

The Smithian Categorical Imperative: How MacCormick Smithified Kant

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Abstract

This paper offers a reading of one of the central features of Neil MacCormick's last book, *Practical Reason in Law and Morality* (2009), namely, what he called 'the Smithian Categorical Imperative' (SCI). The SCI is presented by MacCormick as a synthesis of the best of Immanuel Kant and Adam Smith's contributions to moral philosophy. The paper proceeds in three parts: the first two are dedicated to articulating, but also evaluating, MacCormick's understanding of Kant and Smith. The focus in these two parts is on two sets of concepts: autonomy and universality in the case of Kant, and imagination and sympathy in the case of Smith. The third part then discusses the formulation and two applications of the SCI, the first of those relating to the practice of lying and breaking promises, and the second to the conjoined twins' case. The paper is written in a sympathetically critical spirit. It is argued that MacCormick's rapprochement between Kant and Smith in the form of the SCI is a genuinely important and original contribution to moral philosophy. Nevertheless, the paper also considers whether, by modifying MacCormick's interpretation of Kant and Smith (and especially the latter), we may be able to further extend MacCormick's characteristically generous capacity to tread a middle path between otherwise antagonistic theoretical traditions. The ultimate hope expressed is for a picture of moral life that combines the full and distinctive importance of autonomy, universality, imagination and sympathy.

Introduction

In a recent book, *The Emotional Construction of Morals* (2007), Jesse Prinz asserts that 'the division between those theorists who think feelings are essential to morality and those who think emotions are incidental is perhaps the most fundamental rift in moral philosophy' (Prinz 2007, 13). Prinz himself is a devoted Humean and, as the title of his book suggests, he sets out to defend a thoroughly sentimentalist theory of both the emergence of morality and the exercise of moral judgement. What Prinz does not attempt, which is unsurprising given the momentum of his Humean project (the book above is the third of a tripartite series, each corresponding to the three parts of Hume's *Treatise*), is a synthesis between the best of both sides of the debate. Instead, he places himself squarely on one side of the debate, articulates and develops it as best he can, and then defends it from potential objections. As a form of philosophical expression, it is a commonly encountered one.

Quite a different philosophical temperament characterises the work of Neil MacCormick. He sought, in many of his works, and perhaps especially his books, to find a middle path between what he saw as untenable extremes. For instance, in *Legal Reasoning and Legal Theory* (1978; 2nd ed in 1994 – my references are to the second edition), his first and still much-admired book, MacCormick acknowledged the role of both deductive and non-deductive elements in legal reasoning, thereby building a bridge upon which the advocates of syllogistic reasoning, on the one hand, and the sponsors of various kinds of irrationalism (or realism, depending on one's terms), on the other hand, could meet and carry out a fruitful dialogue. Later, in revising his account, though also broadening it out to encompass his more mature view of the values of a legal system, MacCormick sought to find another middle path, this time between the persuasive (rather than demonstrative) elements of legal reasoning and the value of governance under general rules designed to minimise the potential for

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paternalism and tyranny (see *Rhetoric and the Rule of Law*, 2005). There are other examples, too, outside the theory of legal reasoning – for instance, his attempt to find a middle path between ‘individualist Whiggery and Marxist collectivism’ in his all-too neglected essays on *Legal Right and Social Democracy* (1982; the phrase is at 8) – but enough has been said already to give a flavour of the approach.

It is exactly this approach that also characterises MacCormick’s last book, *Practical Reason in Law and Morality* (2009; hereinafter ‘PRLM’). In it, MacCormick attempts precisely to find the best in both worlds: first, in the rationalist world exemplified by Immanuel Kant; and second, in the sentimentalist world represented by Adam Smith. His efforts are summed up in his construction of a concept that neatly encapsulates the rapprochement between both traditions: the Smithian Categorical Imperative.

My aim, in this paper, is to re-tread the steps of MacCormick’s attempt to bring the two traditions together. In that sense, the paper is predominantly expository. The first and second parts of the paper are dedicated to discussing MacCormick’s reading of Kant and Smith, respectively. The third then turns to an exposition of the above-mentioned concept, the Smithian Categorical Imperative. MacCormick’s principal aim, as we shall see, is not to offer a faithful reading of Kant or Smith: he characterises their work, both in terms of what he sees as its advantages and its limits, in ways that suit the overall project of his book. The approach I take is to provide as clear a flavour of MacCormick’s own approach, while nevertheless paying attention as to whether MacCormick’s interpretations of Kant and Smith are plausible and desirable. This approach also allows me to consider, in the conclusion to this paper, whether MacCormick’s rapprochement between Kant and Smith in the form of the Smithian Categorical Imperative sufficiently takes into account what we may have good reason to cherish in Kant and Smith’s contributions to moral philosophy.

PRLM is by no means the first time MacCormick indicated the need for a rapprochement between rationalist and sentimentalist readings of the moral life. Already in *Legal Reasoning and Legal Theory*, in the tenth and final chapter entitled ‘Law, Morality and the Limits of Practical Reason’, MacCormick pointed to the need for an affective element. He argued, for instance, that ‘although reason is our guide in securing the consistency or coherence of a system of norms, it is an affective commitment to rationality in action which makes us follow that guide, if we do, or so far as we do’ (MacCormick 1994, 270). Indeed, there is an important sense, he said, in which ‘we would have no call for norms about conduct at all if we did not *care* about to live with other people, or about how other people live with us’ (MacCormick 1994, 270; original emphasis). In that work, however, MacCormick was responding to Hume’s scepticism as to the reach of reason; he argued that Hume was wrong about the passivity of reason, but right that we need affective attitudes in order to value anything (including reason itself) (MacCormick 1994, 269).

