. These aspects are the 'improper emotions'.¹⁷ In positive terms, one should calmly and impartially enter into others. At the very least this means imagining to be an 'absolute outsider' with no personal interests in the case observed. Being disinterested, i.e. not merely suppressing interests, but really not having any interests in the case, implies *impartiality* (see Firth 1952: 335ff.).

¹⁶ Note that this moral community is not held together by *ex ante* similar values. Rather, the community is held together by the fact that each member is affected by a specific action. By sympathizing with all members, it appears, Smith expects similar, in fact, the same values or judgements to result *ex post*.

¹⁷ In Adam Smith's moral theory the impartial spectator defines what is proper and what not. In order to avoid a deeper discussion of this issue at this place, I will here crudely state that one should control one's emotions when making a moral judgement.

Note that impartiality is therefore a normative criterion, something one ought to do. This implicitly becomes clear in light of the following lines. “The most vulgar education teaches us to act, upon all important occasions, with some sort of impartiality between ourselves and others” (TMS, III.3.8). Impartiality seems to be one of the fundamentals humans should learn (and do in fact learn) at the beginning of their social lives. Therefore, Raphael (1975: 95) concludes that, “[s]o far as judgments about others are concerned, Adam Smith’s spectator simply *is* any normal observer who is not personally affected” (emphasis in original). This is what I identify as the first concept of the impartial spectator. I will refer to it as *real-person-concept*. Probably it is the least problematic one. As Raphael (1975: 87) pointed out, Hume’s idea of a judicious spectator seems to have been the inspiration for it.

In this meaning, the impartial spectator is a description of *how* to sympathize if one has to evaluate another’s behavior. This includes both the case when I am merely observer of an action and also the case when I am affected by somebody else’s action. If I am to evaluate someone who has acted upon me, I will have to abstract myself from my immediate passions and feelings and then place myself in the actor’s position. I will have to imagine I were merely an observer of the action. “The standpoint of the spectator constitutes, when it is properly sympathetic and informed, impartiality” (Griswold, 1999: 104). It is ‘de-personalizing’ our experiences of others. Note again that this conception only refers to the judgments of others’ behavior. I take myself, possibly as subject of another’s action, and evaluate his action by impartially sympathizing with him and observing bystanders (and myself).

But of course the perfect degree of impartiality cannot be reached in the real world. The ‘is’ and the ‘ought’ come apart. Consequently, the real world evaluations will never perfectly meet the condition of moral equality, on which Smith seemed to have laid major importance. “[T]he more the decision of the judge is prepared by a sympathetic comparison of the situations involved in a conflict of interests on which the judge is to make a decision the more equitable the decision itself may be said to be and equity as an evaluative attitude does not seem reducible to a simple fact, to an ‘is’, but, it seems to me, precisely, an ‘ought’” (Bagolini 1975: 112).¹⁸

Note that perfect moral equality between the two parties to be judged means that the personal values of the judge are left aside. That is, given that I am merely the observer of an action, the more I sympathize with the parties, the less are my own values involved.

¹⁸ It should be noted that Bagolini refers to legal evaluations. However, I believe the statements made to be valid for moral evaluations as well. It seems as if Smith’s legal philosophy largely resembles his moral philosophy in these aspects.

Consequently, the evaluation will become more equal between the two parties concerned; the respect for each other is the same. Sympathy therefore also reduces the arbitrariness of the evaluation from the perspective of the affected parties. "The greater the participation of the judge is in the situation of the persons involved in a conflict of interests, the greater is the possibility that the judge's arbitrariness will be limited and that in his decision an objectivity even if relative and socially relevant will be expressed" (Bagolini 1975: 111). From the point of view of the parties, I repeat, the better the judge sympathizes with them, the less he includes his own values and the more he respects only the values of those who are affected. The verdict thus does not depend on the (more or less arbitrary passer-by) individual observer or judge but on the people involved in the case under consideration.

In contrast to Hume's judicial spectator, Smith also applies the impartial spectator to evaluate oneself (see Raphael 1975: 87). This application to oneself bears the second conception of the impartial spectator, the *man-within-the-breast*. The reason for applying the impartial spectator to oneself lies with the fact that people strive for approbation or praise. Take again the case of me observing an action. If I impartially sympathize with the actor and then come to the conclusion that he has acted in a manner worth approving of, the actor, when 'receiving' the approval, will feel good. This is because "nothing pleases us more than to observe in other men a fellow-feeling with all the emotions in our own breast" (TMS, I.i.2.1).¹⁹ In fact, striving for approbation (and avoiding disapproval) will even induce him to behave in such a manner as to be approved of. That is to say, one 'calculates' the potential consequences of one's actions and then acts in a manner which will expectedly be followed by praise. However, as we gain experience, we find that "by pleasing one man, we ... disoblige another" (Raphael 1975: 91). We try to get out of this conflict by not merely acting in order to receive praise, but in such a manner which is *worthy* of praise. But who tells us what action is worthy of praise? It is exactly "the man within the breast" (see TMS, III.2.32-33; TMS, III.3.5-6.; TMS, III.3.26), the impartial spectator in the second conception, that does so. One could equally call it one's conscience. Note that even in the absence of any real spectators this man within the breast will be 'activated'. All that is required is that someone once was around and that one has learned to consider such an external position.

As compared to the real-person-concept, the man-within-the-breast-concept of course introduces the need for further abstraction and is thus more complex (see Broadie 2006: 185).

¹⁹ Note that this claim caused debate between Smith and Hume. Whereas Hume agreed that, in the case of friends, seeing their sentiments comply with each other causes pleasure, he rejected the universality of the claim. "An ill-humod Fellow; a man tir'd & disgusted with every thing, always ennuié; sickly, complaining, embarass'd; such a one throws an evident Damp on Company, which I suppose wou'd be accounted for by Sympathy; and yet is disagreeable" (Hume 1932: 313).

One has to *imagine* that one stands under the surveillance of somebody else - and one even has to imagine this somebody else. But for Smith this is a necessary exercise, as the external perspective matters. Just as somebody rubbing his nose on the mirror cannot clearly see his own reflection, someone who does not imagine that he is being looked at by somebody else is not able to see the ‘moral worthiness’ of his own actions. Therefore a certain distance between the judge and the culprit is required. But as there need not necessarily always be others around, one *imagines* such a person, a ‘representative’ of others.

Smith seemed to have been well aware of the importance this man within can take up. “The real or even the imaginary presence of the impartial spectator, the authority of the man within the breast, is always at hand to overawe them [the ‘personal’, self-interested passions] into the proper tone and temper of moderation” (TMS, VII.ii.1.43). And further, “[h]e [the man of real constancy and firmness, the wise and just man] has never dared to forget for one moment the judgment which the impartial spectator would pass upon his sentiments and conduct. He has never dared to suffer the man within the breast to be absent one moment from his attention. With the eyes of this great inmate he has always been accustomed to regard whatever relates to himself” (TMS, III.3.25). Obviously, being aware of one’s conscience is something that Smith valued highly. A “wise and just man” has to be and will (by definition) actually be aware of this spectator *at all times*. Consequently, if a man can manage to be wise and just, the impartial spectator will strongly influence his behavior.

Therefore, I believe the term “demigod” (TMS, III.2.33; TMS, VI.iii.23) has been used by Smith only in order to illustrate the ‘ranking’ of the impartial spectator in an individual’s evaluation (i.e. as a being beyond his power). But could it not be the case that the term ‘demigod’ was used to indicate a Divine value? Let us hypothesize that this is the case, i.e. that the impartial spectator really is a Divine value. And let us regard this value as the third conception of the impartial spectator, the *demigod-conception*. Consider the following passage: “real magnanimity and conscious virtue can support itself under the disapprobation of all mankind” (Corr., Letter 40, 1759). Obviously, there seems to exist some values above social practice. “Real magnanimity” and “conscious virtue” indicate that the impartial spectator as the ‘inner voice’ is susceptible to these values. As they lie beyond society – and are therefore independent from the individual members of the society – they seem to be universal.²⁰ Accordingly, as the impartial spectator is the measure for praiseworthiness, he will be universal as well, at least partly. Therefore, Young (1986: 366f) stated that “Smith also refers to the spectator as the ‘ideal man within the breast’ (TMS III.3.38) and as ‘this

²⁰ In the following I will throughout use the term ‘universal’ in this sense, i.e. as independent from social or individual specificities.

and hence can be thought of as examining the developmental psychology of moral evaluation. These stages differ according to the degree of abstraction from oneself. The binding feature of these stages is that they all allow for the interpretation as mechanism. In order to clarify what I mean, I will exaggerate the concept of the impartial spectator into a purely hypothetical mechanism. This mechanism will be called the *ideal* version of the impartial spectator. It should be made clear that this version does not explicitly appear in Smith. I do believe, however, that the ideal version is the hidden basis for all other concepts of the impartial spectator. Even more, I believe this hidden basis to provide a normative part of Smith's philosophy. It presents us with what he believes we ought to do.

Distilling the ideal version of the impartial spectator, no additional values to the ones of those people acting and directly affected by this specific action are to be included – not even those of the observers. Impartiality, according to Firth (1952: 335ff.), is given if judgments are not influenced by particular interests – not even moral standards – and are dispassionate. This makes the 'mechanism impartial spectator' *impartial*, but not *impositional*. That is, the position of the impartial spectator as outsider, as observer, matters. It is *not* the person or personal traits or cultural background of the observer that matter. Consequently, whether the impartial spectator is rather individualistic, socially determined, or universally given, depends solely on what subset of the human race is affected by the action to be evaluated. The reason lies in the fact that values or judgments evolve within a given moral community.

Let me try to make this point clear by again relating to the three distinct concepts, the *real-person-concept*, the *man-within-the-breast-concept*, and the *demigod-concept*, in this order. In the *real-person-concept*, the impartial spectator can be seen as a machine for proper or even ideal sympathizing. The manual to this machine could be read as follows: When evaluating a specific action, abstract it from yourself in all relevant aspects, put yourself into the position of the actor and the one being acted upon, and then find the intersection of *their* values. If the action is within this intersection, it is worthy of praise (or at least not worthy of disapproval); if not, it is not. As it is me judging others in the real-person-conception, it seems as if I am being utilized as a 'machine' in order for *other* people to find an evaluation for *their* dispute.

Similarly, the second concept, the *man-within-the-breast-concept*, can be interpreted as a machine as well. But now it is me who makes use of the machine in order to find an evaluation of *my* action. Let us re-read the manual to this machine: If you have acted upon someone, throw your perspective and the one of the person you have acted upon into the

machine, turn it on, and out will come the moral evaluation of your action. Just like a washing machine gets rid of the dirt on my clothes and gives me back pure white shirts, the perspective of the impartial spectator will get rid of my improper emotions or interests and give me back a 'pure' moral judgment.

So too would the demigod operate. In this case the perspective is, however, at a greater 'distance'. We do not call for other people's verdict, but for the verdict of a (semi-)divine being; we have to use a Divine machine. This brings with it the fact that 'we' as humans are no longer necessary for the application of the machine. Its *operation* is independent of 'us'. We simply pass our laundry.

So, although three different conceptions of the impartial spectator can be distinguished, they all share a binding feature: the abstraction of one's own interests and the external perspective. This external perspective however respects only the values of those bound together via a specific action. It does not include any additional values. In this sense, it resembles a machine which transforms inputs into outputs. This machine is what I will call the *ideal version* of the impartial spectator. It is ideal in the sense that, as will be argued in the following section, humans cannot reach it; we will always include parts of our own value system. The necessity to abstract from oneself and perfectly sympathize with the parties involved makes this impossible. Perfect sympathy is not possible and thus the ideal version of the impartial spectator is out of reach. Nevertheless, if we want to reach a 'good' judgment according to Smith, we should try to approach this ideal as far as possible (see Evensky 2005 and Broadie 2006), i.e. sympathize as well as possible before coming up with a verdict.

Note, again, that the important aspect when using the machine is what you put into it. If I am to judge between two parties to a quarrel, why should I include the perspective of, for instance, the Pope – given that he is not one of the parties? I could of course do so, but then I would not sympathize properly. In the same way, why should someone else, when judging my action, include other perspectives than the ones of those affected? Put differently, there is no a priori criterion involved. "The judgment of the impartial spectator does not express an absolute criterion of the good, that is a criterion a priori deducible from a rational faculty that is superimposed on the changes in the historical situation. The judgment is so much less partial, the better, I repeat, he is informed of the social situations in which his judgment is uttered." (Bagolini 1975: 107). Therefore, the impartial spectator is not merely *impartial*, but even *impersonal*. This is to say, again, that there are no personal traits or values involved in the judgment - at least in the ideal case.

4. Applying the Machine to the *Real World*

The impartial spectator in its ideal version, as it was described above, is a rather cumbersome machine to handle. One crucial aspect of him was that he was able to completely exclude his values from the judgment. He sympathized with the others in such a way that he only respected the values of those people bound together by an action. In other words, he was able to fully abstract from himself. He was absolutely impersonal. This way of sympathizing clearly goes beyond the Smithian conceptions of sympathy, which were referred to above as the weak and the strong form of sympathy. In both these conceptions the person sympathizing does in fact include his personality, for he at least keeps conscious about being the one watching and not one those directly involved. “[T]he spectator can take the place of the agent in his imagination in many degrees, but there is a point beyond which he cannot possibly go in his identification: he must retain some consciousness of his own self as that which sympathizes” (Haakonssen 1981: 49).

But, obviously, even what I have labeled the weak and the strong forms of sympathy are not available at zero costs. Since a lot of imagination is involved, it takes time and mental effort. Moreover, sympathizing presupposes a large amount of knowledge about the persons one sympathizes with, for one has to imagine their values in order to reason about their intentions to act.²¹ The application of the *ideal version* of the impartial spectator is therefore impossible. Apparently, not being able to fully enter others excludes important information of the one being sympathized with. I cannot fully consider his view. Further, because imagination starts from ‘my position’ – how I believe the other person evaluates the world – it seems as if *imagining* being in the other’s situation will include *personal* experiences and values *of the evaluator*. Consequently, the impartial spectator will become personal to some degree. This will make the judgment of the ‘real world’ impartial spectator biased towards the attitudes of the observers. With this bias (and lack of information) comes the introduction of mistakes, as Brodie (2006: 183) observes. Nevertheless, the distinction between the *real-man*, the *man-within*, and the *demigod* can help to filter out the essential shaping factors of this real world version of the impartial spectator. Accordingly, the impartial spectator can be seen in individual, social, and universal terms. It seems as if it has so far been focused on these ‘inputs’ to the impartial spectator in the literature rather than on the ‘output’. In the following, I will try to justify each of these views but still try to set them in relation to the output, thereby qualifying their respective importance. In a nutshell, the social input arises in the form of established forms of behavior and general rules. Individual interpretations of these

²¹ Note that Smith was explicit about the decreasing ability to sympathize with others as the social distance increases (see TMS VII.II.1+2).

rules make the impartial spectator individualistic as well. However, some rules appear to be universal, i.e. independent of the individuals. This makes the impartial spectator universal as well.

4.1. Social Roots

In order to at least partly overcome the cognitive effort and requirements for 'good sympathizing', it appears as if Smith had detected a short-cut to the impartial spectator. This short-cut reduces the effort necessary when evaluating others. By applying the short-cut, the impartial spectator turns from being a mechanism to being *a value itself*. That is to say that the impartial spectator represents certain values according to which I will evaluate my actions. What is being skipped is the *process* of finding the value via impartially entering others. In other words, the impartial spectator turns out to be an *ex ante* value system instead of a *process for ex post evaluation*. Unfortunately, this short-cut brings with it a further source of imperfection in the form of interpretation. I shall return to this point shortly.

Smith introduces the short-cut to the real world form of the impartial spectator through the possibility of reliance on past judgments. Past experience can be considered the main source for the formation and adjustment of the impartial spectator in its real world form. Before reasoning which behavior is worthy of praise, one has to have received praise for this or similar behavior before. It could equally be the case that one has observed someone else receiving praise for such an action, or that one is told by opinion leaders that one ought to receive praise for this or that action. Therefore, in applying the impartial spectator to oneself, Smith introduced the possibility for evaluating actions which have not yet taken place. Consequently, one can *ex ante* find out which action is appropriate. However, this presupposes the existence of some regularity in judgment, some general rule, which could then be applied to future cases.

As Firth (1952: 341ff.) notes, an ideal observer has to be consistent in his judgments as a consequence of impartiality.²² Consistency here refers to the final statements, i.e. not to the premises or arguments of the judgment process. In other words, an ideal observer or impartial spectator will come to similar statements in similar cases.²³ Therefore, if the

²² Note that Broadie (2006) does not regard the impartial spectator as an ideal observer due to his imperfection. However, as consistency of the ideal observer is a consequence of impartiality, both the impartial spectator and the ideal observer should be consistent.

²³ Here I assume that each case is unique; it can never occur again in the very same way. Thus, an impartial spectator can only once make a judgement about each case. The regularity comes into play when cases are regarded as similar in 'relevant aspects'.

impartial spectator makes certain judgments repeatedly, a rule which could be applied to future cases may be identified.

The impartial spectator triggers certain sentiments via sympathy in its strong form. That is, if he comes to the conclusion that a certain conduct was worth disapproval, the man in whose breast he is sitting will feel bad. Therefore, the rules described above, Smith calls them “general rules” (e.g. TMS, III.4.7), are based on sentiments as well. “[T]he natural desires and moral sentiments of individuals lead ultimately to the evolution of the rules of justice, the only rules of virtue capable of exact specification and breaches of which are to be punished. There is, of course, more to the story than this. The point, though, is that Smith derives these rules from the supposed interactions of ordinary people functioning in a society. The people themselves are assumed to have no knowledge of the larger social consequences of their actions. A person is injured, and the observer immediately feels resentment toward the perpetrator and sympathy for the victim” (Young, 2005: 95f.).

A rule derived through the working of sympathy and consequently the real world impartial spectator will be universal (i.e. independent of specific social circumstances) if *all* humans are involved or respected in the judgment process. If the people taken into account only belong to a certain society, the rule generated in the judgment process will only be valid for the respective society. But note that generating a rule²⁴ from the repeated judgments implies a further cognitive step, namely reflection about these judgments. We have to consider judgments to be about similar cases, and that the judgments weigh similar ‘arguments’ similarly. However, this does not mean that the general rules are per se grounded in rationality. As Smith states, “[b]ut 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).

The introduction of ‘reason’ is a source of confusion. This source appears on stage in the form of interpretation. “Our continual observations upon the conduct of others, insensibly lead us to form to *ourselves* certain general rules what is fit and proper either to be done or to

²⁴ According to Griswold (1999: 144ff.) the impartial spectator itself defines the rules. To my understanding, this is to say that the judgement of the impartial spectator is the measure of accurateness for each individual. I agree with this view. However, what I am interested in at this point is how this measure is formed, i.e. what could be called meta-rules. For the sake of simplicity I have chosen to speak of ‘rules’ instead of ‘meta-rules’.

be avoided” (TMS, III.4.7, emphasis added). Although we observe the conduct of others, it is nevertheless up to us to form a rule out of this observed conduct. To illustrate: consider the case of littering in public. If you observe that one out of hundred people drops a piece of paper on the street, you would probably say that ‘not littering’ is the rule. But what if ten would drop their rubbish on the street, or even thirty or forty? How large has the percentage of people obeying the rule to be in order to be able to speak of a clear rule?²⁵ Apparently different people may come to different conclusions about what the rule is.

4.2. Going Beyond the Socially Given: Internalizing and Interpreting Rules

The social roots of general rules bear a great advantage. As our judgments are likely to be distorted due to self-love, looking at oneself in the first place may not be a good solution for deducing objective rules. We would only reinforce our judgments and not reach ‘consent’. Accordingly, an answer to the question of how we ought to behave can be found by looking at others, i.e. at existing rules or standards of conduct. As the above quotation suggests, rules concerning the different virtues are explicitly mentioned by Smith. On the whole Smith identifies six virtues: justice, prudence, charity, generosity, gratitude, and friendship (TMS, III.6.9). Unfortunately, only the rules of justice, to be more precise, the rules of commutative justice,²⁶ are “precise, accurate, and indispensable” (TMS, III.6.11). Those concerning all other virtues are “loose, vague, and indeterminate and present us rather with a general idea of what ought to aim at” (TMS, III.6.11). It appears that Smith believed the rules of justice to be shared by all people. Otherwise they could hardly be “precise and accurate” throughout the society, let alone humanity. Thus, no disagreement will occur in judging a conduct which falls into the sphere of commutative justice.

Things are different, however, for those rules of other virtues apart from justice. These have to be interpreted as they are not commonly shared by everybody, with the result that different behaviors will occur in similar circumstances. Consequently, no clear standard of conduct or rule can be detected when observing others. As quoted above, we are then confronted “rather with a general idea of the perfection we ought to aim at” (TMS, III.6.11). This creates further space for interpretation and reflection. With this interpretation comes the

²⁵ In this example I have only relied on the number of people obeying the rule. But interpretation might also be subject to the individual intensity of obedience. See Schlicht (1998) on these aspects of rule formation and interpretation.

