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## ADAM SMITH AND THE THEORY OF PUNISHMENT

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### ABSTRACT

A distinctive theory of punishment plays a central role in Smith's moral and legal theory. According to this theory, we regard the punishment of a crime as deserved only to the extent that an impartial spectator would go along with the actual or supposed resentment of the victim. The first part of this paper argues that Smith's theory deserves serious consideration and relates it to other theories such as utilitarianism and more orthodox forms of retributivism. The second part considers the objection that, because Smith's theory implies that punishment is justified only when there is some person or persons who is the victim of the crime, it cannot explain the many cases where punishment is imposed purely for the public good. It is argued that Smith's theory could be extended to cover such cases. The third part defends Smith's theory against the objection that, because it relies on our natural feelings, it cannot provide an adequate moral justification of punishment.

Key Terms: Punishment, Adam Smith, resentment, impartial spectator, retributivism, utilitarianism

### INTRODUCTION

In *The Theory of Moral Sentiments (TMS)* and in the *Lectures on Jurisprudence (LJ)* Smith presents a distinctive theory of punishment.<sup>1</sup> This theory is not well known but is, I believe, well worth discussing. It plays an important part in Smith's

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accounts of morality and society; it differs significantly from the accounts offered by Smith's predecessors and contemporaries; and it embodies an approach to the problems of punishment and desert which contains some important insights but has received little attention in more recent philosophy. In this paper I shall first give an account of Smith's theory emphasising some of its distinctive features and strengths. In the sections that follow I shall consider two lines of objection that have been brought against it.

#### SMITH'S ACCOUNT OF PUNISHMENT

The central claim of Smith's theory is that we regard the punishment of a crime as deserved only to the extent that an impartial spectator would go along with the resentment of the victim. As he puts it in *TMS*, someone appears to deserve punishment if they are 'the natural object of a resentment which the breast of every reasonable man is ready to adopt and sympathize with' (II.i.2.3). In *LJ* he claims that 'in all cases the measure of punishment to be inflicted on the delinquent is the concurrence of the impartial spectator with the resentment of the injured'. He goes on to explain that 'if the injury is so great as that the spectator can go along with the injured person in revenging himself by the death of the offender, this is the proper punishment' (*LJ(A)* II.89–90).<sup>2</sup> This account of punishment is an integral part of Smith's moral philosophy, in which a central role is played by the concept of sympathy. Smith sees this as a matter of entering, in some degree, into the feelings of others. Although he allows that emotions sometimes seem to transfuse themselves from one person to another (*TMS* I.i.i.6.), the cases he has principally in mind are more complicated. As spectators we imaginatively transpose ourselves into another person's situation. We can thus form some idea of the feelings which we ourselves would experience if we were similarly placed and even 'feel something which, though weaker in degree, is not altogether unlike them' (*TMS* I.i.i.2). Smith uses this conception of sympathy to account for our moral sentiments. He deals first with our sense of 'propriety and impropriety'. We regard other people's feelings and the actions which arise from them as right and proper, or as praiseworthy when, on transposing ourselves imaginatively into their situation, we observe that we entirely sympathise with them. We regard them as improper or blameworthy when we observe that we do not entirely sympathise with them. Smith goes on to explain what he calls our sense of 'merit and demerit'. This depends primarily on our capacity to enter into the feelings, not of the person who performs an action, but of those affected by it. If, as spectators, we find that we can enter into the gratitude of those who have been benefited by an act we will see it as meritorious, that is as deserving reward. Conversely, if we can enter into the resentment of those who have been injured in some way, we will attribute 'demerit' to the person who inflicted that injury, that is we will see him or her as

deserving punishment. The proper objects of resentment, and of punishment, are thus actions which tend to do ‘real and positive hurt to some particular persons, from motives which are naturally disapproved of’ (*TMS* II.ii.1. 5). Such acts constitute injustice. They may be contrasted with mere failures of benevolence. The latter may be deplored but do no positive hurt and do not arouse resentment or call for punishment.

Smith was aware that this account contradicts much of what his predecessors and contemporaries said about the purpose and justification of punishment. Plato had famously put into the mouth of the sophist Protagoras the claim that it is irrational to punish someone purely for the sake of what is past. To do so would be to ‘exact blind vengeance like a beast’. Rational punishment, must therefore look to the future. It seeks to ‘correct’ the criminal or to discourage others from emulating him, and, in the last resort to rid the city of those who are incurably wicked by exiling them or putting them to death.<sup>3</sup> These views are echoed, more or less explicitly, by philosophers and theorists of natural law such as Hobbes (1654, 1999: 25), Grotius (1625, 2005: II. 20. 7–9), Pufendorf (1688, 1934: VII.iii. 9–12) and Hutcheson (1747, 2007: III. viii. 9),<sup>4</sup> and by lawyers such as Blackstone (1726, 1970: IV.i).<sup>5</sup> They could easily be accommodated to a Christian orthodoxy which insisted that vengeance or retribution should be left to God.<sup>6</sup> Smith explicitly opposes this tradition when he argues (against ‘Grotius and other writers’) that ‘the revenge of the injured’, not ‘the consideration of the publick good’ is ‘the real source of the punishment of crimes’ (*LJ* (A) II 90–1). In support of this view he points to cases (to be discussed in section 2 below) where the public good is thought to require the infliction of very severe penalties but where these penalties are not seen as deserved (*LJ* II 91; cf. *TMS* II.ii.3.11).