MacCormick was a self-confessed admirer (his own term was ‘addict’) of Hume, and a good deal of his work can be profitably read as an ongoing dialogue, though most often debate, with Hume. So it may seem particularly surprising that in seeking a rapprochement between rationalism and sentimentalism, MacCormick chose Smith rather than Hume. Certainly, signs that MacCormick might have recourse to Smith as a representative of sentimentalism were already present in earlier works. For instance, in a chapter on Smith in *Legal Right and Social Democracy* (1982), MacCormick refers to Smith’s *Theory of Moral Sentiments* (1759; hereinafter ‘TMS’), and offers a brief summary of Smith’s account of moral judgement: he says, summarising Smith, ‘The extent to which human beings possess a fully developed moral judgement depends on their, as it were, constructing within their breast an ideal impartial spectator who is genuinely impartial in relation to themselves and those with whom they deal, but who is fully informed of the intentions and motivations of the agent, because the impartial spectator shares them’ (MacCormick 1982, 107). This passage contains

several interpretations of Smith that are controversial (e.g. as we shall see, it is by no means necessary for the spectator to share anything with the agent), but to be fair, MacCormick's discussion is brief and set in a context in which the principal focus is Smith's contribution to political economy and jurisprudence.

A much more extensive reference to Smith's moral theory is made in chapter five of *Rhetoric and the Rule of Law*, 'Universals and Particulars', an earlier version of which appeared in a collection of papers that responded to it (Bankowski and MacLean 2006). In the chapter, MacCormick asserts that 'the most promising answer' to challenges posed by moral particularism and intuitionism, keenly felt by MacCormick (as many were raised by his colleagues in Edinburgh), 'comes out of Adam Smith's moral philosophy, or at least would start from some of his insights' (MacCormick 2005, 84-5). Already, there, MacCormick offered the view that proper regard to sentimentalism need not result in 'rejection of the Kantian idea of the universalisability of grounds for practical judgement' (MacCormick 2005, 87). In the response to the above-mentioned collection of essays (Bankowski and MacLean 2006), which was written after *Rhetoric and the Rule of Law* went to print, MacCormick was even more forthright (I cite this in its entirety, as it is the most extensive statement of MacCormick's approach prior to PRLM itself):

Smith's moral psychology has somehow to be married to Kantian universalisability – and perhaps the ideality and impartiality of the ideal impartial spectator already prefigure this – for a Kantian or Kant-like approach to justification to be at all plausible... The particular interest of Smith's approach is that it does suggest an approach to moral judgement in which each of us as a moral being in our radical particularity...engages with every other in his or her radical particularity. It is your anger or resentment, not the anger or resentment of somebody like you, that I immediately feel through my essentially human capacity for sympathy ('empathy' in a more contemporary way of speaking) when I see you suffering pain at the hands of someone else; but we do not interact peacefully or profitably if we do so on the basis of pure raw emotion, whether directly or sympathetically experienced. The moral impulse and the moral judgement are geared to generating a common measure of emotional engagement. This can be achieved through reflective consideration of matters in the light of an ideal impartial spectator's response, seeing all relationships as two-sided and contemplating encounters from both or all points of view in the case of bilateral, or respectively, multilateral encounters. (MacCormick 2006, 258)

The signs, then, that MacCormick might rely on Smith were present in earlier works. Nevertheless, MacCormick nowhere justifies, in any detail, his preference for Smith over Hume. In the above-cited response, he does include the phrase: 'sympathy as theorised by David Hume and, even better, by Adam Smith...' (MacCormick 2006, 257), but he does not go on to say in what respect Smith's version was better. In PRLM he presents Smith's device of the impartial spectator, 'by reference to which people normalise or even rationalise their emotional responses in mutual interaction', a 'necessary corrective to pure sentimentalism' (MacCormick 2009, 2) – though this can be misleading if read to suggest that there is no reference to the 'spectator' in Hume. As both Alexander Brodie (2006) and D.D. Raphael (2007) have observed, there are such references (including to the spectator's sympathy), though there are important differences between the two versions. The matter is complicated because there are times when MacCormick characterises Smith's position that make it resemble Hume's where this resemblance is in fact misleading *à propos* Smith (as in the idea that the spectator has to share the feelings of the agent being observed), and other times when he paints Smith in ways that clearly indicate genuine differences and thereby respect Smith's originality and distinguishability from Hume. On the whole, it should be said that, given his purposes, MacCormick was right to have favoured Smith over Hume – even where some of

MacCormick's interpretations of Smith are controversial (and, thus do not make Smith as distinguishable from Hume as he ought to be seen).

Part of Smith's appeal to MacCormick was his insistence on the importance of impartiality. This is a value often referred to in MacCormick's work. Sometimes, it is conceived of as an attitude, and sometimes as a procedure. Indeed, there are times when MacCormick runs a reference to Smith together with proceduralist theories of practical reason (e.g. MacCormick 2006, 258). Even his tendency to refer to the 'ideal impartial spectator' rather than simply 'the impartial spectator' is indicative of the links he saw between Smith and proceduralists such as Jürgen Habermas and Robert Alexy. Thus, in the case of Habermas, MacCormick speaks of the 'ideal speech situation', as 'one in which all forms of coercion or interpersonal power or domination are put side for the purposes of conducting (or imagining the conduct of) interpersonal discourse' (MacCormick 2005, 21). Indeed, in *Rhetoric and the Rule of Law*, his entire approach to rhetoric is to counter its 'bad name' by relating 'persuasiveness to an ideal or a universal audience', with the focus being not on merely on what is persuasive, but on what is persuasive 'on the same terms to everybody' (MacCormick 2005, 20). The stringing together of these references suggests that it was at least in part these rationalist elements of Smith's approach (as exemplified particularly clearly in Smith's endorsement of impartiality) that made Smith so appealing to MacCormick.