²⁶ In TMS (VII.ii.1.10) Smith distinguishes commutative and distributive justice. Accordingly, commutative justice “consists in abstaining from what is another’s, and in doing voluntarily whatever we can with propriety be forced to do”. Distributive justice “consists in proper beneficence, in the becoming use of what is our own, and in the applying it to those purposes either of charity or generosity, to which it is most suitable, in our situation, that it should be applied”.

source for failing to derive the *final judgment* of the impartial spectator via the application of rules. As the impartial spectator's judgment is a blurred target, we may fail to hit it in the heart. Due to self-love and the inability to 'fully' sympathize, our judgments will be biased towards our own view; we cannot fully take the others' point of view into consideration. Thus, we base our judgment on a 'sample of facts' we derive by sympathizing with others. However, this sample is only a subset of the complete set of facts. And even worse, this subset is biased towards our own values and attitudes as it consists of those things we can imagine. Further, as we cannot really know the facts (due to imperfect sympathy), we have to interpret the evidence we have available. Vague rules therefore introduce individual interpretations.

In other words, rules themselves cannot be an ideal standard of conduct.²⁷ Rather, such standards are the basis for a process of 'deliberation' by which one can try to approximate the ideal, though one will never reach it.²⁸ One may initially look at the conduct of others and then wait for the reactions of others that occur. "[M]oral evaluation typically begins with established rules and standards" (Griswold 1999: 146). But in order to become an appropriate measure for the worthiness of certain reactions these established rules have to be reflected upon. And this reflection is especially important when it comes to applying such rules that are "loose, vague, and indeterminate" (TMS, VII.iv.1).

But why is it that we are able to *reflect* upon such rules? The reason, it appears, lies in the fact that each individual has *personal* experiences, i.e. experiences not available to others. These personal experiences make each of us an outsider of the community to a certain degree. As such we are able to reflect on values and standards of conduct of others 'from the outside'. This holds true even if we are outsiders merely by the fact that we are not directly involved in the case we are observing, i.e. we are *distinct individuals* and cannot fully know what the others are thinking. Because we are distinct, we will always have (slightly) different sentiments from the one's who are directly involved. "What they [the spectators] feel, will, indeed, always be, in some respects, different from what he [the agent] feels, and compassion can never be exactly the same with original sorrow; because the secret consciousness that the change of situations, from which the sympathetic sentiment arises, is but imaginary, not only

²⁷ But still rules are a necessary component of the judgement process. "The impartial spectator, reacting to the immediate situation alone, does not know how to draw the distinction between revenge and justice. Only a rule, based on past experience, can enable it to draw that distinction" (Fleischacker 1999: 46).

²⁸ This idea of approximating the ideal without ever reaching it is one of the main components of Evensky's (2005) interpretation of Smith. For instance, the perfect liberal society does not need any government intervention, as each individual will respect the others. However, this liberal society is only ideal, rendering the intervention of the government necessary, at least to some degree. Nevertheless the progress underlying society in its development from the hunting stage to the commercial stage aims at approximating this ideal state. Once again, without ever reaching it.

lowers it in degree, but, in some measure, varies it in kind, and gives it a quite different modification" (TMS, I.i.4.8).²⁹ This difference in sentiments might induce us to 'impartially' analyze the situation.

We can, therefore, really be impartial spectators to a certain degree. This does not mean that we necessarily *are* impartial, but it gives us the *ability* to be so. And, after having been subject to the evaluations of other 'real' (more or less impartial) spectators as well, we may have learned that judgment always takes place and to be able to imagine a judge when it comes to evaluate our own conduct.

The process of reflection is important in order to obtain 'true insight' or to internalize a norm, as opposed to merely adapting it. The impartial spectator can, therefore, even in the real world be the measure, but only "after a process of reflection on and refinement of what is given" (Griswold 1999: 145). Merely acting in accordance with the rules, without having reflected them, is what probably most people do, though the reflection would be necessary for a 'truly' moral judgment. Put differently, 'acting good' is not enough. One has to *consciously* act good. But if it is up to the individuals to put together the puzzle of social standards, each individual may derive a distinct impartial spectator. Though the deviations of these individual impartial spectators may be extremely small, they nevertheless are present. In other words, the impartial spectator is defining the middle, the right proportion of sentiments, relative to us (Griswold 1999: 182). "Each of us must rely on his or her *own* rules, however, not on rules culled from books or confessors" (Fleischacker 1999: 43, emphasis in original). Consequently, "I *make the relevant judgments independently*. [...] By tracing our moral judgments to our own individual experience, Smith lets us know that this balance of feelings, and between feelings and thought, must be re-established in the heart of every individual" (Fleischacker 1999: 44, emphasis in original).

It would however be misleading to call Smith a pure moral relativist, although he bears a relativist notion of the form that the rules for judgment are derived from the underlying society. But, as mentioned before, there seem to be some universal components entering the impartial spectator - universal as understood in the sense of independent of specific societies. These are the general rules of justice to which, as was argued above, all people would apparently adhere to. As they are "precise, accurate, and indispensable" (TMS, III.6.11), no interpretation is necessary, at least not to the same degree as is in the case for

²⁹ This passage is taken from the edition of Pat Moloney (2004), New York: Barnes & Noble Books. It cannot be found in the Glasgow Edition, which relies on the 6th edition, the last edition that Smith authorized. Thus, the quote probably is taken from the 7th edition, which was published two years after Smith's death.

other rules of morality. Since the impartial spectator is the moral judge, he would, even in the real world, have to respect these rules as well, leading to a universalist judgment. It appears as if the reason for this universal component can be found in the fact that we all share a certain experience: being humans.

5. The Impartial Spectator in the Literature

In the above reasoning it was shown that social rules and personal reflection ‘enter’ the impartial spectator of the real world. Universal ‘truths’ also appear in the case of precise rules of justice, leaving no space for interpretation. That is to say, the values one applies to the world consist of different sources: personal, social or universal. It is from this fact that I believe the different interpretations of Smith’s impartial spectator have developed. In the following, I will discuss these interpretations in more detail. But let me first point out why it matters which interpretation we follow.

In the case of individualistic interpretation, the impartial spectator mainly consists of a person’s own ‘personality’, formed by personal experience and reflected in individual values. It is these values that are applied when evaluating others by entering them impartially, as opposed to impersonally. Whereas *impartiality* allows the application of personal values in order to judge others, *impersonality* requires abstraction from personal values. In the case of impersonal evaluation, only social or universal rules or values may be applied. For instance, a judge could privately find a penniless thief who stole five dollars from a millionaire’s wallet (and leaving the hundred dollar bills untouched) not guilty after *impartially* evaluating both the position of the millionaire and the thief. But in front of the court, in fulfilling his duty as a judge, he would probably have to convict him on the basis of *impersonally* applying the law.

In the case of a socially given impartial spectator, what is being applied when evaluating others is no longer merely given individually, but bears components of the whole society. Therefore the impartial spectator is impersonal to a certain degree. In the case of the universalist interpretation, the impartial spectator turns into a fully *impersonal* spectator in that one now has to fully abstract from oneself in evaluating others. Figure 2 illustrates the relationship between the different interpretations and the degree of personality involved.

(especially justice) calls for restraining his demand that others act in accordance with his conception” (Griswold 1999: 143, emphasis added).

Other authors, Fleischacker (1999) and Evensky (2005) in particular, go one step further towards the individualistic interpretation. For them, objective facts are always subject to individual interpretation when it comes to human behavior. This interpretation or reflection of observed ‘facts’ in turn leads to an individualistic or ‘personal’ interpretation of the impartial spectator. Since each individual in a society has different experiences, each individual will adopt a slightly different view of what praiseworthy behavior is. Nevertheless, the members of each society share a great deal of experiences. For instance, state schools, public universities, or cultural facilities affordable for most members of the society could be institutions favoring the collection of such shared experiences. Hence, the impartial spectators derived within a society may be quite similar, but still vary to some degree.

Haakonssen (1981) and especially Young (1992) appear to go in the completely opposite direction. For Haakonssen the impartial spectator is a mixture of universal truths and social standards. The impartial spectator’s standpoint “does not make moral judgments completely relative to the given system of morality for, as we have seen, the *standpoint* of the impartial spectator implies a universal rule and it is by seeking this that we can gain independence from the given social morality. So it would seem that when we judge of the moral value of an action we consider whether it is in accordance with a general rule and whether the type of action prescribed by this rule is generally compatible with existing values” (Haakonssen 1981: 62, emphasis added). So it seems that for Haakonssen only the *principle* of impartiality, the *standpoint* of the impartial spectator, is the universal component. But universality comes into play when the (individual) impartial spectator(s) will always come to the same judgments. “Some parts of the impartial spectator’s verdict are universal – and in that sense ‘natural’ – while others are dependent upon the situation in which he judges. Thus, his impartiality and what it implies of universality, consistency, and coherence, are everywhere the same; and equally the primacy of the negative is a natural principle. Furthermore, some situations involving injury are so basic to human life that the spectator’s verdicts will always be recognizably similar” (Haakonssen 1981: 148). Young (1992) seems to focus exclusively on these universal standards of behavior. “[T]he standards of the ‘man within the breast’ are in some sense ideal. They derive from the natural principles of morality and are much like, if not exactly like, moral absolutes” (Young 1992: 75). Young (1992: 80) further states that “Smith’s device of the ideal impartial spectator, which emerges in his discussion of the formation of the conscience, reflects a belief in objective, natural standards

of morality". In other words, the impartial spectator represents a universal judge about what is right and wrong. He is completely impersonal.

6. Conclusion

Impartiality is considered an important component of ethical evaluation. For instance, Rawls' veil of ignorance presents us with the mental exercise to abstract ourselves from the current position and place ourselves into different positions. The main aspect of this exercise is to get rid of particular interests. In the above I have tried to analyze the form in which Adam Smith has contributed to this path, namely by presenting his impartial spectator. Roughly speaking, existing interpretations differ according to the role one's own personality is allowed to play in deriving and applying the moral values which are represented by the impartial spectator. All interpretations to be found in the literature can, to the best of my knowledge, be ordered between two polar cases. While some regard the impartial spectator individualistic, others believe him to be universal.

One aspect of all the interpretations mentioned above is, I believe, striking. Although they share the starting point of the observation of others, none of the interpretations, at least to my knowledge, clearly analyzes how this 'observation' actually takes place. Are all people respected to an equal degree, or are there certain individuals who are being focused more than others in shaping one's impartial spectator? The answer lies partly in holding the ideal and the real apart. In the ideal case, all people are weighted equally, whereas in the real case they are considered with differing degrees of importance. Implicitly, it appears that at least most authors offer a description of the real world. Yet, in not addressing this issue explicitly, it seems easy to conflate these two aspects. Distinguishing the ideal from the real therefore may offer a clearer insight into the working of the impartial spectator.

Griswold (1999) avoids this distinction by stating that "moral evaluation typically begins with *established* rules and standards" (Griswold 1999: 146, emphasis added). Established rules, according to my reading, are clear to all members of a given society. Someone living up to these standards could then be regarded as a role model for the others. This way of dealing with the issue, however, neglects the fact that rules are sometimes, or indeed mostly unclear, even when they seem to be 'established'.

The individualistic interpretations from Fleischacker (1999) and Evensky (2005) come closest to analyzing the question of how people observe others in reality. Nevertheless, even they do not explicitly address the distinction between the ideal and the real. The individualistic interpretation of the behaviors leaves the possibility of weighting different

individuals differently. This seems to me the most reasonable approach for describing reality. Why should some clear 'moral outsider' be considered to the same degree as an outright hero or accepted role models such as, e.g. Jesus Christ and Buddha? Suffice it at this point to have raised the question of how people observe others. A deeper discussion remains to future research.

CHAPTER 3

Signaling and Cooperation in Religious Networks^o

Abstract: We present an economic signaling model contributing to the explanation of economic success of religious groups in the past. Religious groups are interpreted as a frame for signaling and exchanging information about and via others. Two effects occur. First, the larger the network, the worse the quality of a signal one receives of the type of other members. Second, the larger a network, the more potentially valuable information is available. Smaller groups could bear an economic advantage: they can economize on transaction costs because they can signal effectively, thus reducing the need of formal enforcement mechanisms.

Key words: Religious Groups, Signaling, Social Capital, Cooperation

JEL Classification: N20, O17, R12, R15, Z12, Z13

1. Introduction

Economists usually take markets as anonymous arenas of transaction. Personal or any other details about the trading partner are not taken into account, except for what they are trying to sell or buy at what price. Of course economic theories are models, i.e. they abstract from reality. There is no need, even no wish to include all aspects of the world. However, the theories of transaction costs and institutional economics have started to question the set of assumptions behind the economic models at hand in order to enhance their explanatory power. Among other things, it was shown that the assumed anonymity of markets may create costs. These costs mainly arise from the danger of moral hazard. In other words, individuals have an incentive to receive a service or good without paying a corresponding return. However, effective enforcement of claims is crucial for the success of any form of institution. As Bowles and Gintis (1993: 87) state, the “success of institutions depends on their effectiveness in enforcing claims, not simply in their allocative efficiency.” Hence, enforcement devices are necessary which, in general, are costly.

A modernizing economy is characterized by an increasing number of trades with an increasing number of (increasingly anonymous) trading partners. Instead of producing the goods they need themselves, people trade work force for income and income for goods or

^o Co-authored with Mehmet Karacuka, Ege University, Turkey. A previous version of this paper has been presented at the Annual Meeting of the European Public Choice Society 2006 in Turku, Finland. A revised version then appeared in the Working Paper Series of the Economics Department at the Ege University as Working Paper No. 06/10.

services. Further, the production process is characterized by increasing specialization which in turn again leads to an increase in the number of transactions of intermediary goods. In other words, the transaction sector of an economy is growing over time as the economy modernizes: the share of a society's resources devoted to exchange is increasing. North (1984: 263) finds that primarily three factors are driving this development; namely growing specialization, increasing costs per transaction due to the change to anonymous interactions and rent-seeking activities of diverse groups.

Groups or individuals who manage to economize on these costs have a comparative advantage over others who cannot economize on them. This advantage could materialize in a better economic performance. Social networks, for instance, may avoid or at least decrease transaction costs arising from anonymity. They can do so because they rely on personalized trade rather than on anonymous transactions. In other words, people communicate with and about other members of the network. By facilitating communication about the others' propensity to cooperate, each individual will have an incentive to build up a reputation as good trading partner. Otherwise nobody would trade with him – at least having a good reputation should increase the number of potential trading partners. This allows overcoming the coordination problems inherent in big, anonymous markets. Put differently, social networks substitute formal enforcement mechanisms such as detailed contracts by social enforcement mechanisms. Because the enforcement comes from “within the group”, Bowles and Gintis (1993: 85) call this form of enforcement “endogenous enforcement”. Since the enforcement of claims within a network does not necessarily rely on an institutionalized form, i.e. a formal organization, endogenous enforcement mechanisms bear smaller costs than formal ones. It should be noted, however, that sometimes social enforcement may not be available or other, formal mechanisms may be superior.

In order to successfully economize on transaction costs a social network should introduce costs for defecting individuals. This can, for instance, be achieved by high initial or participation costs, which will be sunk in case of detected defection. Further, a social network should provide a sufficiently high probability of detecting defectors.

It has been argued that religious activity is, in general, accompanied by costs. These costs occur in the form of initiation and/or rituals and/or other behavior with opportunity costs. Individuals paying this price in turn receive high reputation and therefore credibility. In other words, religious activity and rituals can be regarded as costly signaling mechanism (see, e.g. Iannaccone 1994, Sosis 2000, Sosis and Alcorta 2003).³⁰

³⁰ This idea is, of course, not new and dates back to at least Adam Smith (see, e.g., Smith 1979: 795).

To the best of our knowledge, the existing literature on reputation and signals in (religious) groups assumes the quality of signals to depend only on the “quality” of *individuals*. This ignores the possibility that the quality of signals is also dependent on the size of the respective *group*. Yet, group size plays an important role in shaping an individual’s choice to engage in cooperative behaviors, thereby influencing free-riding (see for instance Olson 1965). Members of small groups are expected to cooperate to a higher degree than the members of large groups, because the individuals’ identifiability is higher in the former than in the latter. Therefore, a small social group can provide selective incentives. Put differently, the social enforcement mechanism is more effective. The group may become overcrowded as the number of individuals to which this mechanism is to apply expands, making an effective distribution of information regarding the histories and “characters” of members to be communicated impossible (Leeson 2005). In other words, effective communication can become prohibitively costly or even outright impossible if the population is too large.

We will in the following focus on the size of a group as one further explanandum for economic success, as opposed to (religious) dogma. In a nutshell, we believe that small groups, especially religious groups, may face an economic advantage as compared to larger groups. Similar to Leeson (2005), we therefore in part regard fractionalization as *consequence* of bad or lacking (formal) institutions, rather than their cause. In the following section, we will motivate our idea by first examining in more detail how social groups or networks may provide a frame in which signals and information are being transmitted. We will use both terms, group and network, synonymously. This usage of terminology should be regarded as referring rather to the sociological meaning of it than to its meaning in economics. That is, the important aspect is that a collection of individuals share a focal feature, that they are aware of this fact, and that they identify themselves in part via this feature. As evidence for our hypothesis that small groups face an advantage in effective signaling, we will present several case studies from religious groups of the past. These groups have in common that they were extremely successful in economic terms. Section three will provide a formal treatment of our argumentation. A conclusion is offered in section four.

2. Groups and the Economy

As was stated in the introduction, a modernizing economy is characterized by an increasing number of transactions (see, e.g., North 1984). More people trade more goods in a more and more anonymous setting. Further, the anonymity of these transactions may increase the threat of moral hazard as the social sanction for not “paying one’s dues” decreases and

may even become completely ineffective. Nevertheless, the transfer of property rights has to be safe-guarded somehow; otherwise transactions will not take place. This favors the evolution of different enforcement mechanisms, for instance an effective legal system which defines and protects property rights and their transfer. But these new enforcement mechanisms usually do not come at zero costs. To the contrary, building up an effective legal system is very costly. Not only does the legal system require codification and sufficient bureaucratic backing. The officers and magistrates, even the members of the society have to learn to apply the rules. On the whole, the overall amount of transaction costs, not necessarily the costs per transaction, therefore increase. As stated in the introduction, primarily three factors seem to drive this development: growing specialization, increasing costs per transaction due to the change to anonymous interactions and rent-seeking activities of diverse groups (North 1984: 263).

In the following subsection we will outline how establishing small groups may help reduce the transactions costs. Section 2.2. turns the focus on a specific form of groups, namely religious ones. Historical evidence for the success of small religious groups is outlined in section 2.3.

2.1. Groups and Transaction Costs

If the costs of legal enforcement are too high, people may, instead of making use of “new” (i.e. the legal) enforcement mechanisms, try to re-establish non-anonymous interactions. In other words, they may try to economize on transaction costs by (re-)relying on personalized trade rather than on anonymous transactions. The re-emergence of personal transactions might be a substitute or complement for impersonal contract enforcement (see Schaefer and Ott 2004: 355-374). Obviously, the re-establishment of non-anonymous transactions reduces the effect of the second factor mentioned above, the increasing costs per transaction due to anonymity.

As was outlined above, anonymous transactions have to be enforced and “safe-guarded” by some external mechanism, for instance a contract. Writing the contract and suing a contract partner who did not fulfill his duties is, in general, costly. Further, as was mentioned above, contracting presupposes an effective legal system. Within a group, reputation can be a substitute for this external mechanism. Other members of the group might refuse to trade with people from which they know that they did not deliver the agreed upon service or good in former transactions. As they may hope to receive signals about potential trading partners, group members may therefore provide signals about the type of potential trading partners

themselves. Moreover, individuals could be used as sources of information concerning other important aspects of life, e.g. what job is offered somewhere or who is looking for a job. Once the channel of communication is opened, it may be used for exchanging information about diverse topics.

However, an increase in the number of members of a group may lead to a decrease in the value of a signal that the members might receive about another. Two effects seem to cause this decrease of signal value. First, there is what might be called a direct effect. As the number of people with whom I have contact increases, I will have less time or “effort” to spend to get to know each of these people. This in turn reduces the subjective reliability of the signals I receive from them because I make more mistakes in interpreting them. Second, an indirect effect may occur. As the group size increases, it becomes less probable that the one via whom I receive the signal about somebody else will know this person himself. Again, this blurs the signals. On the other hand, an increase in the number of members of a group enlarges the “pool of skills” one has access to. This can, for instance, include the amount of information which is potentially available to the individuals, trading opportunities or specific production skills.