A theory that gives such a central place to the idea of resentment may sound like a recipe for irrationality and vindictiveness. But resentment, as understood by Smith, is not a blind desire that those who have done us harm should themselves suffer some corresponding harm.<sup>7</sup> It is a complex sentiment which makes us desire, not only that someone should be punished, but that he should be punished ‘by our means’ and ‘upon account of the particular injury which he has done to us’. The offender must be made ‘to grieve for that particular wrong which we have suffered from him. He must be made to repent and be sorry for this very action, that others, through fear of the like punishment, may be terrified from being guilty of the like offence.’ (*TMS* II.i.1.6). Elsewhere Smith insists that the object of our resentment is not simply to make our enemy feel pain, rather it seeks:

- ‘to make him conscious that he feels pain on account of his past conduct;’
- ‘to make him repent of that conduct;’
- ‘to make him sensible, that the person he injured did not deserve to be treated in that manner;’
- ‘to bring him back to a more just sense of what is due to other people;’

‘to make him sensible of what he owes us and the wrong that he has done to us’ (*TMS* II.iii.1.5).<sup>8</sup>

All this means that resentment is not merely a response to the experience of being hurt. We resent an injury done to us only when we see it as done by an agent who acted from improper motives. To judge whether the motive for an act was proper or improper we have to put ourselves imaginatively into the position of the agent. We regard it as proper if we find that we can go along with the motive for which he acted and improper if we cannot. So, even if you have harmed me somehow, I will not resent your action unless, on reflection, I see it as having been done from evil intent (or at least from wilful negligence). Similarly spectators will not share my resentment against you unless you acted for motives of which they disapprove. As Smith puts it, ‘if . . . there appears to have been no impropriety in the motives of the agent . . . we can have no sort of sympathy with the resentment of the person who suffers’ (*TMS* II.i.3.1). So punishment will be justified only to the extent that impartial spectators *can* go along with the victim’s desire to retaliate and *cannot* go along with the motives of the one who caused the injury.

We must remember here that the feelings of impartial spectators do not simply mirror those of the victims. They imagine themselves in the same situation as the victims. They may then feel resentment on behalf of people who cannot feel it themselves and even of the dead (*TMS* II.i.2.5). They may also feel indignation toward those who have behaved in ways that tend to do harm, even when no actual harm has occurred (*TMS* II.iii.2.8). But in general the spectator’s feelings will ‘fall far short of the violence of what is felt by the sufferer’ (*TMS* I.i.4.7). This has important implications for Smith’s theory of punishment:

1. It is misleading to suggest that, in Smith’s view punishment ‘looks forward to the satisfaction of the victim and the spectator, not back to the guilt of the criminal’ (Norrie 1989: 232). Punishment may satisfy the victims by affording them pleasure or diminishing their grief, but it is the feelings of the impartial spectator that determine whether punishment is justified. These may not correspond to those of any actual individuals. For example, those who witness the punishment of a criminal may find that ‘the thought of what he is about to suffer extinguishes their resentment for the suffering of others to which he has given occasion’. At the same time they may recognise that they would feel this resentment if they viewed the situation in a cool and impartial way (*TMS* II.ii.3.7).
2. Although punishment, according to Smith, is founded on feeling rather than on reason, there is a sense in which punishments may be judged as reasonable or unreasonable. The act of imagination by which spectators place themselves in the situation of the victim calls for knowledge

and judgement. So their sympathetic feelings, and the punishments that are based on them may be regarded as reasonable when they arise from a genuinely impartial view which takes account of all known circumstances, and unreasonable when they do not.

3. Because Smith recognises that the spectator's feelings will generally be less strong than those of the victim, it would seem that penalties will be less severe than they would be if they were determined purely by the feelings of the injured party.

It is implicit in Smith's account that impartial spectators will go along with a punishment only when it is inflicted for an act which was done with the intention of doing harm (or at least with some awareness that it might cause harm) and from a motive of which impartial spectators cannot approve. Praise and blame ultimately belong to 'the intention or affection of the heart, to the propriety or impropriety, to the beneficence or hurtfulness of the design' (*TMS* II.iii intro. 3–4).<sup>9</sup> Strictly speaking this implies that the actual consequences of an act are irrelevant to punishment. One done out of malice deserves punishment even if it in fact does no harm. Conversely one which does great harm should escape punishment if there was no evil intent. However Smith recognises that, in practice, the actual harm caused by an act does influence our feelings of resentment and hence our judgements as to whether punishment is deserved (*TMS* II.iii.intro.). For example, unsuccessful attempts to commit a crime are generally punished less severely than successful ones even though the motives may be the same in both cases. The reason for this is that we are prone to resent the successful commission of a crime more strongly than the mere attempt (*TMS* II.iii.2.4). Similarly a grossly negligent act, such as throwing a large stone over a wall into a public place, may attract punishment only if someone is actually injured. An act which involves some lesser degree of negligence and does not stem from a bad motive, may not be seen as meriting punishment, but, since it still causes some resentment, the perpetrator may be required to pay compensation (*TMS* II.iii.2.8). Smith sees these 'irregularities' of sentiment as part of human nature and as serving a valuable purpose. If sentiments, thoughts and intentions which had not led to actions were the objects of punishment, 'there would be no safety for the most innocent and circumspect conduct.' 'Bad wishes, bad views, bad designs, might still be suspected.' They would excite 'the same indignation' as bad conduct and 'would equally expose the person to punishment and resentment'. On the other hand the fact that unintended harms still cause a certain 'animal resentment' makes us take care for the happiness of others.

Smith makes it clear that when impartial spectators have no sympathy at all with the motives of an offender they will sympathise with his victim and judge punishment to be appropriate. Conversely when they sympathise entirely with the offender's motives they will judge punishment to be inappropriate:

Before we can adopt the resentment of the sufferer, we must disapprove of the motives of the agent, and feel that our heart renounces all sympathy with the affections which influenced his conduct. If there appears to have been no impropriety in these, how fatal soever the tendency of the action which proceeds from them to those against whom it is directed, it does not seem to deserve any punishment, or to be the proper object of any resentment' (*TMS* II.i.4.3).

This leaves it unclear what happens in cases when spectators disapprove of an act but, nevertheless, have some sympathy with the motives of the perpetrator—for example in cases where someone commits theft out of a desire to save his or her family from dire poverty. One might suppose that sympathy with this unfortunate person would make spectators less prone to share the resentment of the victim and that this, like the point made in 3 above, would have the effect of diminishing punishments. But Smith himself does not say this. Indeed, apart from a passage in *L J (A)* II.147–9 where he says that the penalties for theft are too severe, he seems to go along with the penal practice of his time, including the widespread use of the death penalty. So, although Smith's theory could be developed in humanitarian directions, he himself does not take that step.