In this respect, MacCormick was not alone. Some commentators have read Smith more as a friend of the rationalists – indeed, as a precursor to Kant. Samuel Fleischacker (who, as far as I am aware, MacCormick only read after finishing the first draft of PRLM) argued that there is good evidence to suggest Kant read Smith, and, more importantly for present purposes, identified the overlap between Kant and Smith on the basis of certain allegedly common rationalist elements. Both Kant and Smith, said Fleischacker, emphasised the need for subjecting ourselves to the 'harsh and ascetic judge' that is our conscience, as supplemented by 'the sacred general rules of conduct', which, when combined, are the only effective resource against 'the passions and self-conceit that blind us' (Fleischacker 1991, 261). Fleischacker argued that both Kant and Smith 'share...a deep sense of the hiddenness and unreliability of the everyday self, and of the need for something independent of its immediate passions to correct for their blindness' (Fleischacker 1991, 262). Of course, Fleischacker does recognise significant (especially methodological) differences between Kant and Smith, but his Kantian sympathies are everywhere present in his reading of Smith.

As we shall see, MacCormick does not go so far, i.e. he retains more of the uniquely Smithian picture than it seems Fleischacker would be willing to. However, MacCormick's interpretation of Smith is nevertheless coloured by his rationalist commitments. Recall, in that respect, MacCormick's tendency to refer to the impartial spectator as ideal, which, as Raphael has pointed out amongst others, is a misreading of Smith (see chapter 6 of Raphael 2007, where Raphael contrasts Smith's fallible and ordinary impartial spectator to Roderick Firth's (1952) ideal observer).

One final preliminary point needs to be made here. PRLM is a rich and wide-ranging book. It also a deeply personal book, and one that I found as deeply moving as intellectually rewarding. As far as I know, much of it was written in the last year of MacCormick's life. As a result, although it is as sophisticated as any of his other books, it is perhaps the most direct, containing personal anecdotes and advice for acting and living well (as in chapter 9 of PRLMN). There is much to find in this book that one will not find in any of MacCormick's writings: it is the most singular and unique in his corpus. Promises made in the other books of the series are met here, including a fabulous discussion of the importance of the much-neglected Lord Stair for contemporary practical philosophy. In this paper, I focus on but one aspect of the book: the Smithian Categorical Imperative, and the readings of Kant and Smith

that contribute to it. Whatever one's assessment of that concept, there is much else in the book to delight in.

I. MacCormick's Kant: Autonomy and Universality

Any discussion of MacCormick's book ought to keep in mind that it was the fourth and final instalment in his 'Law, State and Practical Reason' series of books. I have already referred to *Rhetoric and the Rule of Law* (2005), the other two being: *Questioning Sovereignty* (1999) and *Institutions of Law* (2007). MacCormick himself said that PRLM was designed, in part, to carry on themes introduced in chapter fourteen of *Institutions of Law*, 'Positive Law and Moral Autonomy.' As the title of that chapter attests, MacCormick had already identified autonomy to be the central and unique characteristic of morality – at least when compared to law. The effect of this distinction is felt throughout PRLM and it clearly deeply influenced MacCormick's understanding of the moral life. This is important to point out, for what makes MacCormick distinctive among many moral philosophers is that he builds his moral philosophy around his legal theory; in other words, his moral philosophy, and thus his understanding of moral life, is coloured by the manner in which he understands the nature of law and the nature of the relationship between law and morality. For others not so influenced, the picture of morality might, when constructed independently as it were, be all too easily altogether different. In MacCormick's case, then, it is important to remember that his account of morality is one that already takes on a certain garb as a result of the distinction he makes between the heteronomy of law and the autonomy of morality.

This is not the moment to traverse MacCormick's legal theory. However, it will be helpful to state briefly the manner in which MacCormick characterised the distinctiveness of morality vis-à-vis law in that fourteenth chapter of *Institutions of Law*.

For MacCormick, as he expresses it in this fourteenth chapter, morality is 'essentially' autonomous in character (MacCormick 2007, 249). Autonomy consists in the manner in which 'each moral agent is a law unto her/himself', or, 'more literally, the moral law for each moral agent is that which she or he reasonably judges to determine the right for her/himself' (MacCormick 2007, 249). MacCormick's conception of autonomy is intimately related to the requirement of universality. The relevant 'law for her/himself' is not a law merely or only for herself or himself, but for everyone: 'If it is right that I consume alcohol, it has to be right that anyone do so; what is permissible for me has to be permissible universally. What is obligatory for me (say, abstention from hard drugs) has to be obligatory universally' (MacCormick 2007, 249). This requirement of universality recedes when the question is not right action but rather the good life (this distinction is also important in PRLM): though 'what is good for me is certainly that which I autonomously shape for myself', 'we need not, indeed should not, think it necessary or even permissible, to legislate our view of a good life for anyone else' (MacCormick 2007, 249). Nevertheless, even despite this qualification, autonomy and universality suit each other and are often mentioned in the one breath by MacCormick:

Autonomy is the quality of persons, that is of conscious acting subjects, who shape their will according to reasonable judgements based on the information derived through external and internal senses and gained in discussion with others or from reading and reflecting. By that rational will they construct and act upon conclusions concerning duties and rights that are inherently universalisable. (MacCormick 2007, 250)

A vital aspect of the concept of autonomy is that 'the insight that one is oneself autonomous entails recognition of the like autonomy of every other, hence the equality of all moral agents as such' (MacCormick 2007, 251). Because it is intrinsically autonomous, and thus implies the recognition of the autonomy of all, and because it carries with the requirement of

universality, morality is also discursive and controversial: moral deliberation, for MacCormick, 'ought to proceed through discourse and never in a non-discursive way, by recourse to power-play, rhetorical tricks, or the like' (MacCormick 2007, 252), and once this discursive character is acknowledged so must one also recognise that 'moral opinions can be controversial' (MacCormick 2007, 252). 'Since each of us confronts moral questions as an autonomous agent', says MacCormick, so it follows that 'nobody's answer is conclusive for anyone else' (MacCormick 2007, 252).