The positive and negative consequences of an increase in the size of a group point towards a trade-off. Depending on which effect is more important for them, people might either engage in anonymous market transactions or in personal transactions within groups (see, e.g., Kranton 1996). In the market, people may face a higher risk of being cheated by an anonymous trading partner. By engaging in a personal group, people can avoid this risk, relying on the reputation mechanism. However, within a small group, one can only buy what is offered by the members of the group. Therefore, a market may provide a larger amount and variety of goods. The size of the effects may vary for specific goods or specific individuals. Standardized mass products, for instance, are probably rather traded on the anonymous market than in small networks, as they are easily available and their quality in general does not vary to a large degree. On the other hand, specialized services may be better exchanged within networks.

For our purpose it seems sufficient to simply keep the basic trade off in mind, stating that people could either engage in anonymous transactions or in group transactions, both having specific advantages and disadvantages. Even more important, these advantages depend on the number of people engaging in the respective form of transaction, implying an optimal size of groups. Though, to the best of our knowledge, the explicit claim of an optimal group size is new, various studies confirm the idea that “group size matters” both on empirical and

theoretical basis (see, e.g., Carpenter 2007, Isaac and Walker 1998, La Porta et al. 1997, Olson 1965, Putnam 1993 and 1995, Wagner 1995).

2.2. The Role of Religious Groups

Apparently, groups and their size can play an important role in terms of signaling and providing information. Religious groups, we believe, have in the past played an extremely important role in this respect. The reason why they were able to do so lies in the fact that religion was in general of much greater importance than today. In other words, religious affiliation and activity used to be very focal. Greif (1989: 882) supports this point for the so-called Maghribi traders, a group of Jewish traders in the Mediterranean Sea in Medieval times. “The common religious-ethnic origin of the traders provided the natural boundaries for the coalition and served as a signal where information regarding past conduct could be obtained, while the commercial and social ties within the coalition served as a network for the transmission of information.”

Additionally to this focality, symbolic activity is practiced within a religious community. As Posner (1998) showed, people performing symbolic activities, such as burning or saluting a flag, also transmit signals to others. More specifically, people signal their propensity to cooperate. Symbolic activity may be regarded as signal because costs are usually attached to it. These costs need not be high in their direct terms, i.e. in terms of time or other resources. Rather, the costs arise in the form of opportunity costs. For instance, burning the flag of a country X demonstrates clearly that I do not think very positively of X, (some of) its inhabitants or its politics. I therefore signal to those watching me that I do not want to have much to do with country X. Consequently, I will tend not to realize any trading opportunities I possibly had or could have built up with it.³¹ On the other hand, my action signals that I am very willing to cooperate with those who share my attitude towards X. It does not really matter whether these others actually burned the same flag or not. What matters is that I have convincingly demonstrated my willingness to cooperate with them.³² Religious activity may again be regarded as special in this case, as it is full of symbolic behaviors, e.g. attending services on a regular basis and the actions performed within a specific service.

It is important to note that it is not (necessarily) the case that the signal value is the reason for the symbolic action. They are both of intrinsic value and of signaling value, the former

³¹ Note that these opportunity costs rise with the success of the group I am demonstrating against.

³² Of course these others could convincingly demonstrate *their* willingness to cooperate with me by burning a flag themselves.

probably even outweighing the latter. What is important is that people (un-)intendedly transmit signals together with the action.

Leaving aside the intrinsic value, the key to the signaling value lies in the assumed connection between the symbolic activity and what one is signaling about, for instance being a cooperator. As this connection is seldom - if ever - straightforward and clear, most signals are imperfect: they do not perfectly identify the other's type. What is relevant is the focality of the signal (it has to be regarded as crucial) and the costs associated with a certain kind of behavior.

Religious affiliation and the practice of religious rituals were extremely focal in former times. Cooperation may be facilitated in religious groups exactly because obeying religious rituals can be extremely costly in terms of time and other resources. This is due to the fact that these rituals are performed rather by people who plan to be part of the group for a long period of time. Those who are uncommitted, i.e. those who do not obey the rules of the religious group, can be identified comparatively easily. In turn, they will be avoided as partners in collective action. Further, the mere fact of being part of the group, and as such being conscious of being under surveillance of others, may contribute to the willingness to obey the rules. Already Adam Smith claimed religious sects to be important for the monitoring and creation of reputation which is essential for trust and cooperation within communities (see Smith 1979: 795).

We regard these rather qualitative argumentations as supporting the idea that religious groups offer a "frame" within which its members can distinguish themselves from others. Moreover, this frame is of intrinsic value to its members, i.e. they will try to avoid exclusion from the religious group. Therefore, the signaling mechanism may be effective in such groups, leading to economic advantages of groups as compared to anonymous markets. And yet again we regard the arguments brought up as evidence for the fact that group size matters. Note however that the reasoning is "backward-looking", i.e. membership in religious groups may be motivated by other than economic motives but leading to unintended economically advantageous outcomes.

2.3. Religious Networks in History

As mentioned above, religious beliefs may be a way of communicating commitment and loyalty to other group members. The advantage of these signals is that they can promote intragroup cooperation by overcoming the problems of free-riding and moral hazard that may plague cooperative pursuits. Sosis and Ruffle (2004: 112) argue that the greatest cooperation

can be achieved when “frequent and emotionally evocative rituals are employed to bolster postulates that are highly unfalsifiable”. This seems to be relatively more the case in religious groups as in others. However, if this is so, then this superiority of religious groups should show in their comparative success. The following stories of success might serve as evidence for the truth of this hypothesis.

Based on empirical research using a database on 19th century utopian communes, Sosis (2000) finds that religious communes are more likely than secular communes to survive at every stage of their life course. Apparently, the costliness of religious rituals and the corresponding symbolic activities of the individuals may contribute to the longevity of religious groups.³³ Sosis and Ruffle (2004) extended their analysis on field experiments on Israeli Kibbutzim. They observe that the most cooperative subpopulation in their sample is males who attend synagogue daily. Both studies seem to be a testament of “strict” religions’ ability to sustain long-term cooperation. The costs of the frame seem to be positively correlated with its longevity.

As a historical example for the role of religion in enhancing cooperation, trust and reciprocity, Avner Greif (1989, 1992, 1993, and 1994) refers to the Maghribi traders. These formed a distinctive merchant group within the Jewish community in Medieval times which specialized on long-distance trade, especially around the Mediterranean Sea. He describes the agency relations in that period as characterized by asymmetric information. The revenues the agent received depended upon circumstances that were not directly observed by the merchant. Apparently the relations among the Maghribi traders suggest that these relations were based upon mutual trust and many of the business associations mentioned in the documents were conducted without relying upon the legal system and many business relations were not based upon legal contract. However, only a few documents within thousands reflect allegations of misconduct (Greif 1989: 881).

The advantageous signaling mechanism which small religious networks offer during the period of early settlements in America has also been subject to various studies. Clark (1946, 1947, and 1951) argues that the new sectarian movements in North America created a considerable amount of economic saving. This seems to be rare in times when the communities had few possibilities of “formal” control. The religious sect contributed to meeting the problem of mobilizing capital in frontier areas and thus in encouraging the development of new economic enterprise. According to Clark (1951: 261-5) the sectarian

³³ Of course this and the following examples don’t rule out the possibility that religious dogma (or strictness of its enforcement) is the key factor for success. However, since the dogmas involved vary to a large degree, we at least rule out the possibility that a specific dogma plays the decisive role.

form of religious organizations provided a “cheap” form of religion in terms of money and expenses of time. This made possible the release of labor and capital for economic development. Gardner (1917) and Taylor and Arrington (1958) show the importance of cooperation in the early economic history of Utah. They emphasize the importance of the Mormon Church which organized cooperative construction of irrigation systems, cooperative stores, smaller retail stores, wool spinning mills, and industrial cooperation.

All the above examples indicate that religious affiliation indeed served as a focal frame for social activities. We would like to emphasize at this point, however, that we do not claim that religions are the only, most appropriate or even an efficient way to organize in such networks. For instance, inefficiencies may result when potentially beneficial exchanges are not considered for ideological reasons. Rather, it seems as if different cultural regions developed different devices to cope with the problem of anonymity. In China, to give only one example, Guanxi could be seen as another form of network which has evolved in order to (re-)introduce “personal” relationships.³⁴ Therefore, we think that all over the world different forms of institutions developed, making possible the social enforcement of transactions. In the case of traders in the Medieval Mediterranean and the colonization of America, religious sects may have played this role. We therefore explicitly exclude cases like the religious groups in Asia or other parts of the world.³⁵

3. Modeling Different Effects of Group Size

As one allows for the introduction of non-anonymity in trading relations, trading partners may be distinguished according to their social distance. For instance, Leeson (2005) identifies three “classes” of potential trading partners; direct friends, group members, i.e. people sharing one specific signal, and non-group members, i.e. “all others”. From direct friends no signal is needed since his type is known for sure. Group members can (more or less successfully) signal their type while non-group members cannot. Signals, as we will interpret them in the following, serve to build up reputation of the individuals. If the signals are effective, i.e. cheaters are correctly detected as cheaters, trust may over time be created. In our case religious affiliation will serve as signal. The “gains from trade” with these different classes differ, due to transaction costs.

³⁴ Guanxi is defined as “the relationships that an individual maintains in social networks” (Knight and Yueh 2002: 5).

³⁵ See Leeson (2005) for an excellent survey on institutions in pre-colonial Africa. Apparently, religion, along with other social-distance-reducing institutions, played an important role for the success of long-distance trade. Colonization, so it is argued, forbid these signals and hence caused trade to break down.

We will formalize this idea in the following, taking a strictly individualistic view. That is to say we define the utility of a representative individual as depending on signals about the type of other individuals and the amount of information available. We assume that the utility of an individual joining a group is determined by three factors. The first is an increased quality of signals about the types of other actors from within the group as one now has “access” to this signal. We will label this the signaling quality s , where $0 \leq s \leq 1$. It is a function of the size of the group, X , and some probability $0 \leq \tau < 1$ that information about others is being transmitted correctly. One could interpret this probability as a measure for “honesty” within the group. The second important influence on the utility of a group member is derived from the amount of skills he has access to. Because the presupposition of profiting from somebody else’s skills is knowledge of them, we will in the following focus on “information”, which we will label g . Just like the quality of a signal, the amount of information is a function of the size of the group, X , and of some “loss” $(1-\gamma)$, where $0 \leq \gamma \leq 1$, if the information is not received from a direct acquaintance. As third factor, we identify psychological, sociological and other aspects, c , which we will hold constant for the sake of simplicity. This does not mean, of course, that these factors do not play an important role or are necessarily independent from the group size. We would simply like to point to something else. Formally, the utility of an individual could therefore be defined as:

$$(1) \quad u = u(s, g, c),$$

Signals and information taking the following form:

$$(2) \quad s = s(X, \tau)$$

$$(3) \quad g = g(X, \gamma)$$

In the following, we will focus on discussing the latter two functions in more detail.

3.1. The Quality of a Signal

Consider the following static setting. In a group of X individuals, each individual knows the type of k others. Assume that from directly known individuals one receives a perfect signal, i.e., a signal of value 1. In a first step, only group members are matched randomly. Whenever a group member x_i wants to find out about the type of some specific other group member x_j , he can either know this x_j himself or ask another member of the group, call him x_k .

whether he in turn knows the type of x_j . x_k will supply some signal q about x_j if he does know him. If this is the case, the informant x_k will correctly inform x_i about the type of x_j with probability τ . However, if x_k does not know x_j personally, the individual x_i will have to consult someone else. Formally, this idea can be presented as follows, s again presenting the value of the signal that x_i can receive about the type of x_j :

$$(4) \quad s = \frac{k}{X} + \left(1 - \frac{k}{X}\right)q$$

$\frac{k}{X}$ represents the probability that x_i knows x_j himself. Therefore, he will not know x_j with probability $\left(1 - \frac{k}{X}\right)$. In this case he will have to ask some other group member. Again, this other member will personally know x_j with probability $\frac{k}{X}$.

If x_k knows x_j personally, he will inform x_i correctly with probability τ . Again, with probability $\left(1 - \frac{k}{X}\right)$, x_k will not know x_j personally and x_i will have to ask another member, who again will supply some signal q . Formally q can therefore be expressed as:

$$(5) \quad q = \frac{k}{X}\tau + \left(1 - \frac{k}{X}\right)q.$$

This procedure continues. If (5) is solved for q and substituted into (4), one can yield the following value of the signal:

$$(6) \quad s = \frac{k}{X} + \left(1 - \frac{k}{X}\right)\tau.$$

In this case the first derivative of the quality of the signal with respect to the size of the group is:

$$(7) \quad \frac{\partial s}{\partial X} = \frac{k}{X^2}(\tau - 1) < 0.$$

Since, by assumption, $0 \leq \tau < 1$, the term is clearly negative. An increase in the size of the group is associated with a decrease in the value of the signal that one member can receive about the type of some other group member, and vice versa. A reduction in the size of the group can lead to an increase of the signal value. Therefore, fractionalization may be the consequence of bad institutions, as was claimed in the introduction.

It should be mentioned at this point that an increase of the probability that an informant will correctly pass information about an acquaintance, τ , is also associated with an increase in the quality of the signal. An increase in “honesty”, τ , can therefore be a substitute for a decrease in size.

3.2. Allowing for Matching with Non-Group Members

Consider the case of allowing contact to non-group members. One then has to distinguish between “acquainted in the group” and “acquainted outside the group”. Let’s assume that each individual knows K others. These K others could either belong to the same group or not. Those who belong to the same group will be labeled k_G , those who do not k_{NG} , the indices “G” and “NG” identifying group members or non-group members, respectively. Therefore:

$$(8) \quad K = k_G + k_{NG}.$$

Assume again that from directly known individuals one receives a signal of value 1, whereas one only receives some portion $0 \leq \tau < 1$ from not directly known group members and an even smaller portion $0 \leq \mu \leq \tau$ from non-group members about the type of a randomly met trading partner. The size of the group is again labeled X , the society as whole has the size N , $N \gg X$. The overall signal value can then be derived:

$$(9) \quad s = \left[\frac{k_G}{X} + \left(1 - \frac{k_G}{X}\right)\tau \right] + \left[\frac{k_{NG}}{N - X} + \left(1 - \frac{k_{NG}}{N - X}\right)\mu \right].$$

The first term refers to our basic model where only contact to group members is allowed. The second term extends the analysis to the contact with non-group members. The effect of an increase in size now changes to:

$$(10) \quad \frac{\partial s}{\partial X} = \left[\frac{k_G}{X^2} (\tau - 1) \right] + \left[\frac{k_{NG}}{(N - X)^2} (1 - \mu) \right].$$

The first term is, as we have seen in the previous subsection, negative. Unfortunately, the second term is positive. In order to check whether the overall effect is negative, assume that the absolute value of the first term is bigger than the second one. This is the case iff:

$$(11) \quad \left| \left[\frac{k_G}{X^2} (\tau - 1) \right] \right| > \left[\frac{k_{NG}}{(N - X)^2} (1 - \mu) \right]$$

$$(12) \quad \Leftrightarrow \frac{k_G}{X^2} (1 - \tau) > \frac{k_{NG}}{(N - X)^2} (1 - \mu)$$

$$(13) \quad \Leftrightarrow \frac{k_G}{k_{NG}} \underbrace{\frac{(N - X)^2}{X^2}}_{\gg 1} > \underbrace{\frac{(1 - \mu)}{(1 - \tau)}}_{> 1}$$

This means that, if it is not the case that one has extremely many more friends outside the group than within, then the overall effect of an increase in size will be negative.³⁶

3.3. Amount of Information

Regarding the quality of a signal about others, a small group is, *ceteris paribus*, advantageous compared to a larger one. However, larger groups can have the advantage of making a larger amount of information available. The more people are members of a specific group, the more information is likely to be circulated in this group. Assume that each member of the group has one unit of information which could be of value to all other members. Applying the same logic as in section 3.1., every individual knows k others. From those who are directly acquainted the whole unit of information can be received without loss. However, information received indirectly via the $(X - k)$ other group members faces some loss of $(1 - \gamma)$, that is, only a portion $0 \leq \gamma \leq 1$ of information is received from strangers within the group. One can think, e.g., of not openly passing information to strangers or of misunderstandings concerning what is “needed”. Formally, the amount of information available to each member is therefore:³⁷

$$(14) \quad g = k + (X - k)\gamma$$

³⁶ It seems unreasonable to expect that the effect of even having extremely more friends outside the group than within can outweigh the second ratio on the left hand side, since the latter is weighted with squares.

³⁷ Equation (14) does not consider that information could be received from non-group members. However, under the assumption that the share of information received from group members is larger than that received from non-group members, the following results remain valid. The proof is straightforward.

Clearly the first derivative with respect to X is γ and therefore positive.³⁸ This means that an increase in the group size is associated with an increase in the amount of information available to each member.

The amount of information is dependent on γ , the degree of “closeness” of the members. This closeness may in turn be dependent on the level of trust within a group. The higher the level of trust within a group, the higher is the amount of information available from a specific stranger in the group. From this point of view, a higher level of trust might offset shortcomings of size. Therefore, a new group which split from a pre-existing one could profit from its potentially higher level of trust. Even though the overall amount of information within the group as a whole is now smaller, the information available to each member individually might not be reduced by the same amount.

We are well aware of the limitations of the model chosen, especially of the assumption that the full amount of information being passed around in a group is potentially available to all members. However, we think that this does not change our intuitive result that an increasing size of a group increases the potentially available information for each individual. Without a formal presentation, one might consider an alternative model relating to the issue of the quality of a signal. Again each individual x_i knows k others. For the sake of clarity, we will name these “first round acquaintances” k_{i1} . Assume now that each of these k_{i1} individuals will provide the individual x_i looking for information with information of their respective acquainted people as well. We will call these “acquainted of an acquaintance” or “second round acquaintances” k_{i2} . Crucial for the amount of information available for each individual is the fact that the k_{i2} people known by each of the k_{i1} acquainted of some individual x_i might know each other. If they do so, this would reduce the amount of information available for x_i . But now an increase in the number of group members decreases the probability of these “double-acquaintances”, therefore increasing the amount of information available to each individual. Thus, we regard our model as incorporating our intuition of positive informational aspects of an increase in group size.

3.4. Optimal Group Size

Given the definitions obtained in the previous subsections, one can calculate the optimal size of a (religious) group for given values of τ , γ , and k . Recall that there is a basic trade-off

³⁸ Note that in this formulation, if the group receives a completely new member, the “average member” does not know this new group member directly. Thus, the first derivative in this formulation actually underestimates the true amount of information. With some positive probability the average member will know a new member who will provide the whole unit of information instead of the portion γ only.

between the positive and the negative effects of an increase in the size of a group. This trade-off implies that the optimal size of the group is reached if the difference between these two effects is minimized. In our terms, the optimal size is therefore reached when the signal value “is equal to” the amount of information.

A graphical representation of the optimal group size implied by the model analyzed in sections 3.1. and 3.3. is given in figure 1a. The abscissa displays the share of people engaged in the religious group under analysis. The values for τ , γ , and k used for plotting the graph in figure 1a are arbitrarily set to 0.4, 0.9, and 0.1, respectively. The optimal size of the group is reached in the intersection of the two lines, where a share of 55% of the people in the society is engaged in the religious group. Here the signal value and the amount of information are equally approximately 0.5.

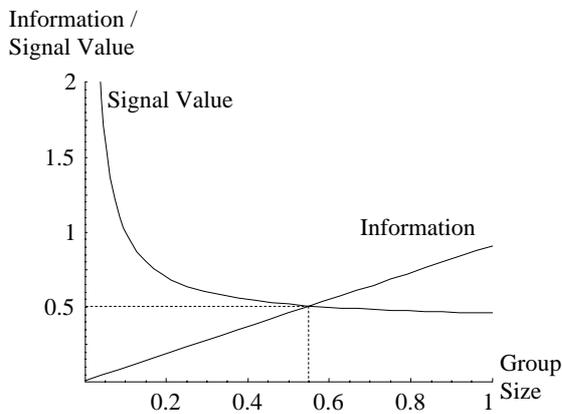


Figure 1a) *Optimal group size*

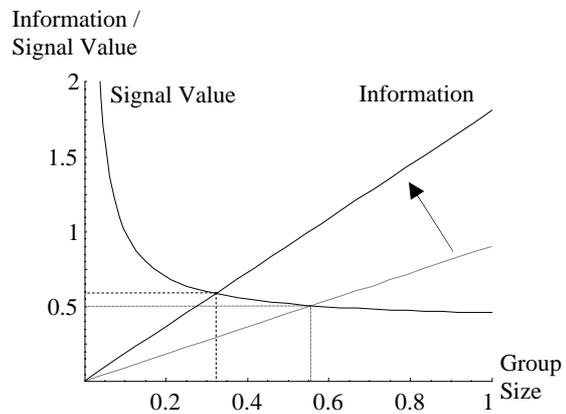


Figure 1b) *Effect of increase in importance of information*

It might be of interest how the optimal size of the group varies as the given parameters vary. Since the results are intuitive, we simply state them at this place. As γ increases the line representing the available information will tilt upwards, shifting the intersection of the two lines to the left, i.e. the optimal group size will decrease. An increase in τ will cause the line representing the signal value to shift upward, thereby increasing the optimal group size as the intersection of the two lines will be pushed to the right. The same will hold true for the case of increasing k .