Smith recognises that just punishments generally serve the public good. They deter crime, 'correct' the offender and sometimes physically prevent him from repeating his crimes (*TMS* II.i.1.6). They thus enforce the laws of justice without which society could not survive. But that is not the primary purpose of punishment. Nature has implanted within us a 'consciousness of ill-desert' together with 'terrors of merited punishment' as 'the great safe-guards of the association of mankind, to protect the weak, to curb the violent and to chastise the guilty'. It thus leads us by natural principles 'to advance those ends which a refined and enlightened reason would recommend to us' (*TMS* II.ii.3.3–5).

Smith goes on to argue, apparently with Hume in mind,<sup>10</sup> that it is not a recognition of the importance of justice for the survival of society that leads us to approve of punishment. He concedes that we sometimes appeal to such considerations in order to confirm our natural sense that punishment is appropriate. He imagines someone who has been convicted for a dreadful crime and is about to suffer for it. When we see him 'broken and humbled by the terror of his approaching punishment' we may begin to take pity on him. But then we may reflect that his punishment is for the good of society and that showing compassion to the criminal would harm other people (*TMS* II.ii.3.7). We may also appeal to utility<sup>11</sup> in defending the established rules of justice against attack. When the 'young and the licentious' ridicule the most sacred rules of morality we may think a mere appeal to feeling inadequate and argue, instead, that these rules serve the general interest. But this, Smith claims, is not what first animates us against 'licentious practices'. All men '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' (*TMS* II.ii.3.8–9).<sup>12</sup> He goes on:

[W]e are no more concerned for the destruction or loss of a single man, because this man is a member or part of society, and because we should be concerned for the destruction of society, than we are concerned for the loss of a single guinea, because this guinea is a part of a thousand guineas. In neither case does our regard for the individuals arise from our regard for the multitude: but in both cases our regard for the multitude is compounded and made up of the particular regards which we feel for the different individuals of which it is composed' (*TMS* II.ii.3.10).<sup>13</sup>

His position here is in keeping with his general view that nature is providentially ordered. Its 'Author' intends the happiness of mankind but wisely has not left us with the task of working out how to achieve this. He has, instead, endowed us with natural instincts which lead us to act in ways likely to promote our happiness. Thus we have an 'immediate and instinctive approbation' of 'that very application of punishments' which is most proper to ensure 'the welfare and preservation of society' (*TMS* II.i. 5.10). Even if such references to the divine authorship of the universe are not meant literally, Smith clearly does believe that following our natural sentiments will, in general, promote our happiness.<sup>14</sup>

Although he does not make the point explicitly, Smith could also argue that punishments which are grounded in our natural feelings of resentment are more likely to promote the cohesion and well-being of society than are ones explicitly designed for that purpose. A key element of his moral theory is the idea that we desire not just to have the approval of others, but to be worthy of approval. We fear being blameworthy rather than being blamed, and 'dread the thought of doing any thing which can render us the proper objects of the hatred and contempt of our fellow-creatures'. This is so even if there is no possibility of our actually being hated or condemned on account of them. Smith even claims that this has led 'men of the most detestable characters' to admit their guilt and accept their punishment' (*TMS* III.2.9). These points help to explain how punishment can have a beneficial effect on offenders. Because it is justified by the spectators' sympathy with the resentment of the injured party it serves as a forceful expression of the hatred and contempt which society feels towards the criminal. Thus Smith's theory provides a psychological basis for the idea that punishment can serve to 'correct' the criminal, to make him repent and to understand the wrong that he has done. It would also explain how punishment might help offenders to 'reconcile themselves to the natural sentiments of mankind' and become 'the objects rather of compassion than of horror' (*TMS* III.2.9). If Smith is right on this point, he has more resources than philosophers in the tradition of Grotius for arguing that punishment can have a corrective effect.<sup>15</sup> On his account, it is precisely because



punishment is grounded on natural feelings, rather than on the supposed good of society, that it can bring the criminal to recognise his guilt and seek to reform.

Much modern discussion of punishment is based on the distinctions (a) between forward and backward-looking justifications and (b) between revenge and retribution. Smith's theory does not sit easily with either of these distinctions. One important point here is that resentment, as Smith understands it, is not a purely backward-looking emotion. It does indeed respond to the injury that has been done but, on Smith's account, it also seeks to make offenders conscious of their guilt and thus to bring them to a sounder frame of mind. In this sense it is also forward-looking.

Those who distinguish between retribution and revenge may refer to the following points:

- (a) Revenge is a personal response to some hurt that has been done. Only those who have been hurt and those who have personal ties to them can desire or exact revenge. Revenge also has an emotional element in that it affords pleasure or satisfaction to victims or those associated with them. Retribution, by contrast, is impersonal in the sense that the individual or agency which exacts it need have no connection to the victim and may feel no particular emotions.
- (b) Those who seek revenge for some act must see it as hurtful but not necessarily as wrong. Neither are they committed to avenging similar acts done to others or even to themselves on similar occasions. Those, on the other hand, who exact retribution must see the act as wrong (rather than as merely hurtful) and must be acting on some general principle which would require similar actions in similar cases.
- (c) There are no internal limits to the severity of revenge. One might, for example, kill someone in revenge for a minor slight. Retribution, by contrast, is based on the idea that the nature of the crime sets limits to the severity of punishment.<sup>16</sup>

Smith's language sometimes suggests that he sees punishment as an act of revenge. But, given the distinctions we have just made, this impression is misleading. In his view punishment is determined by the sympathy of impartial spectators who, by definition, feel no personal tie to the victim. They see the act which is punished as wrong (rather than merely hurtful), they act on general rules and they see the nature of the crime as determining the proper severity of the punishment. All this may suggest that Smith is concerned with retribution rather than revenge.<sup>17</sup> Like the retributivists he emphasises the idea of desert and sees utilitarian considerations as playing, at most, a secondary role. But there is still an important difference between his theory and other forms of retributivism. The latter typically rely on an appeal to reason or a 'moral faculty' to support their

view that criminals deserve to be punished. Thomas Reid, for example treats the claim that ‘There are some things in human conduct that merit approbation and praise, others that merit blame and punishment; and different degrees either of approbation or of blame, are due to different actions’ as a first principle of morals for which no further justification can be given (*AP* V.i. 637b).<sup>18</sup> The distinctive feature of Smith’s account is that he founds punishment on the natural feelings of resentment felt by victims of crime and by those around them.