By contrast, the life of the law is characterised by heteronomy. Heteronomy prevails 'where there is will, or decision-making capability, but where the rule to which the will submits is set by an extraneous or alien will' (MacCormick 2007, 252). The law 'confronts each moral agent with categorical requirements in the form of duties, obligations, and prohibitions that purport to bind the agent regardless of the agent's own rational will as an autonomous moral being. The law's demands to the autonomous agent', then, 'purport to bind the agent in a heteronomous way. Law is (in this sense) heteronomous, as well as authoritative and institutional; it thus stands in clear conceptual contrast to morality, which is autonomous, discursive and controversial' (MacCormick 2007, 255). Of course, in practice, the matter is not so clear, and MacCormick goes on to show that 'people living under law are at best relatively heteronomous, hence relatively autonomous also' (MacCormick 2007, 258), as exemplified in the case of 'the conscientious objector to abortion who is nevertheless willing to endorse an obligation to go along with legislative decisions democratically taken, yet who at the same time campaigns vigorously against the use of tax revenues to finance abortion clinics' (MacCormick 2007, 258).

The issue of how legal obligation leans on the moral life of persons conceived of as essentially autonomous is a complex one, and not the subject of the present paper. What is important to see is that the distinction between law and morality, at least on the conceptual level (and, to a less clear extent, on the practical level), influences MacCormick to picture moral life as essentially autonomous. It is this picture that MacCormick believes owes 'a great deal to the moral philosophy of Immanuel Kant' (MacCormick 2007, 249).

In both the fourteenth chapter of *Institutions of Law*, as well as in PRLM, MacCormick often accompanies his exposition of Kant's moral philosophy by reference to H.J. Paton's *The Moral Law* (MacCormick cites from two different editions of this book, 1948 and 1958). This reference points to an important issue with respect to the interpretation of Kant that it will be useful to begin with here. It is an issue that is explained well in a paper by Paul Bamford (1992). Bamford points to what he calls 'an ambiguity' in Kant's conception of the Categorical Imperative ('CI'). The ambiguity concerns two different ways to interpret the CI, one of which is stronger than the other, and one of which (the stronger) was also Paton's preferred interpretation (Bamford 1992, 78). The stronger interpretation expresses the view that to act in accordance with the CI is to act in accordance with objectively valid principles. The weaker interpretation is that to act in accordance with the CI is not necessarily to act in accordance with objectively valid principles, but rather, merely universalisable principles. Bamford shows that there is evidence that Kant held both views, hence his thesis concerning the ambiguity of the CI in Kant's philosophy.

The point is important because whereas all objectively valid principles are universalisable, not all universalisable principles are objectively valid (Bamford 1992, 76-7). As Bamford puts it, in the case of the objectively valid principles, these are so if and only if they 'would be willed by any rational being who was judging rationally (i.e. without prejudice or emotion)... The principle is objectively valid...only if every rational agent would so choose (were they considering the situation rationally)' (Bamford 76-7). By contrast, in the case of universalisable principles, these need not by necessity be objectively valid. To see this, consider the case of the 'fanatic' (first proposed by R.M. Hare):

A ‘fanatic’ is a person who is prepared to universalise a clearly wrong principle; for example, that slavery or apartheid is acceptable, or that Jews should be exterminated. That there actually are or have been such people may not be obvious, especially in such extreme cases, but that there can be such people is clear. In fact, there are probably lots of them, for, given the definition of ‘fanatic’, the father of a teenage girl who believes that rapists should be put to death – and who is quite ready to ‘universalise’ this (would say, e.g. that he or his son should be put to death should either of them turn to rape) – counts as a ‘fanatic’. So do people with strong views about communists, draft-dodgers, policemen and bourgeois revisionists. (Bamford 1992, 77)

The question that we can pose, then, is whether MacCormick’s understanding of Kant is such that it subscribes to the stronger reading (as may be suggested by MacCormick’s reliance on Paton’s book) or to the weaker reading, in which case we would need to examine how MacCormick answers or would answer the counter-example offered by Hare.

Let me say at the outset that this interpretative issue connects up with another one articulated in a recent paper by Ido Geiger (2010) concerning whether or not the formula of universal law of the CI (and particularly in the *Groundwork of the Metaphysic of Morals*, 1785; hereinafter the *Groundwork*) grounds or can ground the objectivity of moral permissions and prescriptions and whether it can operate in the absence of any moral knowledge. Geiger argues that the formula – indeed any purely formal procedure – cannot ground the objectivity of moral permissions and prescriptions. Relatedly, Geiger argues that Kant’s discussion of the formula ‘speaks of agents who generally know what their duties are and how these duties are fulfilled or violated in most all everyday situations; and they know these things without putting their intentions to any universalisation test’ (Geiger 2010, 272).

The matter is important because depending on the interpretation favoured, Kant may or may not be easily Smithified. More precisely: if MacCormick were to adopt the strong reading, and suggest that the universalisation procedure is sufficient to ground the objective validity of the relevant action (based on the relevant principle), and if he were to think that the CI itself is capable of producing (rather than already assuming) moral knowledge (i.e. of some principles), then this would make it difficult to see how Smith could be made room for. If, however, MacCormick were to say that the proper understanding of the CI, in its formula of universal law, is the weaker one, i.e. the merely universalisable one, and if he would agree with Geiger that it presupposes rather than produces moral knowledge, then this makes it readily susceptible to Smithification (so to speak). This is so because Smith’s account of the sentimentalist genealogy of moral rules, and his notion of the imaginative and informed exercise of impartial spectatorship, can supply not only the moral knowledge in question (thereby rendering it less mysterious than it might otherwise be), but can also secure its fallible character (at least if we picture the spectator, as Smith does, as ordinary rather than ideal). In supplying the moral knowledge in question, while acknowledging its fallibility, it would also accommodate the Hare objection: taking into account the situational factors, including the feelings, of the agents concerned, we might be more likely to avoid the kind of universalisations that the ‘fanatic’ ends up with (though this does not mean it would be strictly impossible for us to avoid making them; there is, for Smith, and on the weaker reading of Kant’s CI, no secure method for acting rightly). Let us now see whether MacCormick (as per his account in PRLM) might have agreed with this interpretation of Kant.