Note that in this analysis, information and signal value are weighted equally. That is to say, in our model, information and signals are perfect substitutes and one unit of information is worth one unit of signal value. This need not be the case. If one assumes that information is more freely available in a modernizing economy, e.g. due to inventions like the internet, the value of the signal might gain importance relative to information available within the group.

This would lead to a decrease of the optimal group size. Figure 1b exemplarily illustrates the case of a relatively doubled importance of signal value as compared to information.

4. Conclusion

In the above we have argued that the economic success of a group may depend on its size. The basic idea was that small groups may economize on transaction costs by providing a platform for signaling. On the other hand, small groups face the disadvantage of only making a small amount of information available. Both effects may be of different importance according to the specific environment of individuals and the underlying economy.

We believe that these results may contribute to an ongoing discourse in sociology, namely whether dogmas play a role for the economic success of religious groups. It is well known that this discourse was probably started by Max Weber (1905). He claimed that the protestant work ethic was the one specific factor which distinguished the Protestants from other (religious) groups and made the evolution of capitalism possible. Several authors have countered this idea since. Other groups, e.g. the (Jewish) Maghribi traders, the (Catholic) Genovese traders or even Buddhist monasteries in Japan³⁹ have developed similar (capitalist) institutions as the Protestants, and have economically outperformed other groups. These results may point to a different “cause” for economic success. Maybe the above analysis could point in this direction as well.

Especially the USA provides a vivid example for the dynamics of religious group formation. While ninety percent of Americans claim to have a religion, more than 60 percent are formal members of a church or synagogue, and 40 percent actually attend religious services in a typical week (see Iannaccone 1992 and 1994). The “market” of religion also is very competitive with numerous denominations and sects. Additionally, this market is in continuous flux. On average, two schisms, defined as “the successful formation of a new denomination as a result of a break from a pre-existing denomination” (Liebman et al. 1988: 344), occur within a period of three years (see Sutton and Chaves 2004). Maybe economic needs are at least partly driving this development.⁴⁰

Maybe our analysis also contributes to the discussion about the so-called Kelley thesis.⁴¹ It states that more liberal, ecumenical churches which are assumed to be large in size, are

³⁹ For an excellent analysis of the Buddhist monasteries in Japan in this economic respect, see Collins (1997).

⁴⁰ Walker (1937) may be regarded as one of the first scholars who claimed a direct causality between the needs of growing economy and schism. He explicitly relates the Reformation to capitalism as a response of social institutions to adapt new enlarging economy.

⁴¹ For a statistical debate about the validity of the Kelley Thesis, see Iannaccone (1996a, 1996b), Hadaway and Marler (1996), Hoge (1996)

declining in church membership. On the other hand, more conservative, fundamentalist churches which are assumed to be rather small in size are increasing in membership (see Spilka et al. 1985: 241). Liberal, according to our reading, means low costs for the church members when they try to live up to the religious standards, whereas conservatism is correlated with high costs. According to our reasoning the needs of a modern economy may call for smaller and more conservative groups.

In order to avoid misunderstandings, we would however like to once again stress that religious dogma or other factors, e.g. the psychological⁴² or sociological⁴³ aspects of the respective groups, are without doubt extremely important for the performance in various aspects, e.g. the economic ones, of religious groups. The narrowness of economic theory in these respects however has hindered us from tackling these points. Though our model therefore excludes relevant aspects of the world, we hope to have been able to focus attention on an aspect which we believe to be neglected so far.

⁴² Spilka et al. (1985 and 2003) for instance provide an excellent survey of psychological aspects of religious behaviours.

⁴³ See e.g. Durkheim (1995), Liebman et al. (1988), Niebuhr (1965), and Sutton and Chaves (2004).

CHAPTER 4

Impartial Spectator, Moral Community and Some Legal Consequences^o

Abstract: Building on Adam Smith's moral theory, this paper discusses effects of group size on moral standards. The key concepts of Smith's theory, that of sympathy and the impartial spectator, provide a basis for this discussion because both presuppose a moral community, i.e. a group of people bound together via common experience and values. As this group increases in size, common experience becomes scarce and leads to a decrease in the habitual sympathy among its members. Consequently moral communities sharing related impartial spectators will be of limited size. In order to achieve coordination among the members of a polymorphic society, the law regulates which norms should be binding for it. Following Smith, common law seems to bear superior features compared to other legal systems in making use of juries, thereby resembling the internal, moral judgement process. Limits to the application of common law are discussed.

Key Words: Moral Community, Group Size, Law and Economics, Morality and Law

JEL Classification: A13, B30, K40, N0, Z13

1. The Thought Experiment

This paper presents a thought experiment in the sense of Uskali Mäki's idea of "models are experiments" (Mäki, 2005) word-for-word. It experiments with Adam Smith's moral theory and confronts it with the evolutionary models which represent the dynamics of norm formation. More specifically, it discusses the relationship of the impartial spectator and the size (and heterogeneity) of the moral community. The results of this thought experiment prepare the ground to discuss some widely held views on the relationship of norms and legal arrangements and thereby we contribute to an ongoing discourse of some basic assumptions of the standard Law and Economics literature.

In his recent textbook, Steven Shavell (2004: 607ff) claims that moral notions are of relatively simple character (i.e., they are of "limited complexity"). He argues that moral norms

^o Co-authored with Manfred J. Holler, forthcoming in the *Journal of the History of Economic Thought*.

help to implement legal rules if both concur and that "...the satisfaction of our broadly held notions of morality tends to advance our well-being" (Shavell, 2004: 603). However, he also claims that such moral norms will only imperfectly serve to advance social welfare. On the one hand, if morality and the legal rule concur, morality implies virtually perfect information and zero enforcement costs – a moral agent knows perfectly well what he is doing and if he follows his moral conviction then there are zero costs for policing and legal enforcement. On the other hand, there are immoral individuals, so there is a need for control and the enforcement of legal rules. One could add to these arguments, as we will show in the following, that even if there are clear moral rules (possibly of limited complexity), these might be in conflict with another. These conflicts can be interpersonal and intrapersonal. In the case of an interpersonal conflict of norms, legal rules may select one of the alternatives and therefore coordinate among citizens with conflicting moral positions.

In general, the Law and Economics literature emphasizes the legal perspective inasmuch as laws are considered efficient and dominant to morality. However, morality and the law need not necessarily be comparable. It could well be that morality has a different status than law, i.e., that it serves different needs in a society and, obviously, follows different mechanisms. For Ken Binmore, to quote a somewhat radical view, morality is merely a means of coordination: "Just as it is actually within our power to move a bishop like a knight when playing Chess, so we can steal, defraud, break promises, tell lies, jump lines, talk too much, or eat peas with our knives when playing a morality game. But rational folk choose not to cheat for much the same reason that they obey traffic signals" (Binmore, 1998: 6). Of course, one might argue that if we ignore traffic lights, at least in some parts of this world, we might get run over, irrespective of whether we blush⁴⁴ because of our violation a legal and social norm. To a large extent, traffic regulations are self-enforcing, and violators will either literally "die out" or change their behavior. A visit to Naples can teach us that where traffic regulations are not obeyed in daily practice, there is no direct advantage to concur with them. However, it can well happen at 3 o'clock in the morning in Lund (Sweden) a good citizen, who is walking the dog at this time of the day to enjoy the early sunshine, will tell you that you should not ignore the red light after you crossed the street that has not seen a car for the last ten minutes to self-enforce traffic regulations.

⁴⁴ This refers to Smith (TMS I.I.10): "We blush for the impudence and rudeness of another, though he himself appears to have no sense of the impropriety of his own behaviour; because we cannot help feeling what confusion ourselves should be covered, had we behaved in so absurd a manner."

Shavell (2004: 603) maintains that "it is hard to explain why moral notions within a given society are similar, and why those among different societies may display real variation...". Our thought experiment will attempt to provide an answer to this puzzle.

Adam Smith's model of how morality works offers, in our opinion, a valuable analysis of how norms of conduct and behavior evolve and how they are sustained. Moreover, we believe that this theory of moral behavior can be further elaborated by considering effects of group size. We regard these effects as being inherent to it and a consequence of self-interest. Smith himself regarded self-interest as a justifiable and central trait of human behavior, for "[e]very man is, no doubt, by nature, first and principally recommended to his own care; and as he is fitter to take care of himself, than of any other person, it is fit and right that it should be so" (TMS, II.II.11). Though this notion of self-interest need not mean that "Man" is selfish, Smith seems to be well aware of the potential danger for society that this trait has. Therefore, nature provided the human race with restrictions on self-interest, namely "sympathy" and the so-called "impartial spectator". Sympathy is the ability to transcend oneself and see a situation from another one's point of view. The impartial spectator is derived from sympathy. He is "the man within the breast" (TMS, III.2.32-33), an illustration for one's conscience. According to Smith, sympathy is the mechanism by which the impartial spectator is constructed and works, but it becomes less effective with increasing social distance between people. As will be shown later, one consequence is the emergence of subgroups. Given such subgroups, the possibility of coordination via sympathy and the impartial spectator is restricted. In order to still be able to regulate such societies, the law comes into play as an artificial constraint for the self-interest of individuals.

We will build on Smith's theory and argue that, if one accepts its modeling of "moral sentiments", heterogeneous societies may evolve. According to Smith, because the law is dependent on the moral support of the society heterogeneity will have an important effect on the way the legal system is to be organized. Common law may in some cases be superior to statute law. More specifically, we will argue that common law can be regarded as having two favorable features. First, it relies on "tradition" and thereby entails the knowledge of the past. Second, it makes use of juries and thereby approximates impartiality in its legal process, an aspect which seemed to have been of major importance for Smith. A legal trial under common law can even be regarded as resembling Smith's moral judgment process. However, as will also be argued, common law is restricted by its need for a homogeneous society. Further, common law may face difficulties when it has to deal with prospective regulations, i.e. it has to regulate situations which are new to the society. Common law can in these cases not rely

on past judgments. The remainder of the paper will be organized along this line of thought, starting with a brief summary of Smith's view on self-interest, before we discuss sympathy and the impartial spectator, the building blocks of Smith's moral theory.

2. Adam Smith's View on Self-Interest and Justice

In Adam Smith's writings, the notion of self-interest does not necessarily coincide with the term egoistic or selfish as the above citation of TMS (II.II.11) suggests. Most of the time it can be paraphrased as "focused on oneself". It is considered a central human trait. Compared with other moral theories, Smith gave self-interest a moral grounding in regarding it as central to the virtue of prudence: "The care of the health, of the fortune, of the rank and reputation of the individual, the objects upon which his comfort and happiness in this life are supposed principally to depend, is considered as the proper business of that virtue which is commonly called Prudence" (TMS VI.I.6).

Griswold (1999: 93) distinguishes two meanings of selfishness in Smith, namely "egoism" and the "(im-)possibility to transcend ourselves". Smith seems to have used both meanings in his TMS, the former in the beginning and the latter in the end. The former kind, egoism, can be identified as relating to the question whether we are interested in the well-being of others or not. The latter, transcending oneself, refers to the question of how we can identify with others.

From the *Wealth of Nations* we learn how interest in our own well-being, the care of fortune, can lead to socially beneficial outcomes. It is self-interest in this sense, i.e. the seeking of personal gains, what we appeal to when we trade with others. "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest" (WN I.ii.2). In appealing to the other's self-interest, both sides of a contract can make gains. It is therefore a driving force for the economic development of a society⁴⁵ and not to be seen as bad per se. These advantages can only be realized if the society is well-functioning and (most) people are actually aware of the need of such a society. "He [man] is sensible, too, that his own interest is connected with the prosperity of society, and that the happiness, perhaps the preservation of his existence, depends upon its preservation. Upon every account, therefore, he has an abhorrence at whatever can tend to destroy society,

⁴⁵ However, this economic development is not an end in itself. It is rather partly to be used in order to correct for the defects of a rich society, e.g. dullness of workers in a highly specialized industry. The virtuous aspects of economic development seem to lie in the fact that a greater number of people can afford to "learn to live a moral life."

and is willing to make use of every means, which can hinder so hated and so dreadful an event” (TMS, II.II. 20).

What can destroy the well-functioning of a society? According to Smith it is injustice (TMS, II.II. 20). Injustice or the violation of justice, “is injury: it does real and positive hurt to some particular persons, from motives 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).

In potentially leading people to try to take what is not theirs, Smith viewed self-interest, understood in the sense of *overly* egoism, as dangerous for the society at large. “[T]he misery of one, who is merely their fellow-creature, is of so little importance to them in comparison even of a small conveniency of their own; they have it so much in their power to hurt him, and may have so many temptations to do so, that if this principle did not stand up within them in his defence, and overawe them into a respect for his innocence, they would, like wild beasts, be at all times ready to fly upon him; and a man would enter an assembly of men as he enters a den of lions” (TMS, II.II.18). Clearly, letting self-interest run free would result in society ending up in a sort of “Hobbesian Jungle”.

The positive and negative consequences of self-love raise a question which Evensky (2005: 8f) called “the cohesion question”. “If the productive potential of liberal society derives from individuals’ freedom to pursue their own interests ... how can such a society avoid a Hobbesian war of all against all? What cohesive force can constrain the destructive dynamic of unbridled self-interest and hold liberal society together so that its potential – a materially satisfactory, secure, tranquil life for each individual and the greatest possible wealth for the nation – can be realized?”

Smith’s answer to this question is two-fold. On the one hand, mankind is equipped with a natural constraint on his selfishness. This constraint is sympathy, the ability to transcend oneself and see a situation from another one’s point of view, and the impartial spectator, who is derived from sympathy. The impartial spectator can in most cases be regarded as illustration of our conscience.⁴⁶ It is that which defines which behaviors are adequate for a given situation. In personal relationships sympathy can reduce egoism to that degree which does not arouse the unsocial passions of those surrounding the scene (Griswold, 1999: 119). On the other hand, as society evolves, an artificial constraint is invented by mankind, namely the law. The law can constrain egoism even in non-personal relationships.

⁴⁶ The case of judging about other’s behaviours is an exception. Therefore Raphael (1975: 95) concludes that, “[s]o far as judgements about others are concerned, Adam Smith’s spectator simply *is* any normal observer who is not personally affected” (emphasis in original).

Before considering the law, we will in the following describe sympathy and the impartial spectator in more detail.

3. Sympathy and Moral Community

Adam Smith views man as being under constant surveillance of a so-called *impartial spectator*. This impartial spectator serves as an internal enforcement mechanism inherent to human beings and is derived from common experience among a group of people. We evaluate our own conduct with the eyes of the impartial spectator and strive for its approbation. The process is not unlike a Popperian testing of hypotheses. However, here the hypotheses are about moral conduct and social behavior.

In order to be able to construct such a mechanism there has to be some basis for evaluating situations of others and oneself. This basis is what Adam Smith calls *sympathy*.

3.1. Sympathy, Altruism and Empathy

The meaning of *sympathy* in Smith is ambiguous. In most cases it can be defined in the above sense: the ability to transcend oneself and see a situation from another one's point of view. If used in this sense, sympathy is merely an ability. No emotions are necessarily derived from it. Sometimes, however, the term is used to describe the reaction of the spectator to the imagined change of positions. This describes an emotion rather than an ability, though the emotion is clearly derived from the ability.⁴⁷

Both meanings of sympathy derive from the potential to put ourselves in the position of others; to see things from their point of view. It is not necessarily restricted to altruistic fellow-feelings - although such feelings may derive from it - but even allows for a reflection about one's own conduct. "Pity and compassion are words appropriated to signify our fellow-feeling with the sorrow of others. Sympathy, though its meaning was, perhaps, originally the same, may now, however, without much impropriety, be made use of to denote our fellow-feeling with any passion whatever" (TMS I.I.5). Hence it is not the passion of others which puts our sympathy in motion, but our hypothetical experience of being in the other person's position. "Sympathy, therefore, does not arise so much from the view of the passion, as from that the passion of which he himself seems to be altogether incapable; because, we put ourselves in his case, that passion arises in our breast from the imagination, though it does not

⁴⁷ To complicate things further, sympathy is sometimes used in order to describe the *comparison* of the original emotions and the derived emotions. Haakonssen (1981: 51) even distinguishes a fourth meaning of the term, the *emotion arising from the comparison* of the original and the derived emotions.

in his form the reality. We blush for the impudence and rudeness of another, though he himself appears to have no sense of the impropriety of his own behavior; because we cannot help feeling what confusion ourselves should be covered, had we behaved in so absurd a manner" (TMS I.I.10).

It might be clarifying to note that Smith's notion of sympathy differs substantially from David Hume's notion. In Hume, it is the other's experience and expression of passion which triggers the fellow feelings. "When I see the *effect of passion* in the voice and gesture of any person, my mind immediately passes from these effects to their causes, and forms such a lively idea of the passion, as is presently converted into the passion itself" (Hume, 1978 [1739]: 576, italics added). In contrast to Hume, Smith regards the fellow feelings as arising due to the other's situation or action, not the other's expression of passion. Hume's notion of sympathy implies a potential of altruistic (or spiteful) fellow feelings – a feeling for the other. In principle, this does not concur with the notion of sympathy of Adam Smith which is a feeling for oneself, and not for the other. As quoted above: "We blush for the impudence and rudeness of another, though he himself appears to have no sense of the impropriety of his own behaviour."

Unfortunately, the notions of Hume and Smith get somewhat blurred when the other's situation or action is accompanied by *observed* passion. It is then no longer obvious whether it is the passion *or* the situation of the other which induces our feelings.⁴⁸ A brief formal treatment could help to clarify these concepts. Let us assume that $u_i(\cdot)$ expresses the (personal) utility function of agent i and $u_{ji}(\cdot)$ represents agent j 's (personal) utility function as assumed by i . The situation (position) of i and j is summarized by s_i and s_j , respectively. Then we can write sympathy, altruism and empathy as follows:

⁴⁸This is perhaps the reason why Ken Binmore identified the sympathy concept of Adam Smith with David Hume's notion. (See Binmore, 1994: 21 and 54ff). He calls Smith a pupil of Hume which, of course, suggests that their concepts of sympathy concur (Binmore, 1998: 12). However, in this context, it seems more appropriate to consider Adam Smith a younger friend to Hume with the capacity of critique towards the older one.

Sympathy	$u_i(s_i, s_j)$, with <i>partial sympathy</i> given by $u_i'(s_j)$ ⁴⁹
Altruism	$u_i(s_i, u_{ji}(s_j))$, with <i>pure altruism</i> given by $u_i^*(u_{ji}(s_j))$
Empathy	$u_{ik}(s_i) > u_{jk}(s_j)$, with k as the un-involved observer.

Binmore (1994, 1998) illustrates the working of *empathy* for the case of Adam and Eve: If Adam and Eve are represented by k and i, respectively, $u_{ik}(s_j)$ implies that Adam is the uninvolved observer who needs to imagine himself in her shoes with her preferences (and her beliefs). Thus, starting from the self-centered preference relation $u_k(s_k)$, empathy implies a perfect substitution of roles *and* preferences with the qualification that $u_{ik}(\cdot)$ does not express the preferences of i but the preferences of i *perceived* by k. If this substitution works then it should be possible that Adam is in a position to compare the two alternative situations which could be relevant for Eve: (1) Eve enjoying the apple, represented by s_i° , and (2) Eve enjoying a fig leaf, represented by s_i^* . A possible result of this comparison is $u_{ik}(s_i^\circ) > u_{ik}(s_i^*)$ with the consequence vividly illustrated in Massaccio's "The Expulsion of Adam and Eve from Paradise" in the Brancacci Chapel of Santa Maria del Carmine at Florence. Note that while $u_{ik}(s_i) > u_{jk}(s_j)$ compares k's empathetic preferences of two individuals i and j, related to their corresponding situations s_i and s_j , $u_{ik}(s_i^\circ) > u_{ik}(s_i^*)$ expresses k's empathetic preferences of individual i being in situations s_i° and s_i^* , respectively.

Adam Smith's impartial spectator combines agent i's sympathy with the empathetic preferences of others, k, directed to his or her own position, s_i . Consequently, i's reaction, specified by the choice of a situation s_i , on the assumption of an impartial spectator can be described as $\max u_i[u_{ik}(s_i)]$ subject to s_i .

⁴⁹Here we make the rather plausible assumption that the sympathy we have towards j, based on j's position, depends on our own situation. As a consequence, the partial derivative $u_i'(s_j)$ is valid for a given s_i .