This naturalistic form of retributivism avoids some of the main difficulties of utilitarian theories<sup>19</sup> and of orthodox retributivism. It also has attractions of its own. The emotions and attitudes on which it grounds punishment obviously do play an important role in sustaining our penal practices.<sup>20</sup> It attends to the resentment of the victim and the indignation of onlookers, while, at the same time, treating the criminal as a subject for concern in his own right. It stresses the feelings of the person who is punished towards himself and the effect of punishment upon these feelings. It associates punishment with the very real need of most human beings for the approval of others. And, as we have seen, it could be developed in humanitarian directions. In these respects it is a good deal in common with recent expressivist and communicative theories of punishment.<sup>21</sup> All these points do, of course, presuppose the moral psychology of *TMS*. I shall not pursue that general issue here but in the next two sections I shall look at some more specific points of difficulty that have been raised in recent scholarship.

#### PUNISHMENT AND THE PUBLIC GOOD

The account given above may leave the impression that, in Smith’s view, punishment can be justified only to the extent that it responds to an injury done to some particular individual, and that considerations of the general interest therefore have no role to play. In at least one passage Smith seems to make this point explicitly. In part VI of *TMS*, added in the edition of 1790, he writes:

Proper resentment for injustice attempted, or actually committed, is the only motive which, in the eyes of the impartial spectator, can justify our hurting or disturbing in any respect the happiness of our neighbour. To do so from any other motive is itself a violation of the laws of justice, which force ought to be employed either to restrain or to punish (*TMS* VI.ii.intro. 2).

However this cannot be the whole story. Smith is fully aware that governments must make regulations to promote the security and well-being of society and that, in doing so, they may penalise actions which, in themselves, involve no harm to individuals. In *TMS*, after arguing that ‘it is not a regard to the preservation

of society, which originally interests us in the punishment of crimes committed against individuals', Smith adds:

Upon some occasions, indeed, we both punish and approve of punishment, merely from a view to the general interest of society, which, we imagine, cannot otherwise be secured. Of this kind are all the punishments inflicted for breaches of what is called either civil police,<sup>22</sup> or military discipline. Such crimes do not immediately or directly hurt any particular person; but their remote consequences, it is supposed, do produce, or might produce, either a considerable inconveniency, or a great disorder in the society (*TMS* II.ii.3.11).

Smith illustrates this point with the example of a sentinel who is put to death for falling asleep while on watch. He goes on:

This severity may, upon many occasions, appear necessary, and, for that reason, just and proper. When the preservation of an individual is inconsistent with the safety of a multitude, nothing can be more just than that the many should be preferred to the one. Yet this punishment, how necessary soever, always appears to be excessively severe. The natural atrocity of the crime seems to be so little, and the punishment so great, that it is with great difficulty that our heart can reconcile itself to it. Though such carelessness appears very blameable, yet the thought of this crime does not naturally excite any such resentment, as would prompt us to take such dreadful revenge.

In *LJ* he uses the same example as part of an argument to show that the public good is not the natural intention of punishment. In cases such as this 'the punishment enacted by law and that which we can readily enter into is very different' (*LJ* (A) 91–2).

These passages are very puzzling. It is clear that, in Smith's view, we see a punishment as deserved only if it responds to an injury done to some particular person or persons. The sentinel's case does not involve such an injury. Thus he does not, strictly speaking deserve to be punished. The passage cited from *TMS* VI clearly implies that punishment in such circumstances is unjust. But in *TMS* II he says explicitly that we approve of the sentinel's punishment and see it as just. It is not surprising, therefore, that one recent critic (Norrie 1989: 230) has accused Smith of adopting contradictory positions.

One way of dealing with this difficulty is to hold, with Raphael (1972–3: 95–7), that Smith sees the sentinel case as an 'exception that proves the rule'. It is exceptional in the sense that the special circumstances of the case override the normal rules of justice. This reading is plausible, especially given the tradition of thought going back to Roman times which held that normal principles of justice do not apply to military discipline. It would certainly explain why Smith sees the

punishment of the sentinel as ‘proper,’ but may leave us puzzled as to why he should also see it as ‘just’. Raphael regards this latter claim as an oversight on Smith’s part. Smith, he suggests, was ‘too ready to agree that *justification* on the grounds of utility makes an act *just*’. A punishment, such as that of the sentinel, which ‘does not fit the crime in terms of desert’ is an injury to him and is thus unjust. ‘It may still be warranted as right and proper on the grounds of a degree of utility great enough to override the injustice, but *unjust* it remains.’ Thus, Raphael argues, Smith was conceding too much to utilitarianism when he allowed that the punishment of the sentinel was not merely ‘proper’ but also ‘just’.

This may be a satisfactory way of handling examples which fall under military law. In such cases, an act that is not particularly harmful in itself can imperil the lives of others and even threaten the security of the state. It might therefore be argued that the sentinel should suffer the extreme penalty even though he does not really deserve it. But that does not account for the many cases in civilian life where behaviour is penalised primarily because it is contrary to public interest. These include cases of what Smith would call ‘police’, that is regulations covering trade, commerce, agriculture and manufacturing, where governments quite properly establish laws with the aim of promoting the well-being and prosperity of the nation. As a result, actions which are innocent in themselves often become liable to punishment:

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. 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 (*TMS* II.ii.1.8).