There is evidence both ways, but it seems to me that the balance is in favour of the weaker interpretation, and thus the one more susceptible to Smithification. Having, in the first chapter of PRLM, established the distinction between explanatory and justificatory reasons, and thus defended the notion of human beings as practical reasoners, who ‘both act and reflect upon our actions’, reacting to events, sometimes with deliberation about what to do (PRLM,

18), MacCormick then goes on to say that when it comes to reflecting on relationships between ourselves and others, or between persons generally, we ought to see ‘the need for some kind of a law-like response to the situation’ (PRLM, 19). This suggests that what is important for MacCormick is not assurance that in following such-and-such a rule we are acting rightly, but rather that in deciding what we ought to do we react in a law-like way. What is important is that we universalise, for this will help us to act autonomously: and not, for instance, out of mere inclination or self-love. Take the following example from MacCormick: when facing Caesar, MacCormick says that we do well to consider that even if all tyrants ought to be resisted, it is not the case that any human being ought to be killed save in necessary self-defence (PRLM, 19). Universalising in this way might help us, then, to distance ourselves from our own thoughtless proclivities, as when we are too caught up in the situation, and ensure that when we do act, we do so as a result of the endorsement of a law-like response.

Following this discussion, MacCormick explicitly criticises a view, which he believes to have been expressed by Christine Korsgaard (1996), to the effect that ‘we are all moral legislators and the law of our rational nature depends on our common universal legislative will’ (PRLM, 19). MacCormick argues that we should resist this legislative analogy, and in doing so offers us further evidence that he would not accept the stronger reading, according to which the CI is in itself productive of the knowledge of, and guarantees the objectivity validity of, what we ought to do. Indeed, MacCormick states that the legislative analogy is too ‘arbitrary’, and it is the judicial rather than the legislative function that we ought to have in mind here. This is so, he says, because ‘nobody comes to reflection about right and wrong in the context of practical deliberation save in the context of a learned and inherited practical code. People’, he continues, ‘are brought up to know and understand simple moral rules, like not to tell lies, not to break promises, not to be violent, not to bully, not to steal things’ (PRLM, 20). Here, then, MacCormick is agreeing with Geiger that, in fact, Kant presupposes a moral knowledge – the key for Kant being that we act autonomously, that we reason ourselves so as to determine our will. As MacCormick says, although we are born and trained into such moral rules (later, he will explain this training in Smithian terms), what matters is that we embrace ‘autonomously what was originally inculcated heteronomously’ (PRLM, 20).

Nevertheless, matters are not so simple, and there are moments also when MacCormick grants the universalisation procedure the ability to produce moral laws. For instance, in the paragraph following the above citations, MacCormick argues that the judicial analogy is not entirely on all fours with the moral life. It is true, he says, that ‘anyone making a decision assumes a background of prior judgements and accepted moral commonplaces that are the framework for the present decision and with which it must cohere’, but this should not hide the fact that judgement ‘is a question of what one is to count as acceptable by way of universalisable maxim – not of what is already accepted. In that sense’, he adds, ‘the rational will is indeed engaged in the process of settling the moral relevance of relationships’ (PRLM, 20).

This role for the will is also articulated later in the book, in the third chapter, on ‘Right and Wrong’, where, speaking of Kant, MacCormick says that because of the need sometimes ‘to go beyond actual norms currently or possibly endorsed by people in this or that social setting’, we should ‘think of an ideal order, that would suit the nature of humans as we have assumed it to be’ (PRLM, 56). The ‘issue’, he says, ‘concerns a comprehensive ideal order such that everyone would be subject to norms of conduct that all could fully endorse as fairly accounting for everyone’s interests and ideals’ – and he follows this with a citation of Kant’s universal law formula of the CI (PRLM, 56). In these passages, then, MacCormick does seem to be endorsing the stronger interpretation, for he seems to suggest it implies an order of objectively valid principles: the procedure in question is not one of mere universalisation; it is also productive of maxims that are objectively valid: ‘only the ideal set of norms that

everyone could freely assent to could possess this universal character, and thus be capable of being willed as a law for all, by all' (PRLM, 56; it is noteworthy here that MacCormick once again cites Paton in ascribing the above 'ideal normative order' view to Kant: PRLM, 56 fn 7). What is telling, however, is that MacCormick follows that statement by distancing himself from it. Here is how he puts it:

Like many people, I find this line of thought an inspiring ideal as the basis for a critique of actual moral practices and social institutions. As an account of our actual sense of obligation, or of the judgement of right and wrong, it seems too abstract. It dodges the issue of motivation by simply asserting the freedom of the will and the necessity for the possessor of the free will to will just thus and so, and in no other way. Whatever we think the contents of our will may be, it turns out that, to the extent we are practically rational, we actually will what we would will if we reflected long enough and hard enough. This is implausible, not because the ideal is implausible taken strictly in ideal terms, but because its use in the present context merges actual and ideal and blurs the distinction between them. Meantime, we should reflect on whether any more naturalistic account of the problem before us promises to help solve it. (PRLM, 57)

The 'naturalistic account' MacCormick refers to is, of course, Smith's, and he goes on to discuss Smith in the next section. The point to make here is that MacCormick need not and should not (if he is to make room for Smith) confine Kant to that stronger reading.