3.2. Mutual Sympathy and Moral Community

Of course sympathy need not be “unilateral”. It is not the case that only one person sympathizes with the other. It may go both ways. If there is a common platform of experience between the members of a society, mutual sympathy should prevail: If I have experienced similar things before, I find it rather easy to imagine myself being in the same position, now experienced by another person. An understanding for the other’s position will result. This is what Adam Smith calls the “pleasure of mutual sympathy” (TMS I.I.14). Not friendly fellow-feelings triggers this pleasure but the fact that sympathy can work because of the common experience which the members of a society share. "Man, say they, conscious of his own weakness, and of the need which he has for assistance of others, rejoices whenever he observes that they adopt his own passions because he is then assured of that assistance; and grieves whenever he observes the contrary, because he is then assured of their opposition" (TMS I.i.2). If our passions (and thereby our evaluations and judgments) are confirmed by others then we feel good, although the passions as such can result from sorrows and pain.

Smith’s moral sentiments require a “moral community” of common understanding and experience (see Darwall, 1999: 160). Given such a community, it seems that, at least in the short run, we have no control of the pleasure of sympathy and the pain of opposition as they "are always felt so instantaneously, and often upon such frivolous occasions, that it seems evident that neither of them can be derived from such self-interested consideration..." (TMS I.i.2.2).⁵⁰

The development of these feelings in the long run could however be modeled by an evolutionary process. We could construct an evolutionary model which demonstrates that pleasure results from a congruence of passion *if there is a common experience*, and this will lead to a convergence of “shared feelings”. The model could, for instance, be constructed along the line of Binmore’s (1994, 1998) theory of justice which focuses on common standards of evaluation to solve social coordination problems. Binmore claims that evolution has provided us with the capacity of the original position, i.e. the capacity to abstract from our current social position, "as an idealized representative of a class of equilibrium selection criteria washed up on the beach along with the human race by the forces of biological and social evolution". He continues: "Here is a tool supplied by Nature. Let us use it to improve our lives, just as we use whatever tools we find in our toolbox when making repairs around

⁵⁰ Even an ultimate hero like Lord Nelson could shed tears in a society which valued this expression of emotions rather highly. In a review article in *The New York Review of Books*, Brewer (2005: 57) adds that the "...idea that the ability to express feelings had become a commonplace of eighteenth century medical theory and philosophy". Here Brewer refers to Adam Smith’s *Theory of Moral Sentiments* and points to a “cult of feeling” which came along with Georgian sentimentalism.

the house" (Quotations from Binmore (1998: 9)). But what guarantees common experience? In a society either characterized by hierarchy and social segmentation or the division of labor common experience can be scarce.

Moreover, there is no guarantee that we get a *social ethics*, i.e., a theory of justice, from the working of sympathy as described above which allows to evaluate a social situation and generalize the result. The fact that all members of the society blush if x prevails, *given a common experience*, does not imply that x is bad, should be banned or forbidden, etc. There is no direct link in Adam Smith's moral theory which transforms the personal experience into a social value, even if this personal experience is shared by all members of the society. One reason is that the very same sensation ("expression of fear") can derive from various experiences and some of them cannot be subject to a moral evaluation. People express fear because nature threatens them ("Black Death") or because they are under the spell of a devilish dictator.

Though sympathizing makes us respect others' situations, it is only weakly related to self-interest or even selfishness. This becomes obvious in the light of the following quotation: "Sympathy ... cannot, in any sense, be regarded as a selfish principle. When I sympathize with your sorrows or your indignation, it may be pretended, indeed, that my emotion is founded in self-love, because it arises from bringing your case home to myself, from putting myself in your situation, and thence conceiving what I should feel in the like circumstances. But though sympathy is very properly said to arise from an imaginary change of situations with the person principally concerned, yet this imaginary change is not supposed to happen to me in my own person and character, but in that of the person with whom I sympathize" (TMS VII.III.7).

In our current use of language, it seems appropriate to substitute "character" in this phrase by "characteristics": they specify the personal and social conditions of the other, but not his or her value system. "When I condole with you for the loss of your only son, in order to enter into your grief, I do not consider what I, a person of such a character and profession, should suffer, if I had a son, and if that son was unfortunately to die: but I consider what I should really suffer if I was really you, and I not only change circumstances with you, but I change persons and characters. My grief, therefore, is entirely upon your account, and not at least upon my own" (TMS VII.III.7). However, one might add, it is still my grief and has no immediate impact about how you feel about the loss of your son.

Thus common experience facilitates sympathizing and renders it habitual as one permanently puts oneself into the other's shoes. It seems quite clear that those people who

often see each other, e.g. at home, share a lot of common experience. Therefore, sympathizing is subject to what might be called social distance. This is due to the different levels of habitual sympathy, leading to different levels of mutual understanding. According to Smith the highest possible degree of sympathizing is that to oneself. "Every man feels his own pleasures and his own pains more sensibly than those of other people" (TMS, VII.II.1). Since we are used to "fellow-feel with ourselves" at all times, we can perfectly well sympathize with ourselves. The degree of habitual sympathy decreases as we sympathize with others, even if we consider the relationship between parents and children. However, as parents sympathize with their children more habitually than with others, they can sympathize better with the former than with the latter. "After himself, the members of his own family, those who usually live in the same house with him, his parents, his children, his brothers and sisters, are naturally the objects of his warmest affections" (TMS, VII.II.2), affections being nothing else than habitual sympathy (TMS, VII.II.10).

3.3. Impartial Spectator and Formation of Social Expectations

Smith derives two consequences of his notion of sympathy: the potential of self-evaluation and the pleasure of mutual sympathy. Let us first look at the potential of self-evaluation. Smith (TMS III.I.2) observes that the "principle by which we naturally either approve or disapprove our own conduct, seems to be altogether the same with that by which we exercise the like judgements concerning the conduct of the other people. We either approve or disapprove of the conduct of another man according as we feel that, when we bring his case home to ourselves, we either can or cannot entirely sympathize with the sentiments and motives which directed it. And in the same manner, we either approve or disapprove of our own conduct, according as we feel that, when we place ourselves in the situation of another man, and view it, as it were, with his eyes and from his station, we either can or cannot entirely enter into and sympathize with the sentiments and motives which influenced it. We can never survey our own sentiments and motives, we can never form any judgement concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them." Smith (TMS III.I.2) continues: "We endeavour to examine our own conduct as we imagine any fair and impartial spectator would examine it."

It could be enough to argue that people follow this pattern and that is why sympathy allows for self-evaluation. But Smith gives a further argument: "In this, therefore, as well as in every other emotion, passion, and habit, the degree that is most agreeable to the impartial spectator is likewise most agreeable to the person himself" (TMS VI.III.53). As we are social beings we do not ignore the judgment of others. On the contrary we strive for their appreciation and are therefore willing to change our habits and our behavior such that others can agree with them.

The *impartial spectator* perspective, which derives from sympathy, thus becomes operational to evaluate, to control and to restructure our behavior. It influences our conduct without identifying the evaluators, i.e., their judgments or, more specifically, their preferences or value systems. In modern terms, this evaluation can be understood as comparison of expected values. There is a certain equivalence between the unknown evaluators and the Rawlsian *veil of ignorance*. In *A Theory of Justice*, Rawls (1972) repeatedly refers to Adam Smith's impartial (sympathetic) spectator.⁵¹ The common experience mentioned above creates the familiarity, paired with universality, on which the impartial spectator functions (see Witztum, 1999: 248).

But how is the opinion of the impartial spectator formed? If I sympathize with somebody else, I imagine myself being in his or her position. Taking up this perspective allows for judging whether I approve or disapprove of the (re-)action of the one being sympathized with by comparing it with my imagined behavior. It is important to note that in a moral judgment one has to consider *all* people involved, i.e. the actors and those being acted upon. In doing so, a moral judgment respects the situations and perspectives of all people concerned. In this way, a moral judgment will create the moral community mentioned above. One can therefore suppose that the judgment will at least meet a minimum condition of what might be called fairness. Having conducted this imaginative exercise with all possible perspectives, I will come to the conclusion that a certain behavior will be adequate for these specific circumstances prevailing in the given moral community. My impartial spectator will take up this opinion and tell me to act accordingly. Therefore "justice consists in the verdict of the impartial spectator on what is properly considered injury in *concrete situations* ... He cannot be purely and simply impartial – he must be impartial in relation to actual and particular people and circumstances" (Haakonssen, 1981: 147, emphasis added).

⁵¹Rawls (1972: 263) assumes unanimity and the *original position* is defined such that unanimity is possible. As he observes, this condition "represents a constraint on arguments" and "shapes the content of the theory of justice, the principles that are to match our considered judgements". Rawls can "afford" these constraints as his work is about the moral basis of society, and not about the conduct of individual people which is operational to Adam Smith (see above).

As we, that is the members of the community, assume all others in the community to perform the same exercise, we expect that they come to similar, in fact, the same conclusions. At least it is only similar conclusions which we will understand. Therefore a social expectation is built up and the impartial spectator may be regarded as a synonym for this expectation.

This expectation is applied when evaluating other people's behavior. Therefore, there is a "first-person-plural perspective I share with all others to whom my judgment is implicitly addressed" (Darwall, 1999: 160). I put myself into the shoes of the person being judged by me. "When I make a moral assessment of someone's motive or feeling, according to Smith, I express a sympathy with it that I expect any one (of us) to share. I impartially project myself into that person's standpoint, not as myself but as any of us, and (attempt to) judge what any of us would be moved to do or feel if in that person's shoes" (Darwall, 1999: 160).

The point of view of the impartial spectator will however exceed our moral community via our behaviors. Whenever we get in contact with people who do not belong to our moral community, i.e. people with which we do not have close contact and, therefore, cannot sympathize, we will nevertheless act in such a manner as my impartial spectator will approve of. Our value system is therefore carried over the boundaries of my moral community via our actions. At least this is the case if we remain situated in my initial moral community and only pass its borders from time to time. Things may change when we come to live within the "other community", as we will now partly adopt the perspectives of others, thereby changing my value system.

3.4. Sympathy, the Impartial Spectator and Group Size

It could be expected that, as the reference group increases and more people are considered as objects of an individual's sympathy, the contact between the individual members of the reference group becomes less close. Even in homogeneous groups habitual sympathy is therefore decreasing, leading to less pleasure from sympathizing with each of them as the feeling of mutual sympathy becomes weaker and less frequent. Moreover, the effectiveness of "sanctioning" through sympathy will decrease as well. "While he [the man of low condition] remains in a country village his conduct may be attended to, and he may be obliged to attend to it himself. In this situation, and in this situation only, he may have what is called a character to lose. But as soon as he comes into a great city, he is sunk in obscurity and darkness. His conduct is observed and attended to by nobody, and he is therefore very likely to neglect it himself, and to abandon himself to every sort of low profligacy and vice"

(WN, V.i.g). This will make sympathy and the impartial spectator less effective in constraining self-interest.

Moreover, given the roots of the impartial spectator, it seems obvious that he cannot be “truly neutral” as we cannot sympathize with all people equally. Those with whom we are in close contact will therefore be over-represented by the impartial spectator, compared to those with whom we have only poor contact. This could explain why certain groups within a society behave so fundamentally different from the rest of the society. Take for example groups of criminals or religious fanatics.⁵² Within such groups seemingly autonomous standards of behavior evolve. In other words, they have developed different impartial spectators. As the members of these groups sympathize only with each other, at least more with each other than with outsiders, they adapt the prevailing norms of the group. As these differ from the ones prevailing outside the group, the “intergroup sympathizing” is hindered even more, possibly making the group drift further from the norms of the rest of the society.

This reasoning becomes important when thinking about effects of group size. As the social bond built up via sympathy is likely to decrease in an enlarging society, the impartial spectator will be unable to fully reflect the perspectives of all its members. It will be biased towards those with whom one has closer contact, or with whom one can sympathize due to common experience. Moreover, if one has to sympathize with more people, one will probably be unable to *fully* respect their corresponding points of view. In other words, our imagination of being in their shoes will be superficial. The members’ expectations about how others will and should behave may therefore diverge, especially if there is no common experience. Subgroups, each of which is bound together by mutual sympathy, are likely to result.

The above argument implies a comparative disadvantage of larger groups as compared to smaller ones with respect to the implementation of moral standards, standards of conduct and evaluation, etc. But larger groups may also have an advantage. Whenever one sees others acting according to one’s values, these values may be strengthened. As large groups offer a large “sample size”, seeing others acting in accordance with one’s values could be more likely in larger groups. This could lead to self-enforcement of certain values within larger groups, seemingly contradicting the argumentation about the development of polymorphic societies. Note, however, that the observation of others acting according to my values implies common experience. Institutions in which this common experience can be built up (schools, universities or theatres⁵³) may serve to create and enforce common values. Evensky (1994:

⁵² For Smith religious groups need not be negative. The re-emergence of attention can be gained by joining a (small) religious group, thereby re-creating the possibility to “control” people via sympathy.

⁵³ For the role of ancient tragedy in the formation of common values, see e.g. Nussbaum (1996: 39ff).

42ff) explicitly mentions education and the existence of role models, that is to say persons exemplifying moral behavior to others through their own life, as shaping factors for moral development.

In small groups, a “continuous” development of the value system could be hard to achieve due to volatility in behavior and evaluations. In small groups each individual’s perspective can have a substantial impact on the attitude of the group. If a group member’s evaluation changes, the impact of this change on the evaluation of the group as a whole could be significant. A certain size of the moral community might, therefore, be necessary in order to secure a certain “inner tranquility” concerning one’s value system and to achieve some stability of the group’s performance.⁵⁴

In light of the above discussion, the perspective of the impartial spectator can be regarded as similar to a statistical hypothesis on moral conduct and social behavior. Given that a certain number of people act in accordance with the hypothesis, the hypothesis can either be rejected or corroborated. How many people will have to act in accordance with the hypothesis, in order to reject it of course depends on the overall number of people “observed”. If the sample size is “large enough” the hypothesis may fail to be rejected even if the number of those acting contrary to the norm appears to be “large”. One should expect that not the mere quantity is decisive but the share of the population. If the share of those acting in accordance with the hypothesis is large, the level of significance is higher, leading to a “strong support” for the status quo hypothesis, i.e. the corresponding impartial spectator will be a very effective enforcement mechanism.

4. Law and Regulations

We have argued that polymorphic societies may emerge from the working of sympathy and the impartial spectator. The diversity of values makes it impossible for morality to successfully coordinate behavior among the members of different moral communities. As a consequence, Adam Smith proposes judges and the law to achieve coordination. “In all well-governed states too, not only judges are appointed for determining the controversies of individuals, but rules are prescribed for regulating the decisions of those judges; and these rules are, in general, intended to coincide with those of natural justice” (TMS, VII.IV.36).

⁵⁴ It could, however, also be argued that a small group faces fewer “changes”, as the likelihood that one of its members face new situations is smaller than in larger groups. In this case, moral standards can get ossified in a small group.

Both morality and the law aim at establishing rules of conduct, but the corresponding mechanisms are different. For instance, on the one hand, morality builds on virtue and guilt as “internal” enforcement mechanisms, as well as on praise and disapproval as “external” ones. The law, on the other hand, builds on external enforcement mechanisms such as punishment (see Shavell, 2004: 595-613). However, the two forms interact. On the one hand, legal intervention can achieve good discipline and discourage vice and impropriety. “The civil magistrate is entrusted with the power not only of preserving the public peace by restraining injustice, but of promoting the prosperity of the commonwealth. By establishing good discipline, and by discouraging every sort of vice and impropriety; he may prescribe rules, therefore, which not only prohibit mutual injuries among fellow-citizens, but command mutual good offices to a certain degree” (TMS, II.ii.1.8). These mutual good offices can indeed be realized, as the legal regulation may change the relative weight of two options for action. “When the sovereign commands what is merely indifferent, and what, antecedent to his orders, might have been omitted without any blame, it becomes not only blamable but punishable to disobey him. When he commands, therefore, what, antecedent to any such order, could not have been omitted without the greatest blame, it surely becomes much more punishable to be wanting in obedience” (TMS, II.ii.1.8). Legal regulation may, therefore, solve coordination problems in “adding” a legal aspect to cases in which members of a society were indifferent before. Legal regulation may furthermore “inform” people of their duties, for “it is very seldom that one has a distinct notion of the foundation of their duties, but have merely a notion that they have such and such obligations” (LJ, 321).

The legal framework, on the other hand, presupposes that the underlying society has matured in an ethical sense. “Absent such civic ethics, order can only be established by countless police enforcing endless dictates of positive law, and this is inimical to the very freedom that is necessary for progress to proceed into the more advanced stages of society” (Evensky, 2005: 66). Too much regulation would hinder the development of the underlying society. Therefore, “Smith clearly feels that a key reason for England’s commercial progress beyond the rest of Europe was its escape from many of the illiberal positive laws that constrained those other nations” (Evensky, 2005: 66).

Given the positive and negative consequences of legal regulation, i.e. the possibility of coordination and the threat of smothering societal development, legislation has to strike a balance between “too much” and “too little” regulation. “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 [legal regulation or commandment] 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). Too much regulation could render the development of an impartial spectator difficult or impossible, as the formation of an impartial spectator presupposes a certain degree of “freedom”. An unconstrained submission to legal regulation renders sympathizing with others unnecessary and imperfect. There is no “putting oneself into the shoes of the other”. However, the formation of the impartial spectator presupposes sympathy.

Now, what is the relationship of heterogeneity and legal regulation? As was argued above, the moral development of people in a society may vary. Therefore, some groups within the society may conclude that legislation has already intervened too much in a specific field, while others would come to the opposite conclusion. In Smithian terminology, some groups may already have developed strong impartial spectators while others have not. Moreover, different groups could also differ according to the “content” of legal regulation: while one group regards a legal regulation as in line with their values, others might regard it as conflicting with their values. Using Smithian terms again, the impartial spectator of some groups may support a certain legal position and the consequences of it, while the impartial spectator of another group may reject it. This may provide a potential for social conflict.

The potential for conflict between morality and the law may even expand to fields where morality seems to be irrelevant at the first glance. “Even when it seems obvious that a legislative enactment does not offend any constitutional moral standard – that traffic laws do not deny anyone due process, for example – morality plays a negative role in that judgement. Like Sherlock Holmes’ dog who did not bark. It may be obvious that traffic laws are unobjectionable in morality; but that too is a moral judgment” (Dworkin, 2006: 17). Consequently, the legitimacy of the legal authority could be undermined.⁵⁵ This may in turn endanger the government. “Civil government supposes a certain subordination” (WN, V.I.b.3). And further “[in free countries] the safety of government depends very much upon the favourable judgment which the people may form of its conduct” (WN, V.i.60). The question naturally arises, how the design of the legal system can prevent the people to regard it as illegitimate.

⁵⁵ For the importance of legitimacy on law obedience “in general”, see e.g. Meares (2000) or Orviska and Hudson (2006).

5. Common Law versus Civil Law

At first glance it seems that Smith had a rather negative view on any form of positive law: “Every system of positive law may be regarded as a more or less imperfect attempt towards a system of natural jurisprudence” (TMS VII.iv.36). In light of the above discussion, however, this statement needs some interpretation. In a perfect world there would be no need for a legal system, as natural jurisprudence would be “self-enforcing”. However, in the imperfect real world, mankind can only come about with imperfect solutions. But some solutions are better than others, and Smith regarded the English solution as the superior one. The reason seems to be evolutionary. Some *ex ante* given feature of the English legal system could have rendered it evolutionarily superior. The mere fact of historical persistence seemed to justify the superiority of the English legal system over other forms, e.g. in France and Scotland (Cairns, 1994: 48ff), in this sense. Or, as new courts and laws take time to be affirmed in practice, a long persisting system has been confirmed over time (Haakonssen 1981: 151ff.). In other words, the superiority of a long-existing legal system is not necessarily given *ex ante*, but can also arise *ex post* because it invites learning.

What feature of England’s law system could bear the evolutionary advantage? Apparently Smith regarded common law to be this feature. In contrast to France and Scotland, for instance, England had adopted common law. The superiority of this regime builds on several features, two of which seem striking. First, it is derived from practice. “The Sentences of former Cases are greatly regarded and form what is called the common law, which is found to be much more equitable than that which is founded on Statute only, for the reason as what is founded on practise and experience must be better adapted to particular cases than that which is derived from theory only” (LRBL, ii.200). Hence, continuously founding verdicts on practical grounds will improve a legal system from an *ex post* perspective.