In *LJ* Smith places a case of this kind alongside that of the sentinel. He tells how the British government once ‘took a fancy’ (which Smith calls ‘a very whimsical one indeed’) that the country could not prosper if people were permitted to export wool. It therefore decided to prohibit such exports and enacted that violations of this regulation should incur the death penalty. Since ‘[t]his exportation was no crime at all, in natural equity, and was very far from deserving so high a punishment in the eyes of the people’ the law, proved unenforceable. No one was prepared to co-operate in punishing so severely such an ‘innocent’ action and the government was forced to reduce the penalty to the confiscation of the goods and the vessel (*LJ* (A) II.91–2; cf. *LJ* (B) 182; *WN* II. 647–8). Smith uses this case, and that of the sentinel, to show that our feelings as to whether an act does or does

not deserve punishment are not determined purely by considerations of the public good. But there is another respect in which the two cases differ from one another. Smith thinks it 'proper' for the sentinel to be put to death, even though we look on him with pity rather than with resentment or indignation. In the case of the wool exporters, on the other hand, he sees the fact that their acts do not arouse any hostile feelings as showing that the death penalty is inappropriate.

Haakonssen suggests that Smith would see economic regulations, such as the law against exporting wool, in the same light as those of military discipline. He points out that, in setting out the priorities of the sovereign, Smith puts 'defence against foreign enemies' before 'an exact administration of justice' (1981 93–5, citing *WN* iv. ix. 1, and v. I). He takes this to explain Smith's attitude to punishments such as that of the sentinel (122), and argues that Smith would draw a distinction between a narrower sense of '[natural] justice', which is concerned only with acts injurious to other individuals, and a broader sense in which an act that is necessary for the preservation of the community may be called 'just'. In many cases 'punishments which are . . . justified by the overall utility of the laws which they are meant to protect will be inconsistent with natural justice and punishment'. Where this happens 'the system of punishment must follow the area of law to which it is related.' The provisions of military law therefore take precedence over everything. So far as 'police' and 'revenue' are concerned, Smith criticises many existing laws and the punishments attached to them. But he does recognise the need for some laws in these areas. He would 'presumably' accompany them with 'reasonable provisions for punishment', but 'unless it can be shown that such laws are of the greatest importance in supporting the defence system of the country or are in some other way essential to the continued viability of society, the requirements of natural justice must take precedence' (121–2).

It is certainly true that Smith sees defence as the first priority of government. It is also clear that he justifies some commercial regulations by considerations of defence (*WN* II.v.30; IV.ii.30; IV.v.a.36). It is possible, therefore that he would see some laws of 'police' as analogous to those of military discipline. But it is unclear precisely what Haakonssen has in mind when he suggests that 'the system of punishment must follow the area of law to which it is related' and that, except in cases of the greatest importance 'natural justice must take precedence.' Two possibilities come to mind. The first is that, in Smith's view, all laws of police are of such importance that they override the claims of natural justice. But this is highly implausible. It would involve the suspension of natural justice in dealing with a large number of relatively minor offences. Moreover Smith holds that the primary aim of police is 'opulence' and recognises that this is much less important than defence (*LJ(A)* 2; *WN* IV.ii.30). The second possibility is that only a limited number of regulations are vital to national security and that in all other cases the rules of natural justice apply. The trouble with this suggestion is that, as we have seen, Smith's conception of natural justice seems to rule out any punishments

designed primarily to promote the general good. So, if natural justice always took precedence in cases other than those affecting national security, no one could be punished for violating laws which were designed merely to promote opulence or convenience. So the problem remains: 'How could Smith justify punishing acts which are innocent in themselves but are prohibited by the laws of police?'

We may note here that a similar issue arises for other forms of retributivism which (a) justify punishment as a response to moral wrongdoing and (b) allow that the state may penalise actions which are not wrong in themselves. The standard response to this problem is to argue that once a law has been passed by a legitimate government it becomes immoral to disobey it. Thus the effect of the law is that an act which was previously innocent comes to deserve punishment. As Reid puts it '[w]hen the laws are equitable, and prescribed by just authority, they produce moral obligation in those that are subject to them, and disobedience is a crime deserving punishment.' (*Active Powers* 613b–614a; cf. 662a). The difficulty for Smith is that his theory, unlike Reid's, implies that punishment can be justified only as a response to injuries done to individuals. Smith does not explain in any of his surviving writings how he would solve this problem. But one can see in a general way how his account of punishment might be extended to deal with this difficulty.

In the passage from *TMS* II.ii.1.8 cited above: Smith claims that '[w]hen the sovereign commands what is merely indifferent, and what, antecedent to his orders, might have been omitted without any blame, it becomes not only blameable but punishable to disobey him'. Given Smith's general moral theory the claim that an act is both blamable and punishable should mean that an impartial spectator would disapprove of it and would approve of the perpetrator being punished. Thus Smith must hold that, even when an act is forbidden for the sake of the public good, the sympathetic feelings of the impartial spectator still determine whether, and to what extent, it is punishable. This raises the question 'Why should impartial spectators approve of punishing acts which, prior to the promulgation of the relevant law, were not seen as in any way harmful?' On a Humean conception of sympathy, they might be seen as sharing impartially the feelings of all affected by an act. Their judgements would then have a utilitarian character.<sup>23</sup> But that is not Smith's view. On his account impartial spectators will approve of an offender being punished only if (a) there is an injured party or parties who might be expected to feel resentment towards the offender, and (b) the spectators recognise that in the same situation they would feel the same way. Suppose, then, that a law has been passed forbidding some activity that, in itself, does no harm to individuals. Before the law was passed this activity caused no resentment but, one could argue that, once it came into force, the situation changed: breaches of the law could cause a resentment with which the impartial spectator could sympathise. The reason for this is that laws give rise to rights and expectations. In *LJ* Smith calls these 'adventitious' rights. To illustrate these, he