The most sustained discussion of autonomy in PRLM is chapter 5, 'Autonomy and Freedom'. Most of the discussion here already refers to Smith, as it comes after a discussion of him and indeed after the initial presentation of the Smithian CI. Nevertheless, it gives us a good indication of why MacCormick thought autonomy so 'fundamental to view of practical reasoning advanced in this book' (PRLM, 89). Placed in historical context, MacCormick reminds us that both Smith and Kant were 'reacting against, and seeking to transcend, a part of the inheritance from the natural law thought that belonged among the common intellectual property of eighteenth century philosophers, jurists and political thinkers' (PRLM, 89). Both, as he says, were particularly engaged in Protestant versions of natural law, an essential element of which was that 'anyone acquainted with the general facts of human nature and aware of the relations of humans with God was able by the application of reason to understand the basic principles of right conduct among humans' (PRLM, 89). The crucial point was that 'even heathens who had not received the divine revelation through the Bible knew', on this account, 'the basics of this law "written in their hearts" and to that extent had the law inside themselves' (PRLM, 89).

Kant and Smith, though each in their own distinctive way, were passionately devoted to making the moral law accessible to everyone and not dependent on divine revelation or the exercise of highly abstruse reasoning capable of being performed only by experts (e.g. philosophers or theologians). As MacCormick notes what they did 'was to find a deeper explanation of how people could know the law rather than simply claiming that it stands to reason or indeed is dictated to us by our reason with some aid from revelation' (PRLM, 90). Certainly, they differed remarkably in their methods, with Kant, unlike Smith, employing transcendental rather than empirical methods. But both, Kant with his concept of autonomy (as further supported by universality) and Smith with his notion of self-command and the impartial spectator (as we shall see later), placed emphasis on the freedom of ordinary persons engaged in an everyday moral life.

That this is not only a plausible, but also the preferred, reading of Kant is supported by J.B. Schneewind's masterly *The Invention of Autonomy* (1998). Schneewind reminds us several times in his book that Kant's defence of agency was linked to his 'hatred for servility and subordination' (Schneewind 1998, 488-90). Kant, said Schneewind, resented 'the nobility

whose members always despise the “rabble”, although the workers and the oppressed actually support them. In a series of notes’, he continues, Kant ‘deplores the status of lackeys and describes subordination to others. Interestingly’, and importantly for present purposes, ‘he ties his objections to this to human agency. To be at the beck and call of another is to deny or give up one’s ability to direct oneself; hence subordination involves “a certain hatefulness and a contradiction that immediately shows its injustice”’ (Schneewind 1998, 490; internal quotations are from Kant). Schneewind recognises that Kant took the term of ‘autonomy’ from ‘the political thought of the seventeenth and eighteenth centuries, in which it was used in discussions of the idea of states as self-governing entities’ (Schneewind 1998, 483), and he reminds that the very notion of ‘moral self-governance goes back at least as far as St Paul’s assertion in *Romans* 2.14 that the gentiles are “a law unto themselves”’ – which MacCormick cites a number of times in PRLM (though he argues that the translation should be ‘the law’, not ‘a law’; see PRLM, 67). Nevertheless, Schneewind believes that ‘Kant understood the idea in a radically different way. His view of morality as autonomy’, says Schneewind, ‘is something new in the history of thought’ (Schneewind 1998, 483; for more on Schneewind’s view of Kantian autonomy, see Schneewind 1992).

The stress here is on our freedom, but also our ability, to will ourselves to act in ways that are not ultimately dependent on anything outside of ourselves – those ‘manias for honour, for power and for possession’ (as Kant called them) – of any ‘contingent ends.’ Practical reason, for Kant, is not restricted to means-end reasoning: ‘because we possess practical reason we can constrain our desires in the name of a law that requires the universal acceptability of our plans’ (Schneewind 1998, 522) – though the point, as I have been suggesting above, is not so much the status of the plans (i.e. whether they really are universally acceptable or objectively valid) but that going through the universalisation proceeds triggers, as it were, our autonomous, free nature: we then act ourselves, as a result of our own rational will, and not as a result of anything outside of it. Kant wants us – all of us – to look into our own selves, rather than to the heavens or our rulers, and, via the universalisation procedure, to also distance ourselves from any vain hopes we may have, and to act solely and purely from our rational will – which we can do, but only if we will to act in accordance with a maxim that we will to be universal. The point, once again, is not whether in acting in accordance with a law we are acting necessarily correctly; the point is not the status of the law in accordance with which we act; the point is that we will to act from nothing but the maxim, for that is the sole method that can secure our autonomy, our freedom. By making that the sole foundation for morals, Kant helps bring morality to all humans, thus freeing up those excluded by the gates of religion or political tyranny.

Schneewind also reminds us that Kant’s view is not entirely deprived of feeling – a feature of Kant that MacCormick, regrettably, does not investigate in PRLM. It is true that for Kant we cannot base morality on feelings, for they ‘vary too greatly from person to person and from time to time to be the source of moral order’ (Schneewind 1998, 504). They are simply too unpredictable; if we make them the foundation, we may all too easily succumb to the temptation that they offer us to not do that which we ought to do. However, given that Kant wants to make the moral life, and thus reason, ‘equally accessible to everyone’, he must also allow for some ‘immediacy of feeling, while being more than feeling’ (Schneewind 1998, 504). ‘The rational faculty at work here’, Schneewind says of Kant, ‘must be also able to move us...it must therefore be as much a part of us as the passions and desires it is meant to correct and control, but it must be a deeper part of us’ (Schneewind 1998, 504). Further, says Schneewind, ‘in his final position...Kant allows a direct concern for the good of others to have an immediate motivational role in morality. We do not act with the thought that we are doing our duty when we act to carry out the duties of virtue. If we have performed a duty of virtue, we have made (say) the well-being of a friend our own end. In acting to bring it

about, therefore, our purpose is not to do our duty, but to bring about the well being of our friend' (Schneewind 1998, 527). Morality does not stem from love alone, but it develops it: in Kant's own words, 'Helping others to achieve their ends is a duty. If a man practices it often and succeeds in realising his purpose, he eventually comes to feel love for those he has helped. Hence the saying: you ought to love your neighbour...means...do good to your fellow man, and this will give rise to love of man in you' (Kant quoted in Schneewind 1998, 528). We cannot rely on love in the first place, or at any one time, but love can develop side-by-side with duty.