In more abstract terms, common law seems to bear an informational advantage. Its functioning concurs with Condorcet’s Jury Theorem. This theorem “says that if each individual is somewhat more likely than not to make the ‘better’ choice between some pair of alternatives and each individual has the same probability of being correct in this choice, then the probability for the group majority being correct increases as the number of individuals increases” (Grofman and Feld, 1988: 569).⁵⁶ We therefore conclude that common law converges to correct decisions if each individual contributing to the convention is “somewhat

⁵⁶ Note that the condition that each individual has the *same* probability of being correct is not necessary. As Berend and Paroush (1998) have shown, the necessary and sufficient condition for Condorcet’s Jury Theorem, at least in dichotomous choice models, is that the arithmetic mean of the participants’ decisional abilities is greater than chance. In other words, heterogeneity of the individual probabilities is allowed for.

more likely than not to make the ‘better’ choice.” As common law entails the decisions of the past, it entails the judgments of “many” people. Compared to common law, the number of people involved in the shaping of laws in civil law is relatively limited. Hence, Evensky (1994: 204f) states that the “slow and iterative process of its [common law’s] development gives it its probity. He [Smith] seems to see it as the best method humans could create to realize the distillation of the perspective of an impartial spectator. The standards are those of an accumulated wisdom of many who sought to sit and judge from that perspective. As such it is ‘more deserving of the attention of a speculative man than any other [system of law], as being more formed on the natural sentiments of mankind’ (LJ, 98)” (Evensky, 1994: 204f).

The attempt to approach the perspective of an impartial spectator in legal judgments becomes even clearer in the second, *ex ante* superior feature of common law, the jury. The English system of common law had developed juries constraining the power of the judges and thereby approximating impartiality. By communicating among each other, the members of the jury can overcome their individual (possibly partial) attitudes and overcome shortage of information. In the words of John Rawls, “[I]n everyday life the exchange of opinion with others checks our partiality and widens our perspective” (Rawls 1972: 358). The fact that in real life sympathy is imperfect and people cannot *fully* take the position of those being affected, gives communication its importance. In the imperfect real world, communication is likely to add to the information which derives from sympathy and thus gives the jury better tools to do their duty.

Moreover, as Condorcet’s Jury Theorem implies, by increasing the number of those actually judging from one (the judge) to many (the jury) the probability of being “correct” increases as well. Again, this conclusion holds only if the individual jury members are more likely than not to make the “correct” choice.

Apart from the argumentation about the correctness of judgments, another point appears to have been important for Smith. In Smith’s time the restriction of the power of the judges seems to have been an especially important aspect of juries. Judges, besides the legislator, had a significant role in law-making (Cairns, 1994: 33). Therefore their power had to be limited because “a great number of Judges naturally confirm each others prejudices and enflame each others Passions” (LRBL, ii.201). “The law of England, always friend of liberty, deserves praise in no instance more than in the carefull provision of impartial juries ... Nothing can be greater security for life, liberty, and property than this institution. The judges are men of integrity, quite independent, holding their offices for life, but they are tied down

by the law. The jurymen are your neighbours who are judge of a fact upon which your life depends” (LJ, 425).

It appears that the jury plays a similar role in Smith’s *Jurisprudence* as does the impartial spectator in his moral theory. The jury can be said to be an approximation (and personification) of the impartial spectator (Evensky, 1994: 209). The legal process, when considering a court with a jury, mimics the “internal process” when making a moral judgment. Consider two parties quarrelling about who is right and who is wrong. They do so in pointing out their respective perspectives on what has happened in front of the court consisting of the members of the jury and the judge who takes care that the formal rules of the process are being respected. In Smith’s moral philosophy, these formal rules are those of respecting the other and taking account of their point of view in an *impartial* manner. In other words, the members of the jury are assumed to *sympathize* with the parties. Having sympathized, they will come to a judgment about who is right and who is wrong. Based on the verdict of the jury, the judge decides upon the sentence. Similarly the impartial spectator, as quasi-spokesman of the moral community, will be responsible for a good or a bad conscience to different degrees.

The introduction of a jury may also contribute to the *perception* of the legal proceeding as just, apart from the “rightfulness” of the judgment. Were the sentence passed by one judge only, the parties could regard the verdict as arbitrary decision of this single judge. As outlined above, Smith himself seemed to have regarded the limitation of powers of judges as one important feature in securing justice. More specifically, “[one] thing which greatly confirms the liberty of the subjects in England ... [is] the little power of the judges in explaining, altering, or extending or correcting the meaning of the laws” (LJ, 275). The introduction of a jury could assure that the parties will regard the sentence as legitimate, as the personal multitude of the jury guarantees that it will be balanced. And if the parties involved in a legal case are aware of this balance, they might accept the decision as legitimate. “English law ensured juries were impartial: this was ‘a great security of the liberty of the subject.’” (Cairns, 1994: 47). Moreover, as the process of legal judgment resembles the internal moral process, its procedure, as opposed to its judgment, could per se be regarded as legitimate.

Seen in this light, civil law may clearly appear as inferior to common law. Though this might indeed be the case, a general condemnation of civil law may be fallacious. As Haakonssen (1981: 153) noted, “Smith’s preference for case law and warnings about the dangers inherent in statute law must of course not be taken to mean that the latter can be

dispensed with.” One reason here to fore can be found in sympathy, or, more precisely, in the need for common experience in order for sympathy to work well. Jury members will have to be able to sympathize with the respective parties to the court. If they, however, come from very different social (or cultural) backgrounds, they will not be able to do so. Put differently, the superiority of common law - or more explicitly, the decision of a jury - is limited to such cases where the underlying moral community is homogeneous. In heterogeneous societies common law may be inadequate. Civil law can give clear guidelines of what is “legally appropriate” where sympathizing goes astray and therefore contribute to the acceptance of the verdict inasmuch as consistency is considered a component of fairness.

This conclusion may especially hold true in a changing environment. As civil law can prospectively regulate certain aspects it can provide a stable point of reference in cases in which there is as yet no consensus in the society. Take, for instance, the question whether genetic manipulation of food should be allowed or not. As common law relies on “tradition” it cannot necessarily be applied to innovations without problem. In other words, the impartial spectator has first to be built up before common law can rely on its (past) judgments. It seems, therefore, that there may be more inertia in common law than in civil law. In fact, in “periods of change”, civil law could help to form a common practice, and thus common experience, which could then in turn render the application of sympathy and the impartial spectator possible.

Smith was well aware of the fact that relying on “tradition” could lead to “unsatisfactory outcomes”. For instance, in referring to the case of infanticide, Smith (TMS, V.2.16) observed that “in this [savage] state of society, therefore, a parent should be allowed to judge whether he can bring up his child, ought not to surprise us so greatly. In the latter ages of Greece, however, the same thing was permitted from views of remote interest or conveniency, which could by no means excuse it. Uninterrupted custom had by this time so thoroughly authorised the practice, that not only the loose maxims of the world tolerated this barbarous prerogative, but even the doctrine of philosophers, which ought to have been more just and accurate, was led away by the established custom, and upon this, as upon many other occasions, instead of censuring, supported the horrible abuse, by far-fetched considerations of public utility.”

Closely related to the aspect of a changing environment is the one of a lack of knowledge. Recall that a main condition of Condorcet’s Jury Theorem is that each individual must be more likely than not to make the right choice. In other words, each individual must possess some knowledge about what is “true” and what is “false”. But what if this is not the

case? Consider again the question whether genetically manipulated food should be found in the shelves of our shopping malls. Who would argue that “the man on the street” may contribute to finding the “truth” due to his knowledge about the consequences of genetic manipulation? As it seems implausible that decision makers possess the necessary information, such decisions could be better made by an advisory board consisting of experts. Of course, even experts may fail. But the overall probability that they will do so should be lower than when non-experts are involved in the decision procedure. Generalizing this point further, common law may be advantageous in situations in which the relevant human capital is relatively high. This stresses the potential importance for public education. If public education is not given or it is “weak”, civil law may offer the better solution.⁵⁷

However, legal systems are hardly ever pure cases: either case law or statutory law. Rather, there is always a mixture between them. This fact bears advantages as well, as “[c]ase law cannot fulfil all the needs of a complex society, and to rely solely on it would give judges too much power” (Haakonssen, 1981: 153). In other words, the checks and balances between judges, juries, and the legislature seem to contribute to the legitimacy of a legal system, as well as to its functioning. As was noted above, one of the jury’s main advantages was that it restrained the power of the judges. Similarly, implementing statutes defining what the sentence should be like in abstract terms restrains the judges’ powers. But the reverse is equally true if judge-made law is implemented. The need for this counter-power arises as “[l]aw which is made by some authority other than a judge of concrete cases is liable to be guided by political and religious objectives” (Haakonssen, 1981: 151).

6. Concluding Summary

In this article we have built on Adam Smith’s moral theory in order to discuss effects of group size on moral standards, an issue that is in general not raised in moral philosophy. We have posited that a basis for these effects can be found in the way sympathy and the impartial spectator work. In the real world which is characterized by costly and imperfect sympathy, both sympathy and the impartial spectator presuppose the existence of common experience. As the size of the respective society increases, common experience may be hard to achieve. Morality as coordination device is therefore limited to homogeneous societies, which are assumed to be rather small in size. In order to offset this limitation, larger societies need to introduce other mechanisms, for instance the law. However, as morality and the law

⁵⁷ Schäfer (2006) argues in a similar manner. He proposes the use of “standards”, i.e. vague legal norms, in countries in which the endowment with human capital is high. In countries with low levels of human capital “rules”, i.e. precise legal norms, seem to bear a comparative advantage over standards.

interact, legal arrangements are also subjected to the effects of group size. We have outlined that, whereas common law bears several advantageous features, its applicability is limited to rather homogeneous societies. Moreover, prospective regulation of yet uncertain facts seems problematic with common law. Consequently, in a changing environment with some degree of heterogeneity it seems advantageous to implement components of both common law and statutory law.

A Smithian perspective on legal matters may provide new insights into current debates. One such insight refers to procedural justice. Accordingly, the legitimacy of an authority will tend to increase if people have the feeling of being *treated* in a just manner (see e.g. Tyler 1990 and Meares 2000). The introduction of a jury helps to secure procedural justice if it consists of people who can “understand” both parties, i.e. sympathize with them. This image somehow appeals to the impartial spectator. However, a deeper discussion of this issue is a matter of further research.

CHAPTER 5

Jury on Stage: A Common Law Play^o

Abstract: Legal processes have a theatrical component to them. They offer an audience (the spectators) and actors (the legal parties, lawyers, as well as the jury and judge) who perform a play on the stage of the courtroom. In this paper we focus on the role of the jury, which appears to be simultaneously audience and actor. As audience, it assures that the power of the judge is limited. As actor, the jury is able to play its role in such a way as to incorporate social attitudes into the verdict. Exploring this theatrical component may shed new light on the debate whether juries are a “good” way of finding legal settlements. Further, it could indicate how legal processes are perceived by the public. As our line of argument builds on Adam Smith’s moral and legal philosophy, the analysis may also contribute to the understanding of one of the building blocks of Smith’s philosophy, namely the impartial spectator.

Key Words: Jury, Legal Proceedings, Adam Smith, Impartial Spectator, Theatre

JEL Classification: A13, B12, B30, K40, Z0

1. Introduction

Apparently there is something to the theatre beyond merely telling a story. Martha Nussbaum (1996) for instance, when analyzing the ancient tragedy, found that the way the ancient tragedy was presented, and the topicalities it covered, contributed to the ethical maturation of the society. It could do so by tempting the audience to take up the position of the heroes on stage. Observers felt “compassion” with the roles played. That is, the audience developed emotions towards the characters on stage.

Using different terminology, enjoying a play seems to presuppose and imply that people empathize with the characters. In fact, this empathetic process seems to be one of the most important aspects of theatre. The spectators face the situations and problems of the main characters themselves, as if it were their problems they were actually facing. This introduces the possibility to be confronted with a larger number of decision problems than any individual might be confronted with in his actual life, also rather extreme ones. Theatre allows experiencing situations which can hardly ever be met in real life. To give only one example, although (fortunately) only few people are involved in cases of murder, the ancient Greek society was continuously confronted with it by their tragedies. In addition to being confronted

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with the mere situation, the audience is able to learn how pleasurable ethically correct behavior can be when watching the behavior of the heroes – although the heroes, not only in the ancient tragedy, are of course often killed or ostracized as they are burdened with guilt.

Apart from the variety of situations, the mere fact of being tempted to empathize can bear ethical relevance: the audience practices empathizing. This enhances the empathetic abilities within social interactions. According to Nussbaum (1996), both factors, the practice of empathy and the presentation of alternative situations, could have led to a higher degree of ethical maturation of the Greek society.

Besides empathizing, i.e. taking a different perspective and being involved emotionally, the audience is also invited to form a judgment about the actions performed. In other words, a certain alienation of the audience and the actors is involved as well. Bertolt Brecht's epic theatre can be considered as polar case concerning the role of such cognitive judgment in the theatre.⁵⁸

Not only the audience learns from the play, but also the actors. However, they do so in different ways. The audience empathizes with the characters on stage, while the actors identify with their roles by acting and reacting. Acting, as opposed to watching, implies a greater degree of "physical involvement" than merely empathizing. Note, however, that the difference between actor and audience is often blurred⁵⁹, but for the present purpose it seems sufficient to assume that actors and audience can be treated distinctly.

Theatre is not the only field with theatrical elements. For instance, Ball (1975) analyzes the theatrical aspect of a legal process in front of the court. This, so the author hopes, "may help to clarify its [the courtroom's action] nature and thereby make some small contribution to an understanding of the role of law in our society" (Ball 1975: 82). He finds that "judicial proceedings are themselves a type of theatre" (ibid. 82) which "provide the format of drama" (ibid. 88). Put differently, watching a legal process offers the same potential of ethical maturation as the visit to the theatre, maybe, due to its link to reality, even greater potential.

A word of clarity seems appropriate before proceeding as it is not only one play but two we encounter when watching a legal process. The first, the "play in the small" if you wish, is taking place in front of the jury or a single judge.⁶⁰ The attorneys perform this play in order to convince the jury of their clients' standpoint. As audience of this play the jury finds a verdict. It can do so by letting the jurors employ their empathetic and their cognitive capacities. In other words, both involvement and alienation have to take place on the side of

⁵⁸ Brecht wanted to ban emotions from the stage and only rely on the cognitive abilities of the audience.

⁵⁹ An example will be given at the end of this paper.

⁶⁰ As our aim is to contribute to the discussion surrounding juries, we will in the following only speak of juries.

the jurors. The finding of the verdict makes the jury an actor on a bigger stage, on which the “play in the big” is being performed. This play in the big is the legal process in its entirety, the scene we “as observers without any role” may attend when sitting on the benches for the public. In general, we will in the following focus on the play in the small.

The legal process, the play in the small, provides three theatrical elements: format, space, and audience. The format is, as was found by Ball (1975), that of drama. The element of space can easily be identified as the court room.⁶¹ The third theatrical element, the audience, is, as introduced above, obviously given by the jury.

One way to look at the jury is to regard it as representation of the society that, among other purposes and effects, is supposed to deal with the ubiquitous vagueness of legal norms. Furthermore, and this gives the link to Nussbaum’s analysis, the way in which the jury finds a verdict is due to empathy with other parties of the scenario, namely the accused and the prosecutor. However, empathy per se is not sufficient for legal matters. We also need a cognitive component which compares what we have learned by putting ourselves in the others’ shoes with our standards of behavior, i.e. the law and our moral norms of conduct. As noted above, a certain distance or alienation between the empathizer and the one empathized with is necessary for legal decisions. In other words, a specific kind of empathy is necessary. The kind of empathy we have in mind is what Adam Smith called sympathy. We will outline this building block of Smith’s moral philosophy in section 3. A second building block is the impartial spectator, which, very roughly, can be regarded as the representation of the public. We will argue that both building blocks play a major role in Smith’s legal theory. Actually, his legal theory is closely tied to his moral philosophy, as we will see in section 4. The consequences deriving from this resemblance of legal and moral philosophy for judicial institutions, especially for questions concerning punishment and the application of juries, will be outlined in the subsequent sections.

The aim of our analysis is two-fold. On the one hand, we wish to provide further arguments for the discussion about the advantages and disadvantages of the jury as legal institution. Inasmuch as the jury is seen as a constituent element of the common law this is meant to relieve some of the problems inherent to the question of civil law versus common

⁶¹ Interestingly, the physicality of the court room as such seems to play an important role. Ball (1975: 85f.) reports of the attempt to introduce televised processes, thereby altering the physical appearance of the court room. The Chief Justice found that the “physical alteration of the court-room contributed to a substantive alteration of the trial process which could divert it from the fair and reliable determination of guilt to entertainment, commercialization, or political education. ... Thus, if courtrooms are something more than functional locations, this something more is their theatricality – their appropriateness to the singular theatrical action of judicial proceedings. In a word, a courtroom is, following Bentham, a ‘judicial theatre’ or ‘theatre of justice’” (Ball 1975: 85f.).

law. On the other hand, applying the impartial spectator as actor on the stage of legal settlement could serve as a test of Adam Smith's theory and thereby add to our understanding of it.⁶² In order to highlight the proximity of theatre and legal processes, we will in the following section outline a specific Greek tragedy which confronts us with the difficulties of finding a verdict in case that well-justified rights collide, namely Aeschylus' *Oresteia*. It will serve as reference in the subsequent sections whenever it seems appropriate to illustrate the argumentation with an example.

2. The Oresteia

Aeschylus' version of the *Oresteia*, which is documented in the trilogy *Agamemnon*, *The Libation Bearers* and *The Eumenides*,⁶³ illustrates a conflict of rights. In order to solve this conflict, a tribunal of Athenian citizens is founded, which laid the cornerstone of a jury system. But let us start from the beginning, the fall of Troy. Agamemnon, the commander-in-chief of the victorious Greek troops, paid a high price for his success. In order to defeat the Trojans, he sacrificed his daughter Iphigenia, just as he believed the Gods demanded of him and much to the disapproval of his wife, Clytaemnestra. Apparently his success conceded the sacrifice. Yet, Agamemnon is not a flawless hero. In the moment of his triumph, he for a moment loses control of himself. He seizes Cassandra, a priestess of Apollo, and desecrates the Trojan shrines. He even takes Cassandra back to Greece with him, as slave and concubine.

Of course, this further arouses Clytaemnestra's anger. But she herself is also far from innocent. While her husband was fighting for Troy, she took Aegisthus, a cousin of Agamemnon's, as lover. However, seeing her husband returning home with a concubine strengthens her belief that she has a right to punish him for sacrificing her daughter and offending herself. She plans to assassinate Agamemnon. For this purpose she manages to lure him into the bath where she kills him with three strokes of an axe, in much the same way as an animal sacrifice is made. As Clytaemnestra says herself: "I strike him once, twice, and at each stroke he cries in agony – he buckles at the knees and crashes here! And when he's down I add the third, last blow, to the Zeus who saves the dead beneath the ground I send that third blow home in homage like a prayer" (Aeschylus 1979: 161).

From the point of view of Clytaemnestra, her killing of her husband is merely the enforcement of justice. "Here is Agamemnon, my husband made a corpse by this right hand – a masterpiece of justice. Done is done" (Aeschylus 1979: 162). Yet, despite this scene,

⁶² For a more general discussion of the relationship between Adam Smith's moral and legal philosophy and some consequences for the design of modern legal institutions, see Holler and Lerach (2008).

⁶³ Originally Aeschylus had written a fourth part, which is lost unfortunately.

Clytaemnestra is no blood-thirsty person. Now, as she believes that justice has been done, she holds back Aegisthus who was starting a fight with the citizens of Argos, the people of Agamemnon. “No more, my dearest, no more grief. We have too much to reap right here, our mighty harvest of despair. Our lives are based on pain. No bloodshed now” (ibid. 171).

Although Clytaemnestra is not generally blood-thirsty, she kills Cassandra together with Agamemnon. Before she dies, Cassandra, being a seer, foresees that there “will come another to avenge us, born to kill his mother, born his father’s champion” (Aeschylus 1979: 155). This prediction already hints towards the fact that Orestes, son of Agamemnon and Clytaemnestra, is assigned the role of the avenger. For safety reasons, Clytaemnestra, before she killed her husband, sent Orestes to the royal court of Phocis, a country of one of Agamemnon’s friends, where he is to grow up. However, by the God Apollo he is now ordered to avenge his father by killing his own mother. “Gore them like a bull! he [Apollo] called, ‘or pay their debt with your own life, one long career of grief’” (Aeschylus 1979: 191). This order faces Orestes with the choice between two evils. Whatever Orestes’ choice is, he will have done something wrong; either he will have killed his mother or he will have disobeyed a God. This is the core of his dilemma, which the audience is conducted to take part in.

Orestes chooses to follow the divine order and kills his mother together with Aegisthus. He cuts both to pieces with his sword. But the price he has to pay is high. As Clytaemnestra predicted in her agony, she will haunt him with her Furies. The Furies are multifaceted creatures. On the one hand, they are the spirits of the mother, but they are also partly autonomous from her, at times resembling divine creatures. In other parts, they can be described as the conscience of Orestes. Fagles (1979: 22f.) describes the Furies as “a paradox of violence and potential. Snakes in their hair and black robes swarming, they present a real, objective law – blood will have blood – yet that is a law of human nature, too, and the Furies become the pangs of conscience that can lead to self-fulfilment.”