points out that, if we behave disrespectfully to someone ‘dignified with an office or title’, we injure him in his capacity as a citizen. If we assume a ‘title of nobility’ to which we have no right we injure our equals by claiming superiority over them and our superiors by claiming equality with them (*LJ(A)* I 10–11). These examples sound strange to us, but the general point is clear enough. Laws change the character of our acts. One which was previously innocent may be harmful once a law has been passed. So, even if the law was designed to promote the public interest rather than to protect the rights of individuals, violations of it may be seen as injurious to the rights of other people. It is this resentment, rather than considerations of the general interest, which justifies the punishment of those who disobey. This point could be applied to the law on wool exportation. Presumably this activity was innocent in itself, but those who continued to export wool after the law was passed were disobeying the government. They thus violated the rights of the sovereign. They could also be seen as taking unfair advantage of those who complied with the law, so law-abiding citizens might well feel a resentment with which the impartial spectator could sympathise. Finally one could argue that, while no single act of wool exportation does identifiable harm, such acts are nevertheless harmful when done on a large scale. Those who understood this might have felt resentment against wool importers in general but this could not be focused on any particular individuals. However, once the practice has been forbidden and the majority are obeying, resentment does, quite naturally, become focused on the few who disobey.<sup>24</sup>

This account is highly speculative but it does show that Smith has the resources to meet the problem we have been discussing. If he were to adopt it he could preserve the main lines of his theory of punishment while recognising that much legislation is designed to serve the public good rather than as a response to breaches of natural justice.

#### SMITH’S NATURALISM

Paul Russell (1995: 137–153) develops a critique of Smith’s position by contrasting it with what he takes to be Hume’s account of punishment. In his view the two authors agree that our moral sentiments determine whether we see individuals as deserving punishment or reward. In particular we see individuals as deserving punishment if their actions attract negative sentiments such as resentment or indignation. But Russell thinks that their theories of punishment, nevertheless, differ in an important way. He follows H. L. A. Hart in distinguishing two different kinds of question which may arise in connection with the justification of punishment. The first concerns the general justifying aim of the institution or practice. It asks ‘What is the end or purpose of the practice of punishment?’ The second concerns the distribution of punishment. It asks ‘Who

may be punished and how severely?' On Russell's interpretation, Hume answers the first question in a utilitarian way, by arguing that the general justifying aim of the practice is to promote the public good. It does so by deterring crime and reforming offenders. However he would give a retributivist answer to the second question. He would argue that punishment may only be inflicted on those who deserve it and that it is the moral sentiments which determine who these are. Thus the purpose of punishment is to serve the public good but it may not be inflicted on individuals unless their actions give rise to appropriate sentiments. On Russell's account Hume is thus a 'negative retributivist'.<sup>25</sup> Smith on the other hand is a 'positive retributivist'. In other words he thinks there is a positive duty to inflict punishment on those who deserve it, whether or not punishing them does any good. He thus offers 'a wholly backward or retributive account'. Russell believes that, in this respect, Hume is right and Smith is wrong. There is what he calls a 'justificatory gap' between our sentiments and the practice of punishment. 'It simply does not follow from the fact that our sentiments of blame or resentment are justified that we are therefore justified in intentionally inflicting suffering or pain on the individual concerned.' This gap is most apparent when we think of the practice of punishment as a whole. 'Why should society spend its energies and resources on constructing and maintaining institutions and practices of this nature?' Russell thinks that Hume can answer this question while Smith cannot.

According to Russell, this divergence between the two authors rests on a more fundamental disagreement. Smith holds that punishment is so deeply embedded in our nature that we have little choice in the matter. This need not mean that our retributive practices are essentially involuntary or 'spontaneous' in the sense that they are not matters choice: Smith could allow that, while our natural sentiments are fixed, we do have some choice as far as the practices are concerned. But Russell holds, nevertheless, that Smith's view would block all proposals to eliminate punishment or to reform it in a radical way. Hume, by contrast, holds that 'our commitment to the whole framework of the moral sentiments is not such that it is psychologically or practically impossible for us to free ourselves of retributive practices.' In other words we need not regard our wills as 'controlled and dominated' by our retributive feelings. We can check those feelings in order to pursue socially desirable ends. There is, therefore, room for forward-looking, consequentialist considerations to come into play.

In response to this we may query whether Smith's naturalistic theory of punishment does, in fact, mean that our wills are so dominated by retributive feelings that it is impossible to engage in radical criticism or reform of our penal practices. The key to Smith's account is, I suggest, the role played by imagination in his account of sympathy. We all have a natural capacity to transpose ourselves imaginatively into the position of other people, to recognise that we would have similar feelings if we were in their situation, and, in some measure, to share those



feelings. If we become aware that our feelings do not coincide with the feelings of other people we seek to avoid the contradiction by modifying our feelings. The result is that we tend to adopt the sentiments of the impartial spectator. This tendency is essential to the social nature of humanity. Without it there could be no society and no morality. This implies that both the resentment we feel when we are injured and our tendency to enter sympathetically into the feelings of others are part of human nature. Smith's view is thus naturalistic, but it leaves room for variation among societies and for progressive development.<sup>26</sup> Different social circumstances lead to the encouragement or suppression of different sentiments. Punishments that are practicable in one set of circumstances may not be in another. Increasing knowledge may lead us to see our own acts and those of others in a new light with consequent changes in our sentiments. The development of society may also lead us to extend the range of our sympathies. At an early stage the impartial spectator whose sentiments we adopt may share all the attitudes and prejudices of our own family and tribe. As society develops we become aware of a wider range of attitudes within a nation, or even the whole civilised world, and may come to see our old attitudes as themselves embodying a partial viewpoint. So although, the core facts of human nature remain unchanged, they can lead to very different views of punishment and leave room for criticism and improvement. We can, therefore, reform attitudes and practices. For example, getting people to understand the causes of crime may help to mitigate the resentment they feel against offenders. Conversely getting them to enter imaginatively into the situation of victims might increase their indignation against some practice, such as the abuse of women by their partners, which has previously been tolerated. The arguments used in these discussions are ultimately based on an appeal to feelings but these feelings are not immutable. They are open to change through argument and experience.