MacCormick does not present this dimension of Kant; his focus, as noted above, is on Kant's emphasis on autonomy and universality, as this features in the *Groundwork* and in certain commentators, such as Paton. The point for MacCormick is to stress that, on the back of Kant, we will realise how vital it is that each person 'has to discern for herself or himself what is an acceptable ground of judgement at any moment of serious moral choice, and has to act accordingly' (PRLM, 90). The universalisation procedure, once again, does not of itself secure the validity of our decision. It does not reveal the moral law to us: but it helps us bind ourselves to it. It is binding 'because it expresses what she can will in universal terms as a rule for action by herself or anyone else, and thus also as a ground to judge her own acts and those of other people' (PRLM, 90).

The final words here should belong to Kant:

If we look back upon all previous efforts that have ever been made to discover the principle of morality, we need not wonder now why all of them had to fail. It was seen that the human being is bound to laws by his duty, but it never occurred to them that he is subject only to laws given by himself but still universal and that he is bound only to act in conformity with his own will, which, however, in accordance with nature's end is a will giving universal law. For, if one thought of him only as a subject to a law (whatever it may be), this law had to carry with it some interest by way of attraction or constraint, since it did not have a law arise from his will; in order to conform with the law, his will had instead to be constrained by something else to act in a certain way. By this quite necessary consequence, however, all the labour to find a supreme ground of duty was irretrievably lost. For, one never arrived at duty but instead at the necessity of an action from a certain interest. This might be one's own another's interest. But then the imperative had to turn out always conditional and could not be fit for a moral command. I will therefore call this basic principle the principle of the autonomy of the will in contrast with every other, which I accordingly count as heteronomy. (Kant 1785, 4:433; 1998, 40-1)

This helps us see that Kant's focus is not to guarantee the objective validity of our action (if we follow his procedure) – he is not, in other words, giving us an account of the nature of right or the content of good – but rather that his focus is on securing freedom for all, precisely where it matters most: in the context of the moral life.

II. MacCormick's Smith: Imagination and Sympathy

Whereas the key concepts that MacCormick takes from Kant are autonomy and universality, the central terms of Smith's account are imagination and sympathy. As we shall see, MacCormick's focus is more on sympathy, especially as it features in the deliberations of the impartial spectator, than on imagination. This is a pity, for imagination is just as central to Smith's account as sympathy, and indeed helps, when properly acknowledged, to ward off some misleading readings of Smith's concept of sympathy (for instance, equating it with empathy).

As indicated above (in the introduction) by reference to earlier works by MacCormick, and as present at various points in PRLM, MacCormick often accompanies the term

‘sympathy’ with the term ‘empathy’ (e.g. PRLM, 33 and 57), believing, it seems, that empathy is the modern equivalent. In fact, however, the concepts are very different. Here is how Prinz articulated the difference:

Sympathy leads us to look after those in need or distress. Sympathy can be defined as negative emotional response to the suffering of others. A sympathetic person feels bad that you feel bad. It’s not clear empirically whether sympathy always refers to the same underlying emotion. If so, it’s probably a species of sadness. In this respect, sympathy differs from empathy, which manifests itself differently from context to context... In empathy, we feel the same emotion that someone else is feeling; we put ourselves in another person’s shoes. If you are afraid, an empathetic person will experience fear too... ...parents might sympathise with their child’s fear that there is a monster in the closet, but they may not feel any fear themselves. (Prinz 2007, 82-3)

Prinz takes himself to be describing Hume’s concept of sympathy here, which, he says, ‘also figures prominently in the work of Adam Smith’ (Prinz 2007, 82). Although Prinz’s distinction is helpful, his historical statement is somewhat misleading. First, many commentators say that Hume’s concept of sympathy is (following Prinz’s distinction) much more like empathy, i.e. requiring the sharing of feelings, whereas Smith’s does not (but see a recent paper by Collier, 2010, who argues that there are two forms of sympathy in Hume, one ‘associative’, which is like sympathy, and another ‘cognitive’, which requires imagination; in any event, my principal object of interest here is Smith). Further, commentators also point out that it is certainly not the case that sympathy for Smith is only a matter of a ‘negative emotional response to the suffering of others’, but instead precisely a varied emotional response to equally varied emotional states.