Clytaemnestra and her Furies call for revenge. By her death she suffered punishment for the killing of Agamemnon. But the one who killed *her*, her own son Orestes, remained unpunished. Having called for the assassination, Apollo supports Orestes in his struggle against the Furies. He throws the Furies out of his temple, but still they haunt Orestes. Orestes heads for Athens in order to plead Athena for forgiveness. However, the case is too complicated for Athena in order to find a fast and clear verdict. Her choice resembles that of Orestes. Either she incites the Furies by setting Orestes free, or she incites one of the gods by

convicting his servant. “So it stands”, she summarizes, “A crisis either way. Embrace the one? expel the other? It defeats me” (Aeschylus 1979: 253).

Instead of ruling the case all by herself, Athena decides to gather “the finest men of Athens” (ibd.) in order to judge about Orestes. This assembly, the first formal jury, is the Areopagus, which then turned to be the establishment of the rule of law, “a tribunal here for all time to come” (ibd.). But before this can happen, the jury faces the difficult choice between punishing matricide and respecting the killing as obedience to Divine order. The decision of the jury highlights the severity of what is at stake. After a legal process in which Apollo defends Orestes and the Furies accuse him, it turns out that the lots are equal. Only at this point in time Athena finally decides that “The man goes free, cleared of the charge of blood” (ibd. 265).

It should be noted that there is a debate on whether the number of lots is equal before Athena passes her ballot-stone or afterwards. Before the ballots are counted, Athena tells Orestes that she will cast her lot for him. Also, the director-instructions say that she is “Raising her arm, her hand clenched as if holding a ballot-stone” (ibd. 264). But if the votes were equal after her ballot has been passed, her vote would weigh more than the others’. However the case may be, Fagles (1979, note to line 767) “prefer[s] to believe that the number of jurors is even, that they may be deadlocked five to five [...] and that Athena’s ballot may simply break the tie.” With the acquittal of Orestes Aeschylus’ version of the Oresteia ends.

3. The Concept of Sympathy in Smith’s Moral Philosophy

When watching the Oresteia or some other tragedy on stage, we are in most cases emotionally involved to a certain degree. Some part of the story usually moves us. In other words, we identify with the actors on stage; we feel what they feel, at least partly. This “feeling with” was termed *sympathy* by Adam Smith. In the *Theory of Moral Sentiments* (TMS) we can read that “[p]ity and compassion are words appropriated to signify our fellow-feeling with the sorrow of others. Sympathy, though its meaning was, perhaps, originally the same, may now, however, without much impropriety, be made use of to denote our fellow-feeling with any passion whatever” (TMS I.I.5). This definition refers to what might be called *weak form of sympathy*. In this meaning, sympathy is merely an ability, as opposed to an evaluation or judgment. That is, one imaginatively changes positions with the other. But this does not necessarily mean that we derive any judgments or emotions from this change of positions.

However, Smith sometimes “smuggles in” a different meaning; something that might be called the *strong form of sympathy*. “To approve of the passions of another ... as suitable to their objects, is the same thing as to observe that we entirely sympathize with them; and not to approve of them as such, is the same thing as to observe that we do not entirely sympathize with them” (TMS, I.i.3.1). Here, sympathy corresponds to the evaluation of the other’s behavior after having put oneself into his position. In this meaning, sympathy may sometimes, though not necessarily, be accompanied by emotions or sentiments. Yet, the two forms of sympathy are closely connected as the strong form of sympathy presupposes the weak form of it. Without an imagined change of situations there can be no approval of the other’s passions. We “empathize” with Orestes, to use Nussbaum’s terminology, before we feel “compassion” with his decision and “feel” that he did correctly – or not. In the following subsections we will further analyze the role both forms of sympathy play in Smith’s philosophy.

3.1. Gaining Information

Leaving aside further details about different notions or forms of sympathy in Smith,⁶⁴ it seems worth emphasizing that the basic function of sympathy in its weak form is to get a clear picture of the position of the other. We gain information about the situation of the person we sympathize with. Put differently, sympathizing tells us a story – namely the story of the one we sympathize with. We perform an imaginative play by sympathizing. We imagine how it would feel being in the other’s position. “Indeed, to ‘substitute’ (to use a term from drama) one’s experiences for another’s, in the way that an actor on the stage does for a character when trying to get inside that character’s emotional life, has as its goal the accurate representation of that character. It assumes a difference between arbitrary reconstruction and true interpretation. One has to know what experiences to substitute, how, and when” (Griswold 2006: 33).

Performing this play also implies to take a broader perspective, as we now see things from different points of view. As Griswold (2006: 26) points out, in Smith’s theory “[t]he sympathetic imagination is not solely representational or reproductive. It is primarily narrative, seeking to flow into and fill up another situation, and to draw things together into a coherent story, thus bringing the spectator out of him- or herself and onto the larger stage. All this holds whether we are observing real persons or actors in the theatre.” Watching Orestes’ actions on stage, we not only see the setting with the eyes of the audience, but we also see it with his eyes and the eyes of the other actors. Griswold (2006: 26) concludes that Smith

⁶⁴ For a further discussion of these notions, see e.g. Haakonssen (1981: 51), Griswold (1999), Holler (2006), or Sutrop (2007).

implies “that our sympathizing with imagined characters is the same kind of process as our sympathizing with ‘real’ people in everyday life. This is one reason why drama and literature not only provide Smith with examples that nicely illustrate the workings of the imagination, but on his account are also important to our moral education. Drama and literature are central to ethics (in particular, to moral education) because the sympathetic imagination is so important to the accurate ‘understanding’ of others and to the formation of ethical judgment.”⁶⁵

Apparently, the importance of sympathy in its weak form is to prepare us for an *evaluation of actions* from an ethical point of view. According to Smith, we have to gain as much knowledge as possible of the action and its consequences before we can find a verdict. Hence, we first of all have to sympathize (sympathy in its weak form) with the person being acted upon and with the one acting. By sympathizing with the former, the one acted upon, we can find out about the “damage” that has been done. By sympathizing with the latter, the actor, we can find out about the motives which drove the action. These motives are important because, according to Smith, the propriety of an action is determined by them. For instance, we have to consider what drove Clytaemnestra’s assassination. If we merely considered the assassination without taking account of the Divine order (and the reasons for this order) Orestes would surely be convicted. But, knowing the bigger picture, this would somehow strike our “intuition” as being wrong.

Both cases of sympathy, i.e. sympathy with the actor and the one acted upon, are important for a “fair” evaluation of actions, again, as we want to get a clear picture of what is going on. That is to say, we want to know “why what happened to whom.” By sympathizing with the actor we find out why something happened, i.e. the motives for the action. We find out “what” happened via sympathy with the one acted upon.

3.2. Evaluating Actions

So far only sympathy in its weak form was necessary. When it comes to *evaluate* the situation, sympathy in its strong form comes to play. “The whole drive behind all sympathizing is, as we shall see, a basic wish to relate or compare our own reactions to those of others. It is only this ‘tension’ between persons that gives rise to all evaluations of persons, of which the act of sympathy is the necessary first step” (Haakonssen 1981: 48f.). After we have sympathized in the weak form, i.e. have seen the situation from the other’s point of view, we can now consider whether or not we agree with the actions of those we have

⁶⁵ Nevertheless it should be mentioned that Smith was not always strongly in favour of supporting real-world theatre groups.

sympathized with. This agreement will be reflected by our “degree” of sympathy – sympathy now understood in its strong form or by other forms of reaction. The information we gathered via the changing of positions may influence the way we “feel” about the other’s actions and how we react on them. In some instances this may lead to approval, in others to rejection. That is, we somehow “feel” and “understand” that Orestes’ decision was the right one, possibly because we can imagine having acted in the very same way. Sometimes the story “touches” us, in which case we may feel either strong approval or reprobation, and sometimes we will be puzzled, irritated and paralyzed.

Just as we have to put ourselves both in the shoes of the actor and the one acted upon, we can now evaluate both the action and the reaction of those people directly involved. Both the evaluation of action and reaction seems important for Smith, because he notes that “[a]s our sense, therefore, of the propriety of conduct arises from what I shall call a *direct sympathy* with the affections and motives of the person *who acts*, so our sense of its merit arises from what I shall call an *indirect sympathy* with the gratitude of the person who is, if I may say so, *acted upon*” (TMS, II.i.5.1, italics added). In “order that sympathy should function as a condition and within the ambit of a moral evaluation it is necessary to pass from direct to indirect sympathy” (Bagolini 1975: 105).

When we, as observers, find that we cannot sympathize with someone’s actions, Smith argues, we immediately have an emotional reaction towards the actor. Consider for instance the case in which somebody was hurt by somebody else. Assume that by placing ourselves in the position of both parties we cannot find any justification (or reasonable excuse) for the action that caused the other’s suffering. Hence, we consider the motives for action as being improper, as Smith would say. In this case, we would develop a desire to see the actor punished for causing the harm. In Smith’s own words, “when the hurtfulness of the action is joined the impropriety of the affection from whence it proceeds, when our heart rejects with abhorrence all fellow-feeling with the motives of the agent, we then heartily and entirely sympathize with the resentment of the sufferer.” And Smith continues: “Such actions seem then to deserve, and, if I may say so, to call aloud for, a proportionable punishment; and we entirely enter into, and thereby approve of, that resentment which prompts to inflict it” (TMS, II.i.4.4).

Note that agreement, understanding and approval include a cognitive element. Hence, Smith’s conception of sympathy (in its strong form) also includes a rational component (see, e.g. Khalil 2007: 13f.). As Levy and Pearl (2004: 336) put it, “Smith holds that sympathy is

akin to an estimation procedure in which we imaginatively exchanging positions while preserving our consciousness.”

Punishment implies that we approve of the resentments of the sufferer. But it also means that we approve of the sentiments of the one punished. First, however, Smith makes clear that the “offender necessarily seems then to be the proper object of punishment, when we thus entirely sympathize with, and thereby approve of, that sentiment which prompts to punish. In this case too, when we approve, and go along with, the affection from which the action proceeds, we must necessarily approve of the action, and regard the person against whom it is directed, as its proper and suitable object” (TMS, II.i.4.4).

We may argue that only if we can compare the resentments of the sufferer and the sentiments of the punished offender, we can assure the proportionality of punishment. To put resentments and the sentiments of punishment “on legal stage” could help to clarify if punishment is appropriate and, in case it is, to what degree. We might for instance see that not all offenders are the proper object of punishment. A policeman who “did his duty” and thereby offended a citizen who transgressed a legal rule is an obvious exception.

The motives that drove Orestes to kill his mother were Divine order and avenge for the assassination of his father. Considering this fact alone makes his action proper, i.e. Orestes has a good reason we can understand. But Clytaemnestra answers her death not by gratitude but by haunting Orestes with her Furies. Obviously, Clytaemnestra cannot sympathize with Orestes’ motives – and (possibly) neither can we, if we see things from her point of view alone. This makes Orestes’ action culpable. This tension between propriety and demerit gives rise to the dramatic core of the story. Apparently, morality alone will not give us a solution, viz. a clear verdict. And even the Goddess Athena first has to establish the Areopag in order to find a clear answer.

4. From Moral to Legal Philosophy

In Adam Smith’s moral philosophy judgments are mainly about moral worthiness of actions. But the introduction of “punishment” allows Smith to export his idea of sympathy and make it the basis of his legal theory. By doing so, Smith also implicitly addresses a different issue: There is no “natural” borderline between “process of applying morality” and the “process of applying the law.” In fact, “[i]t is interesting to see how and in what senses the sympathetic process, as outlined by Smith, is applicable to the decision of a judge” (Bagolini 1975: 103). The law seems to follow morality in certain respects, as can be illustrated by the Areopag. In this case, the assembly of men has no legal guidance at all in finding their

verdict. The jurors can only rely on their morality. And out of the “combined morality” of all jurors the law will evolve.

Although given guidance by legal procedures and norms, any judge will also have to sympathize with the legal parties in order to find out what happened. By sympathizing, he may come to the conclusion that one party was (unrightfully) affected in a negative manner, viz. injured. Thus, as Haakonssen (1981: 100) observes, the concept of injury connects Smith’s moral and legal philosophy: “The concept of ‘injury’ is understood in pure spectator-terms: what the relevant, actual spectators – such as judges and juries – in a given society recognizes as injury is in legal terms injury in that society at that time and is definitive of its rights and laws. And what the impartial spectator recognizes as injury is definitive of absolute rights and justice. This is never spelt out in so many words, but is simply taken for granted throughout, and it is indeed abundantly clear once we analyse Smith’s concrete uses of the central concepts.”

The importance of sympathy for legal aspects, especially crime, is highlighted in Smith’s further elaboration on Jurisprudence. It appears that punishment is mainly driven by the resentment of those affected and the sympathy of those who have the power to punish in their stead (see LJ, 485). In general, however, Smith distinguishes three reasons for punishment, namely “*sympathy with the resentment of the sufferer*, or from *public utility*, or to *satisfy the public*” (LJ, 484, italics added). Note that Smith speaks of “public utility”, which could be paraphrased with “public security” or “social protection”. However, Smith is very explicit for the “natural measure of punishment” that “it cannot be utility” (LJ, 475), i.e. the kind of welfare-based utility calculus being used in standard Law & Economics.⁶⁶ Of the reasons for punishment, only the “emotional reasons” account for the wish to punish criminal behavior. “But though it commonly requires no great discernment to see the destructive tendency of all licentious practices to the welfare of society, it is seldom this consideration which first animates us against them. All men, even the most stupid and unthinking, abhor fraud, perfidy, and injustice, and delight to see them punished. But few men have reflected upon the necessity of justice to the existence of society, how obvious soever that necessity may appear to be” (TMS, II.ii.3.9).

Implicit in these arguments is that a crime is affecting not only the direct sufferer, but the public as well. According to Smith, a crime can be “considered in two lights, as committed against the family injured and against the peace” (LJ, 477). In a similar manner, the sacrifice of Agamemnon’s daughter – a crime from the point of view of Clytaemnestra -

⁶⁶ According to Bagolini (1975: 108), this fact distinguishes Smith from Hume. For Hume the utility or “usefulness” is the principle according to which we provide moral approval. For Smith it is the propriety.

also had an important effect on the public. If one believes in divine signals (and their correct interpretation), this crime helped the Greeks defeat the Trojans.

Further, as we have seen, punishment for crime is thought to satisfy resentments. The punishment is supposed to make us feel good and make the punished aware of the fact that he did something wrong. “Resentment not only prompts to punishment but points out the manner of it. Our resentment is not gratified unless the offender be punished for the particular offence done ourselves, and unless he be made sensible that it is for that action. A crime is always the violation of some right, natural or acquired, real or personal” (LJ, 475f.).

That punishment is not only to satisfy the resentment of the sufferer, but the resentment of the society as a whole becomes clear in Smith’s elaboration on the case of murder. “The greatest crime that can be done against any person is murder, of which the natural punishment is death, not as a compensation but a reasonable retaliation. ... When government became more powerfull, the murtherer was not only obliged to make a compensation to the relations of the slain, but likewise to the publick, who were put to the trouble of lending him their protection on that occasion, against the revenge of those who were concerned” (LJ, 475f.).⁶⁷ This implies that both the sufferer and the society are affected and that even the society, “the publick”, will show something like “sentiments” and feel resentments. Thus, the appearance of negative sentiments, both on the side of the direct victim and on the side of the not directly affected public, seems to be the prime driving factor behind punishment.

5. Proportional Punishment and Impartiality

Of course only a minority of legal trials deals with murder in marriage or matricide as the *Oresteia* does. Finding the correct verdict for the majority of less severe cases may often prove more complicated. But, in principle, the above findings apply to all cases, severe or not: If an action caused harm as well as resentments and the intention for this action was improper, the actor is to be punished. Further, our immediate reaction would call for “proportionable punishment” or a “natural measure of punishment.” What constitutes this measure is so far not clear. In the *Lectures on Jurisprudence* we can read more about the proper degree of punishment. “Injury naturally excites the resentment of the spectator, and the punishment of the offender is reasonable as far as the indifferent spectator can go along with it. This is the natural measure of punishment. It is to be observed that our first approbation of punishment is not founded upon the regard to public utility which is commonly taken to be the foundation of

⁶⁷ Note that in the case of murder the sufferer is not present anymore. However, this does not prevent us from sympathizing with him, as we can sympathize even with the dead (see TMS I.i.1.13).

it. It is our sympathy with the resentment of the sufferer which is the real principle” (LJ, 475f.). Obviously, imaginatively placing ourselves in the position of the sufferer and approving of his resentment, i.e. sympathy (in its strong form), brings us to the conclusion that there is “something wrong”. This provides the basis, our “first approbation of punishment”, in the sense that we now agree that someone has to be punished because someone else has been done wrong. Therefore sympathy (with the sufferer and his resentments) is “the real principle” for punishment.⁶⁸

5.1. Proper Degree of Punishment

In order to know what *degree* of punishment is adequate, we have to abstract from the immediate resentment of the sufferer and our own as spectator. We have to call for the position of the *indifferent* spectator: someone who is not directly involved in the situation to be judged of. In Adam Smith’s moral philosophy the indifferent or impartial spectator represents a second building block, besides sympathy. He is “the man within the breast” (see, e.g., TMS, III.2.32-33, and III.3.26+28+29), a synonym for one’s conscience.⁶⁹ For instance, it is he who tells us which action is *worthy* of praise or blame. The focus on the worthiness of praise or blame, as opposed to actual praise and blame is important, because “by pleasing one man, we ... disoblige another” (Raphael 1975: 91). We avoid this conflict exactly by focusing on the worthiness of an action of which the “man within the breast” informs us.

In order to find out about the impartial spectator’s judgment, we have to sympathize with him. That is, we place ourselves in the shoes of an imagined person. Therefore, one can say that moral self-consciousness requires that I “divide myself, as it were, in two persons” (TMS, III.1.6), namely the impartial spectator and my actual self. We can do so if “our sympathizing with imagined characters is the same kind of process as our sympathizing with ‘real’ people in everyday life” (Griswold 2006: 26). Smith argues that we are powerless against this tendency to sympathize with e.g. actors on stage, even if we don’t want to, as the following passage indicates. “When we attend to the representation of a tragedy, we struggle against that sympathetic sorrow which the entertainment inspires as long as we can, and we give way to it at last only when we can no longer avoid it” (TMS I.iii.1.9).

⁶⁸ Once again, this is apparently the reason why it is important that we can sympathize even with the dead (see TMS I.i.1.13).

⁶⁹ For a deeper discussion of Adam Smith’s impartial spectator, see Raphael (1975) or Leroch (2008).

5.2. Distortions of Punishment

The reason why *impartiality* plays such an important role lies in the fact that punishment is grounded on sentiments. These sentiments are likely to distort our evaluation of an action in the immediate moment of their cause. According to Smith, we evaluate our actions in two different situations. “First, when we are about to act; and secondly, after we have acted” (TMS, III.I.89). In principle, both evaluations should involve the perspective of the impartial spectator. However, the passions of mankind make it (almost) impossible to evaluate actions in a similar manner before and after they have been conducted. “When we are about to act, the eagerness of passion will seldom allow us to consider what we are doing, with the candour of an indifferent person” (TMS, III.I.89). But, “[w]hen the action is over, indeed, and the passions which prompted it have subsided, we can enter more coolly into the sentiments of the indifferent spectator” (TMS, III.I.91). This implies that sentiments need some time to “mature” in order to become “reasonable” and “understandable” for others and others can sympathize with them. As Khalil (2007) puts it, Smith’s introduction of both sympathy and the impartial spectator represents a “break pedal” for our sentiments. Sympathizing and calling on the impartial spectator attenuates our sentiments.

Grounding punishment on our immediate sentiments, without calling on the impartial spectator, would thus distort the punishment. Introducing an impartial instance may level out the distortions created by sentiments and hence offer the opportunity of a maturing society, in which only the “correct” infringements are punished “correctly”. Apparently, a main advantage of a well-organized society with a legal court system is that it is able to level out extreme reactions.

A further source of distortion lies in *what* we in fact evaluate. For Smith actually only the propriety, viz. the motivation, and the merit of an action, i.e. its effect on the one acted upon, should play a role. But in fact, the *actions per se* may, as Haakonssen (1981: 65) puts it, “steal the show” (see e.g. TMS, II.iii.1.7). It could well be that people convict Orestes on the grounds of the mere action of killing his mother, without asking for his motivation, the order of Apollo. Again, just as it is the case with the distorted sentiments, the conflation of motives and actions may lead to a distortion of the verdict. “This bias in all judgements of propriety is, naturally, communicated by means of mutual sympathy throughout any social group. Hence it is that although the ideal objects of our moral judgements are motives and intentions, the actual objects are often actions and their consequences” (Haakonssen 1981: 65) that trigger sentiments and resentments.