We can now turn to Russell's claim that there is a justificatory gap in Smith's theory. This argument is correct to the extent that an appeal to the moral sentiments cannot, by itself, provide the kind of justification of punishment that has been sought by most other philosophers. They have generally assumed that the practice of punishment is a human contrivance and that, since it involves the infliction of pain or unpleasantness on those deemed to be offenders, it needs to be justified in terms of some independent moral principle(s). From that standpoint Smith's account of punishment must seem deficient. At very least it requires an additional argument to show that we ought, in general, to follow those of our natural feelings with which an impartial spectator could sympathise. But even a cursory reading of *TMS* will show that it is not designed to provide that kind of justification. Its object is, as its title suggests, to describe and explain the moral sentiments. It is thus primarily a work of moral psychology. When Smith refers to practices of punishment he generally uses them as evidence to support his claims

about the nature of our moral judgements. He makes no attempt to justify our practices of punishment as a whole. A footnote in *TMS* makes the reason for this clear:

[T]he present inquiry is not concerning a matter of right, if I may say so, but concerning a matter of fact. We are not at present examining upon what principles a perfect being would approve of the punishment of bad actions; but upon what principles so weak and imperfect a creature as man actually and in fact approves of it (*TMS* II.i.5.10).

Of course Smith believes that, in following these natural principles, we further the good of society. But he certainly does not think that we should design practices of punishment with that mind. The passage just cited continues:

The principles which I have just now mentioned, it is evident, have a very great effect upon [man's] sentiments; and it seems wisely ordered that it should be so. The very existence of society requires that unmerited and unprovoked malice should be restrained by proper punishments; and consequently, that to inflict those punishments should be regarded as a proper and laudable action. Though man, therefore, be naturally endowed with a desire of the welfare and preservation of society, yet the Author of nature has not entrusted it to his reason to find out that a certain application of punishments is the proper means of attaining this end; but has endowed him with an immediate and instinctive approbation of that very application which is most proper to attain it.

If Smith met a radical sceptic who claimed to reject the practice of punishment as such he would presumably reply, in much the same way as he would to the 'young and licentious' people mentioned in *TMS* II.ii.3.8, by pointing out that punishment is essential to the order and well-being of society. But he would not see the practice as depending on our recognition of this point. He believes that we live in a providentially ordered universe, in every part of which 'we observe means adjusted with the nicest artifice to the ends which they are intended to produce.' The natural principles of human nature may lead us to advance 'those ends which a refined and enlightened reason would recommend to us' but we should not 'impute to that reason . . . the sentiments and actions by which we advance those ends' (*TMS* II.ii.3.5). There is, thus, a sense in which Smith sees the general good as the ultimate justification of punishment, but he also believes that we are more likely to achieve that good by following our natural sentiments than we are by designing penal institutions specifically for that purpose.

CONCLUSION

As we have seen, Smith's primary aim in *TMS* is to describe and explain our moral sentiments. If the arguments I have offered are correct, he offers a plausible account of those sentiments in so far as they concern punishment. In particular he explains in a credible way why we commonly feel that wrongdoers deserve punishment; why we feel that there should be some sort of proportion between punishment and offence; and why society needs institutions which take account of these feelings. One could argue that, on these points, his account is superior to the orthodox retributive and utilitarian alternatives. But this does not mean that Smith succeeds in justifying the particular penal practices of eighteenth century Scotland or of any other society. Nor is his theory particularly helpful to those who wish to criticise or reform existing practice. From that point of view the most obvious difficulties lie in the assumptions (a) that, for any society, we can determine, with reasonable precision, what the sentiments of an impartial spectator would be, and (b) that punishments based on the sentiments of the impartial spectator would not be seen as vindictive but would, rather, help to integrate criminals into society and make them conscious of their guilt. One can imagine that in a relatively simple and cohesive society with shared norms and values these assumptions might be justified. But Smith himself comes close to acknowledging that his own society was too divided for this picture to be accurate. Although he thinks that the recognition of guilt may have a powerful effect on respectable classes, he concedes that 'profligate criminals, such as common thieves and highwaymen, have frequently little sense of the baseness of their own conduct, and consequently no remorse' (*TMS* III.2.11). Elsewhere he writes:

Those... who have been accustomed to see nothing in the persons whom they esteemed and lived with, but justice, modesty, humanity, and good order; are more shocked with whatever seems to be inconsistent with the rules which those virtues prescribe. Those, on the contrary, who have had the misfortune to be brought up amidst violence, licentiousness, falsehood, and injustice; lose, though not all sense of the impropriety of such conduct, yet all sense of its dreadful enormity, or of the vengeance and punishment due to it (*TMS* V.2.2).

Similar points could be made about most other developed societies, including our own. There are many subcultures each with its own norms and values. So long as that is the case it may be impossible to achieve genuine impartiality between members of different groups. Punishments which appear just to some may then seem vindictive to others. This does not necessarily mean that Smith's account of punishment is wholly misguided. Rather, if his account of the relevant sentiments is correct, societies will always need practices of punishment, but to the extent that

they lack shared values, those institutions will be never be wholly satisfactory.<sup>27</sup>  
The problems of punishment may, in practice remain intractable.<sup>28</sup>