5.3. Who Should Punish?

Initially, it seems, it is up to the victims to hold the delinquent responsible. That is, whenever the right of someone is infringed, this creates a right to redress on the side of the victim. Furthermore, this right is directed towards the one who infringed the initial right. “The legal recognition that an action against a person is an injury is based upon the impartial spectator’s sympathy with the resentment of that person, and the right to seek redress is therefore also based upon that spectator sympathy. It is, however, not only the right to seek punishment, but also the right to seek a particular degree of punishment which is dependent upon the approval of the impartial spectator” (Haakonssen 1981: 114).

Apparently, if the victim himself takes revenge for some injury or calls for redress, he will tend to redress “too much” as compared to the standard of the impartial spectator. He, as the direct sufferer, will have strong sentiments against the wrongdoer. In order to overcome this problem of excessive punishment, an impartial “third party” executing the punishment, has to be introduced and improper sentiments thereby excluded.

Seemingly, the mere fact of treating a case in front of a court already helps to introduce an impartial perspective and control resentments. “The theatrical character of lawsuits allows them to redirect aggression. Aggression, the need to fight and have revenge, is acted out and thereby ritually expressed and controlled. It is in this sense that ‘[t]he right to sue and defend in the courts is the alternative of force’” (Ball 1975: 107). Being able to take an impartial perspective then helps the court to secure justice. “Courts may not always or even frequently do justice, but their theatrical quality does contribute to their potential for doing justice by encouraging disinterestedness in the decisionmakers. Actors, judge and jury are asked to play parts in a government of laws and not of people. They are to be those who decide according to law. Fulfillment of the roles enables judgements which rise above prejudice and which, therefore, will more likely be just” (ibid. 101).

6. The Jury as Representation of the Impartial Spectator

Paraphrasing the impartial spectator with our conscience already indicates that he is a rather influential character. At least he is so for a person of real constancy and firmness who “has never dared to forget for one moment the judgment which the impartial spectator would pass upon his sentiments and conduct. He has never dared to suffer the man within the breast to be absent one moment from his attention” (TMS, III.3.25). Constantly acting under the eyes of the impartial spectator actually *defines* a man of real constancy and firmness. This implies that the impartial spectator is the personification of values, of norms of behavior.

“The impartial spectator has normative force in part because it defines the moral point of view already latent in ordinary life. ... The ‘precise and distinct measure’ of virtue is to be found in the ‘sympathetic feelings of the impartial and well-informed spectator’” (Griswold 2006: 39).

It is important to note that Adam Smith’s impartial spectator is built up and influenced by the society surrounding him. In fact, he can be interpreted as representative of and “stand-in” for this public. “When I make a moral assessment of someone’s motive or feeling, according to Smith, I express a sympathy with it that I expect any one (of us) to share. I impartially project myself into that person’s standpoint, not as myself but as any of us, and (attempt to) judge what any of us would be moved to do or feel if in that person’s shoes” (Darwall 1999: 160).

Therefore, the impartial spectator not only tells us what *we* should do. He forms our expectations of what *others* are supposed to do. Put differently, the impartial spectator can be interpreted as epitome of the society’s value system. “It is in this light that I suggest we see Smith’s idea of the impartial spectator. When we strive towards his standpoint we are in reality seeking the position which is most widely compatible with existing values, the position which fits the moral context. ... So it would seem that when we judge of the moral value of an action we consider whether it is in accordance with a general rule and whether the type of action prescribed by this rule is generally compatible with existing values” (Haakonssen 1981: 62).

The impartial spectator defines what could be called the social perspective on a case under consideration. But in fact, the perspective of the impartial spectator is more than just a “position.” It develops normative force, as was found above. It is that kind of behavior we *want* to see enacted, which we “feel” is right. This way of looking at the impartial spectator gives the link to the sentiments and to sympathy, which were discussed in the previous sections.

And yet again we find a close resemblance of Smith’s moral philosophy with his legal philosophy. When it comes to legal decisions, the perspective of the society on a specific case may gain great importance. Firstly, legal rules are always abstract and vague and can therefore not be applied to a specific case without difficulty. According to Hart (1958: 607) “a penumbra of uncertainty must surround all legal rules”, and therefore “their application to specific cases in the penumbral area cannot be a matter of logical deduction ... And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises.” Orestes’ case may serve as vivid example for such a penumbral area. No unambiguous verdict can be found

immediately. Once again, on the one hand, he followed divine order; on the other, he violated a moral standard by committing matricide.

Secondly, if a legal rule is not supported by the society, its enforcement may be rather difficult – except possibly for cases of severe punishment. But even then the severness of punishment could be regarded as improper and induce unintended consequences. For instance, imposing the death penalty for the stealing of apples would probably be regarded as too strict in most western societies and arouse social opposition.⁷⁰

The jury is an institution that may assure that the perspective of the public is respected, at least partly. This seems to be part of the reason for Athene to call in the Areopag, an assembly that consisted of “the best Athenians” (Fagles 1979: 78). Clearly such a noble jury is not available for every earthly trial. At this point of argumentation, the jury may be regarded as more or less random selection of people from the society. As such it may help to find the “social understanding” of given legal rules and the cases to be judged. That is to say, the jury approximates what the society as a whole regards as the social standards for the case under consideration if unbiased. In a (legal) judgment process, as described by Adam Smith, each member of the jury has to individually and impartially sympathize with the parties in the court thereby assuring that they will be respected equally. Via sympathy biases of the parties are leveled out and an impartial position can be approximated.

However, as mankind is not perfect, the jurors may tend to give the parties different weights, thereby distorting their personal verdict. In other words, impartiality may be impossible to achieve *for the individual jurors*.⁷¹ Communication among the jurors may help to overcome these individual biases. Rawls (1972: 358), for instance, found that “in everyday life the exchange of opinion with others checks our partiality and widens our perspective.” Additionally, even if the individual jurors remain partial to some degree, the jury as a whole may reach an impartial verdict if communication is allowed. “The great pleasure of conversation and society ... arises from a certain correspondence of sentiments and opinions, from a certain harmony of minds, which, like so many musical instruments, coincide and keep time with one another. But this most delightful harmony cannot be obtained unless there is a

⁷⁰ This of course does not rule out that a system of terror may suppress social opposition. History is full of examples. What we like to point out is that there are other ways, cheaper in terms of enforcement costs, that provide the same level of silence on the streets.

⁷¹ It seems important to note that the “misunderstanding” of a single juror or judge concerning this social aim is not necessarily the result of a bad intention. “A judge has to apply a rule to a concrete case ... He either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. He ignores, or is blind to, the fact that he is in the area of the penumbra and is not dealing with a standard case. Instead of choosing in the light of social aims, the judge fixes the meaning in a different way” (Hart 1958: 610f.).

free communication of sentiments and opinions. We all desire, upon this account, to feel how each other is affected, to penetrate into each other's bosoms, and to observe the sentiments and affections which really subsist there" (TMS, VII.iv.28). Haakonssen (1981: 171) comes to conclude that it "is hardly surprising that the philosopher of impartial spectating should stress the importance of another product of the early strength of the English courts: the jury system. The feature of the modern jury which Smith emphasizes is exactly that it is likely to function as an impartial observer." Therefore, moral sentiments allow stage the impartial spectator as a jury when it comes to making legal decisions.

Seen in this light, the vagueness of legal rules turns into an advantage as it helps to extract their "true meaning" for a given point in time. "[I]nstead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only 'drawing out' of the rule what, if it is properly understood, is 'latent' within it" (Hart 1958: 612). The judges or the jury are able to identify the meaning of a specific rule for a specific condition of the society exactly because the legal rule is vague. In this sense, the judges or the jury resemble directors of a play who draw out the specificities of the stories that touch the society in this moment in time. Shakespeare will always touch us to a certain degree. But a specific performance, given meaning by the director and the actors, may even enhance its effect if well done.

If the society influences the judicial system, having a close look at the play offered sheds light on the organization of society as a whole. "Judicial theatre, then, holds up a mirror to legitimate society insofar as the courtroom is the locus for trying on, trying out and proving personae juris. It images lawful political community. Accordingly, trial practice may serve as a measure of the out-of-court conduct of nonjudicial officials, such as the police" (Ball 1975: 110).

7. Some Limits to the Application of the Jury

In the light of what has been said in the previous section, it seems odd that juries are not more widely applied than they are. Moreover, it even seems peculiar that the jury in general does not decide on the degree of punishment itself. The answer to these puzzles, we believe, mainly lies in the fact that the application of the jury in the real world faces difficulties which have so far been ruled out in our abstract analysis. It is not the case that the scripts or the theatre play per se are bad – but the actors (or the director) may be worth

improvement. Athena, in choosing the jurors for the Areopag, seemed to have been aware of the necessity of “good” jurors. “These will be men and gods together – the best Athenians, with Athena as their leader” (Fagles 1979: 78).

To enlighten the problem of adequate representation we may apply the Condorcet Jury Theorem. It states that “if each individual is somewhat more likely than not to make the ‘better’ choice between some pair of alternatives and each individual has the same probability of being correct in this choice, then the probability for the group majority being correct increases as the number of individuals increases” (Grofman and Feld, 1988: 569).

The original version of the Jury Theorem presupposes independence among the jurors. However, Berg (1993) has shown that, from a theoretical point, dependence among jurors need not yield the Jury Theorem inapplicable. Yet, crucial for its applicability is negative correlation between the voters. That is, some people will always vote “yes” if others vote “no”. Applied to a jury in the real world, this would mean that some people will always have the opposite opinion of each other. Although this need not be impossible, it seems highly questionable whether this case is the rule. Actual evidence even seems to point to the opposite. For instance, Sunstein (1999) found (in a non-legal setting) that groups whose members were allowed to communicate may polarize. This means that the opinions within a group tend to move towards one extreme opinion within the group. Put differently, the attitudes within the group are in fact not very likely to show negative correlation. Further, by allowing communication, the most extreme opinion tends to be pushed into an even further extreme – at least in cases of judgment of values, as opposed to judgments of fact.

It seems as if two effects distort the attitudes of the individuals in this case, especially if the group finding the judgment is rather homogeneous from the outset. Firstly, as the group is homogeneous, only a limited amount of attitudes is represented. Accordingly, a “good deliberation process” is prevented by a “limited argument pool”, as Sunstein (1999: 4) observes. Communication, which was introduced above as means to overcome partiality, is unable to fulfill this goal in case of homogeneous groups, as the additional information transmitted is not “new”; it does not contribute to a leveling of biases. To the contrary, communication now turns out to have a deteriorating effect. Furthermore, people may adapt their opinion to the one of others if that other opinion is shared by the vast majority of people. This might even be the case if the others’ opinions are wrong. If “A and B believe that fear is justified, C may end up thinking so too, at least if she lacks independent information to the contrary” (ibid. 8).

Secondly, reputation mechanisms may play an important role for the individuals' actions and judgments within a group. "[T]he basic idea is that people care about their reputations, and they speak out, or remain silent, or even engage in certain expressive activity, partly in order to preserve those reputations, even at the price of failing to say what they really think" (ibid. 4). In other words, people often like to see themselves as taking a specific position relative to others. As long as nobody communicates his or her position, everybody takes the attitude he believes to be in the aspired position relative to the others' attitudes. If, after people have communicated among each other, they then observe that, in reality, they do not occupy this position, they tend to change their (expressed) attitudes far enough in the hope to reach the aspired relative position to others in the reference group. The fear of polarization could provide good reason not to give juries the power to decide on the degree of penalty.

If the group is very homogeneous, the effects described above, i.e. the effects of a limited argument pool and reputation mechanisms, may come to play. However, it as well appears to be the case that in order to achieve a "good communication", a certain degree of homogeneity is indeed required. For instance, Sunstein (ibid. 15) observes "good" deliberation "when people perceive fellow members as friendly, likable, and similar to them." In a similar manner, anonymity among group members seems to decrease the amount of information passed to others and thereby hinders deliberation. Moreover, the existence of clearly defined outgroups, i.e. groups distinct from one's own, may favor "good deliberation" within a group as well.

These observations can be interpreted in the way that the ability to sympathize with other members of the group plays a crucial role for reaching a common point of view. Sympathy (in the strong form) can be regarded as rendering the one sympathized with as likeable and similar to oneself. Respecting the fact that we can never fully take the perspective of the other, but will always have to imagine parts of this perspective, we can say that we will have to "imagine more" in cases in which we are very different from each other as compared to those in which we are similar. Thus, the "cognitive effort" necessary to reach a common standpoint or mutual understanding is increased.⁷² If the viewpoints of the group members are similar from the outset, the "cognitive effort" required to understand the other is relatively small.

Explicitly introducing what we have called cognitive effort resembles the introduction of bargaining costs in bargaining theory. As the Coase theorem states, two parties will find an efficient solution to a given bargain if bargaining costs are absent. Similarly, Smith spoke of a

⁷² The term "cognitive effort" should of course not imply that we consciously engage in imagining the others position.

“harmony of minds” which can be obtained if “free communication of sentiments and opinions” is given (TMS, VII.iv.28). But sentiments are communicated via sympathy and are thus subject to cognitive effort. The ideal can only be obtained under ideal conditions, which are not predominant in the real world.

Apparently, there exists a trade-off between the positive and the negative effects of homogeneity. On the one hand, homogeneity facilitates the communication and therefore the flow of information within a group. This effect renders the impartiality of the group as a whole possible. As in all cases of team work, the ensemble has to work together. This presupposes a certain degree of mutual respect and understanding. In different words, sympathy (in the strong form) is already necessary in order to facilitate sympathy and achieve agreement. On the other hand, homogeneity limits the amount of attitudes and information represented within the group. This effect impedes reaching an impartial perspective. The members of the ensemble may enjoy each other’s presence so much that they neglect to play their roles.

Furthermore, the Jury Theorem assumes “good actors”: each juror is more likely than not to make the correct choice. However, there is evidence that in real life this assumption is not met. Tullock (2005: 468) argues that over 60% of the summoned jurors in the USA successfully get around their duty. “Juries typically consist, therefore, of individuals of below average intelligence, below average income and below average productivity. They are made up disproportionately of the old, the lame and the unemployed. They are selected to reflect racial and ethnic diversity and implicitly encouraged, therefore, to think of their role in such terms.” And he continues that, “as general rule they [the members of a jury] do not know the law, and the judges’ instructions are normally confusing. If they did know the law they would still be likely to follow their own ethical principles even if they conflicted with the law” (Tullock 1998: 399f.). Consequently, the knowledge of jury members – at least in the USA – is interpreted as not being sufficient to speak of a high probability that they make the correct choice. This sounds reasonable, at least if the probability of making the correct choice is correlated with the kinds of knowledge stated by Tullock. Consequently, the verdicts of these juries may fail to come to “true” judgments.

8. Back to Stage and the Backstage

The jury as legal institution is surely highly debated. From an abstract point of view we have mostly argued in favor of it. If one accepts Smith’s description of a moral judgment process, the jury could be preferable to other forms of legal settlement as the legal procedure

resembles the moral procedure. Consequently, a legal procedure based on juries could be regarded as “natural”, possibly leading to support from the society. Moreover, the jury as quasi-spokesman of the society gives every member of the society a certain degree of influence on the legal system. “[T]he suggestion is that the action of the courtroom, as a type of theatre, is an image of the manner in which citizens are to have parts of importance and dignity, to be taken seriously and with ceremonious, protective deference, and to have their rights and duties fairly recognized” (Ball 1975: 113). Thus, each member will tend to feel represented by this system, and therefore give assistance and support to it. As Tocqueville (1956 [1835/40]: 32) observed: “I can conceive of a society in which all men would feel an equal love and respect for the laws of which they consider themselves as the authors; in which the authority of the government would be respected as necessary, though not as divine and in which the loyalty of the subject to the chief magistrate would not be a passion, but a quiet and rational persuasion.”

The process of finding approval, paired with the idiosyncratic knowledge derived from individual sympathy with the subjects to the court makes the finding of a common standpoint necessary. This common standpoint can be interpreted as that of a third person, an impartial spectator. In order to guarantee that this third person is not biased towards either of the parties a collective of judges will be formed that can be regarded as a representation of the society’s impartial spectator and of its value system. The impartial spectator is the main actor on the judicial stage of society. It may seem noteworthy that even a rather strict critic of the jury as legal institution, Gordon Tullock, admits that “[i]f what one is trying to do is to produce the democratic outcome, i.e., the outcome which the people as a whole would vote for if they were given a chance, the jury is an excellent technique” (Tullock 1998: 398f.).

However, sometimes the play may misdirect the audience. “The courts may fail to offer an image of the political community by turning in upon themselves, thereby either creating too great a distance from the human realities they are to mirror or overemphasizing the theatrical trappings so that dress and decorum become precious objects in themselves. The courts may also fail to reflect the correct image - the image not of the political community as it legitimately and really is but as it may appear at any present moment when seized by ‘ill humors’. In this latter circumstance judicial masks conceal rather than amplify grievances, and oppression is hidden from view and extended into the courtroom” (Ball 1975: 113f.).

In other words, in order for the jury system to work well, good legal actors are required. These actors have to be able to rely on their “individual” impartial spectator in order to fully extract the potential of the system. But sometimes laymen may confuse reality with

the theatricality of the play. They might be good actors, but forget to rely on their impartial spectator. As Hollis (1985: 222) notes, we “may be inclined to view actors as donning and doffing masks like hats but that is not the only way to conceptualize theatre. Acting can also be regarded less as representation than as expression. This may not seem plausible for village hall theatricals but it rings truer for professional acting...” Therefore, a good actor has to learn to integrate “his personality”, his interpretation of the role. For the juror this implies that he has to learn to call on his impartial spectator, something that seems rather difficult for “village hall” actors. In legal theatre, merely representing instead of expressing may alter the verdict. For instance, one could argue that the propensity to call for severe punishments increases. It adds to the dramaturgy and is therefore fun, or so the jurors might believe, not realizing the reality behind their verdict.

Given the analysis above, the quality of the actors, their ability to express instead of representing, depends on their practice in sympathizing with each other. One way to increase the possibilities of practicing sympathy is to provide arenas for practice, such as the theatre. That could be one of the reasons for public support to the theatre.⁷³

A vivid example of how theatre may affect the well-being of a society (and, as was hinted at in the introduction, how the distinction of actors and audience may get blurred) is given in Ramirez (1991). He reports of a theatre project that involves 650 actors, including 50 horsemen, playing 3.225 roles in a two-hour show. The stage is of 12 hectares and includes a castle and a pond. More than 1.700 inhabitants of Saint-Malo-du-Bois, Le Beaupere, and a dozen neighboring villages helped to put on stage a huge play, twice each week-end throughout the summer. About 11.000 spectators attend each show. The responsibility of this event is with the Association pour la Mise en Valeur du Pays et la Château du Puy du Fou in Vendée, France.

After having visited the event in 1984 and 1986, also participating in its preparation, Ramirez (1981: 85) concludes that while “...attracting tens of thousands of spectators a week over the summer, the people who benefit most from the existence of the Association are without a doubt the over 1.700 members the Association ...” He points out that the “Association and its activities simultaneously preserve and develop the identity of many Vendéans. It expresses it and in a way defines the way it manifests itself, shaping it in the mind of many of the organization’s stakeholders.” It seems that there is a need for identity and the participants feel like this.

⁷³ For instance, Jenkins and Austen-Smith (1987) report grants of 50-60% of the budget of English provincial theatres and Krebs and Pommerehne (1995) report that the share of governmental subsidies to total income of German theatres amounts roughly 85%.

The play stages the history of Puy du Fou from the Middle Ages to World War II. La Vendée “is something like a historic aberration in France.” Its history “does differentiate it from what happened in most of the rest of France” (ibid. 81). The rebellion against the newly established Republic following the French Revolution and the execution of Louis XVI “gave the Vendéans a reputation for being pro-monarchic that has survived to this day” (ibid. 81). Finally, in winter 1794, the Republican army crushed the Vendée rebels. The consequence was massive repressions which involved the shooting of thousands of rebels, “pillaging, ransacking, raping, and destroying much of Vendée, including the castle at Puy du Fou” (ibid. 82). This turned the Vendée into a thinly populated agricultural region and to remain like this for almost two centuries. There is something like “healing” in this theatre project and the wide-spread participation.⁷⁴

Thus, theatre may not only contribute to an ethical maturation of the society as Nussbaum (1996) found. It may also contribute to the “quality” of its legal institutions. And, as our above analysis may have shown, these legal institutions may in turn add to the ethical maturation again. Given its theatrical dimension and its practice of empathy, a jury system has the potential to lead to an ethical maturation of the society as well. However, this potential is combined with a greater risk if the actors are only weak performers. To the best of our knowledge, this specific, theatrical link between morality and the law adds a new argument to the discussion surrounding the use of juries.

⁷⁴ There is however a second story to it. According to Ramirez (1991: 86), the Association provided Phillipe de Villier “with the platform from which he launched his career as politician in the National arena.” De Villier was the most influential actor at Puy de Fou and the key organizer of the event in its beginning. When on March 16, 1986, Jacques Chirac became Prime Minister he was named Secretary of State (i.e., junior minister) for Culture and Communications.

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