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NOTES

- <sup>1</sup> In referring to *The Theory of Moral Sentiments (TMS)*, *The Lectures on Jurisprudence (LJ)* and *Wealth of Nations (WN)* I use the volumes of the Glasgow edition.
- <sup>2</sup> For *LJ* we are dependent on two sets of student notes, both included in the Glasgow edition. I refer to the very full set taken in 1762–3 as *LJ (A)* and to the shorter set dated 1766 as *LJ (B)*.
- <sup>3</sup> Plato *Protagoras* 323c–324c. Although this occurs in a speech by Protagoras, which some have taken to be based on a genuine work of the sophist, it is clear that Plato himself took a similar view. See *Laws* 934c–d.
- <sup>4</sup> ‘Neither anger, nor hatred of the criminal, nor even that honest indignation at moral evil, which is natural to every good man, should be the sole springs of punishing: but rather a calm regard to the common interest, and the safety of the innocent’. See also 1755: III.9 where Hutcheson argues at some length that, because ‘the end of punishment is the general safety’, the severity of the punishment need not correlate with the depravity of the crime’.
- <sup>5</sup> ‘As to the end, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme being: but as a precaution against future offences of the same kind.’
- <sup>6</sup> See, for example, Aquinas *Summa Theologiae*, 2a 2ae, 68, 1.
- <sup>7</sup> Smith’s conception of resentment is very similar to what Butler (1726, 1970: Sermons 8 and 9) calls ‘deliberate resentment’, though Butler distinguishes this from revenge. Like Smith, Butler believes that the object of this resentment is injury, rather than mere harm. He does not refer explicitly to the impartial spectator but he does recognise that, in resenting injuries done to ourselves, we are apt to show undue partiality.
- <sup>8</sup> For these reasons Smith argues that animals and inanimate objects are not ‘proper’ objects of resentment, even though we may feel a desire to lash out against them or even form a more lasting hatred of them.
- <sup>9</sup> Although Smith is aware of the distinction between motive and intention (see, for example, *TMS* II.i.3.1) his language sometimes blurs the point. His position seems to be that we merit punishment only when some improper motive leads us to act intentionally in a way which we know is likely to cause harm. If no actual harm occurs then punishment may be diminished.
- <sup>10</sup> As Raphael and Macfie point out (Introduction to Smith 1759, 1976: 87), Smith seems to be arguing against the account of justice in Hume’s *Enquiry concerning the Principles of Morals*, section III. There Hume argues that ‘utility is the sole origin of justice’ and claims that when someone, by his crimes has made himself ‘obnoxious to the public’ it becomes ‘equitable’ to inflict punishment on him ‘for the benefit of society’.
- <sup>11</sup> I use ‘utility’ and ‘utilitarian’ in a general sense to refer to any view that justifies a practice by reference to its effect on the general interest. Smith could not, of course, anticipate distinctively Benthamite positions.
- <sup>12</sup> Smith’s arguments against Hume on these points have a good deal in common with those which were later used by Reid. Both philosophers argue that human nature leads us to recognise the claims of justice whether or not we are aware of its utility. The main difference between them is, of course, that Smith attributes this recognition to feelings or sentiments while Reid sees it as stemming from the judgements of a moral faculty. See Reid *AP* 653a.

- <sup>13</sup> As Haakonssen (1981: 35–36, 87–9) points out Smith’s criticisms of Hume on justice are bound up with his view of sympathy. Sympathy can be felt only towards specified individuals. This point undermines Hume’s account of justice in the *Treatise*. The *Enquiry* relies on a broader notion of fellow-feeling but this, in Smith’s view, is too rationalistic.
- <sup>14</sup> Smith clearly believes that there is providential ordering in the universe but, as Colin Heydt has pointed out to me, he does not appear to rely on divine authorship in order to explain that order.
- <sup>15</sup> The idea that punishment can not only deter offenders from repeating their crimes but can also in some way ‘cure’ or reform them goes back at least as far as Plato. But it is not at all clear what this amounts to. Both Grotius (1625, 2005: II. 20. 7) and Pufendorf (1688, 1934: VII.iii. 9) refer to the idea that the pain of pleasure allays the ‘sweetness of the sin’ and thus prevents us from acquiring a habit of wrongdoing. This account, which has its roots in Plato’s *Gorgias* 504d–505b, might suit the punishment of children by parents or teachers but seems less well adapted to the punishment of adults in developed legal systems.
- <sup>16</sup> The account in this paragraph is based on Nozick 1981: 366–8.
- <sup>17</sup> For this reason arguments such as those of Elster (1990) against giving revenge a role in punishment are not generally applicable to Smith’s theory.
- <sup>18</sup> See also Price (1758, 1974), p. 83. Price argues that the ‘rewardableness’ of virtue and the demerit of vice are ‘instances of absolute and eternal rectitude, the ideas of which arise in us immediately upon the consideration of virtuous and vicious characters’.
- <sup>19</sup> Here I have in mind particularly the claim that deterrent theorists treat the criminal as a means rather than as an end.
- <sup>20</sup> See Mackie, 1982. Like Smith, Mackie sees practices of punishment as underpinned by retributive emotions. He gives an evolutionary account of the way in which these have developed from a more primitive instinct for retaliation.
- <sup>21</sup> See for example Feinberg 1970 and Duff 2001. According to Feinberg, punishment is a conventional device for the expression of attitudes of resentment and indignation and of judgements of disapproval and reprobation, on the part either of the punishing authority himself or of those “in whose name” the punishment is inflicted’ (97–8).
- <sup>22</sup> Civil police includes regulations that cover trade, commerce, agriculture and manufacturing. (*LJ(A)* I.2).
- <sup>23</sup> See Hume, *Treatise* III.iii.1.
- <sup>24</sup> My argument here has something in common with Duff (2002). Discussing *mala prohibita* (acts that are not wrong in themselves but which violate a lawful regulation), he argues that the question of regulation should be separated from that of sanction. Once a regulation is in place ‘breaches of it involve a kind of wrongdoing which deserves public censure and punishment; in other words, . . . we need to ensure that breaches of it are visited with retributive punishment’ (105).
- <sup>25</sup> Russell’s view is controversial. Most commenators have seen Hume as defending a rule-utilitarian account of punishment. As I hope to explain elsewhere, I find the latter interpretation more plausible.
- <sup>26</sup> A central theme of *LJ* is the development of jurisprudence from the age of the hunter to age of modern commercial society.
- <sup>27</sup> For similar reasons Duff (2001: 175–6) recognises that his communicative account of punishment may be a ‘normative ideal’ rather than a description or justification of existing penal practices.
- <sup>28</sup> My interest in this topic was sparked by an invitation to take part in a conference on Smith at the University of Athens in 2009. I am grateful to the organisers, Athanasia Glycofyridi-Leontsini and Dionysios Drosos and to my fellow participants.