As Brodie (2006) points out, however, it is easy to get tangled up here. There are certainly moments in Smith that suggest that his conception of sympathy is closely aligned with Hume. Smith sometimes speaks of directly experiencing what the other experiences and sharing that feeling (in that sense, given our definitions above, speaking of empathy rather than sympathy). However, as Brodie says, ‘a feature of sympathy to which Smith frequently refers, and which is demonstrably crucial to his account, seems not to form part of Hume’s account: “By the imagination we place ourselves in his (the agent’s) situation,” and sympathy “does not arise so much from the view of the passions, as from that of the situation which excites it”’ (Brodie 2006, 166; the internal quotation is from Smith). In Hume, ‘all we learn is that the spectator’s perception of signs of the agent’s passion results in the same passion in the spectator; the impression causes an idea of the agent’s passion, and the spectator’s idea of the agent’s passion becomes so enlivened as to be a passion in the spectator’ (Brodie 2006, 166). This is utterly different to the account in Smith:

In contrast, emphasis on the situation of the agent leads Smith to downplay the significance of the spectator’s perception of the agent’s passion in the formation of the spectator’s feeling. Indeed, emphasis on the situation leads Smith to say that the spectator may sympathise with the agent even though he, the spectator, does not have the same feeling as the agent. This is clearly a radical departure from Hume’s position. (Brodie 2006, 166)

Brodie’s reading is made even more persuasive when one recalls, as Brodie does, Smith’s two examples where the spectator sympathises with the agent but does not share his or her feelings. The first is the case of those agents who are mentally ill, who have ‘lost their reason’. As Brodie says, in this case, ‘the spectator’s sympathetic feeling of sorry for the agent is not matched by the agent’s own feeling because he is, on the contrary, happy, being blissfully unaware of the tragedy that has befallen him. In this case the spectator considers

how he himself would feel if he were reduced to the same unhappy situation' (Broadie 2006, 167). Indeed, in this case, the agent's feelings are more 'evidence of his tragedy' (Broadie 2006, 168). The second case, that of sympathising with the dead, is even clearer: 'Here, the spectator...has sympathetic feelings which are plainly not matched by the agent's own feelings. Again Smith invokes explicitly the agent's situation, emphasising the fact that the spectator comes to sympathy by imagining himself in the agent's situation, and imagining how he himself would feel if so situated' (Broadie 2006, 168). A gulf here emerges between Hume's empathy and Smith's sympathy.

The same vital role of the imagination is emphasised by Raphael's reading of Smith (2007). It is true, says Raphael, like Broadie, that there are instances where Smith speaks of 'fellow feeling', or directly sharing the same sentiments. This is so, for instance, in a passage in which Smith speaks of what today might be referred to as mirror neurons: 'When we see a stroke aimed and just ready to fall upon the leg or arms of another person, we naturally shrink and draw back our own leg or our own arm; and when it does fall, we feel it in some measure, and a hurt by it as well as by the sufferer' (*TMS*, I. i. 1. 3; quoted in Raphael 2007, 12-3). Clearly, there is a sense in which the capacity for such direct identification, such empathy, with others, is important. In this respect, it is useful to remind ourselves of a passage in Smith's *Lectures on Rhetoric and Belles Lettres*, when he speaks (in Broadie's summary) of 'the interesting fact that it is possible to read a tragedy repeatedly, yet without the play palling, and this despite the fact that the suspense is essential to the play. Smith's explanation', as Broadie continues, 'is that although the play is not new to us who have read it many times, the dramatic events, as they unfold, are new to the dramatis personae, and we readers place ourselves in their shoes and see the unfolding sequence through their eyes' (Broadie 2006, 176). Though, as Raphael points out, even such examples can be read in a sympathetic rather than empathetic light: we can understand them to 'illustrate the fact that our awareness of the feelings of other people can only come from imagining ourselves in their shoes and seeing what *we* would then feel' (Raphael 2007, 23; original emphasis).

In any event, in the vast majority of instances of sympathy, imagination is vital. Certainly, when it comes to judging our own conduct, Smith 'gives', says Raphael, 'the imagination an elaborate double role: we have to imagine what spectators would feel if they imagined themselves in our situation...the feeling is an imagined feeling; and indeed, in the end, spectators in the real world are replaced by the imagined impartial spectator conjured up "in the breast"' (Raphael 2007, 15). Helpfully, Raphael provides the following example (which I cite at length, given how useful it is for understanding Smith):

A spectator observes or hears of an action done or contemplated. He knows its 'cause'; that is to say, he knows what has promoted the agent to act or think of acting. Let us suppose that the agent has come upon a child struggling to swim to the bank of a river; he dives in to help. The 'spectator' imagines himself in the agent's place and notes that he would be prompted to act likewise. In other words, he finds that he 'sympathises' with the agent's feelings and consequent action. He gives expression to his sympathy by approving of the action as right or proper, an appropriate response to the situation.

Now suppose instead that the agent cannot himself swim. There is no point in his diving into the water; that would not help the child and would simply add a second person in danger of drowning. He cannot see a lifebelt or a rope or another passer-by, and so he takes off his shirt and uses that as a sort of rope. Let us hope that it works; anyway, he thinks it is the best he can do. The 'spectator', who hears about the episode, imagines himself in the agent's shoes – and sharing the agent's inability to swim. He finds, reluctantly but inescapably, that here again he would be prompted to act in much the same way as the agent, and so he approves of the action as appropriate to the situation.

Let us now suppose that the agent meets someone who, having heard a garbled account of the incident, accuses him of cowardice. The agent, aggrieved at the taunt, punches the scoffer on the nose. When the ‘spectator’ learns of this and imagines himself in the agent’s shoes, he finds that he too would feel aggrieved but would not be disposed to respond with a punch. Since he does not fully sympathise, he disapproves of the punch and says it was wrong, inappropriate to the situation. (Raphael 2007, 15-6)

The matter is a little complicated by Raphael’s use of ‘sympathising’ in the first and final paragraph. Indeed, Smith does sometimes link up moral approval or disapproval with sympathising, in the sense of sharing, the same emotional reaction as the agent being evaluated: ‘To approve of the passions of another’, Smith says, ‘as suitable to their objects, is the same thing as to observe that we entirely sympathise with them; and not to approve of them as such, is the same thing as to observe that we do not entirely sympathise with them’ (*TMS*, I. i. 3. 1; quoted in Raphael 2007, 17). This, however, when read in light of the following, can be understood as a loose use of the concept of sympathy: ‘When the original passions of the person principally concerned are in perfect concord with the sympathetic emotions of the spectator, they necessarily appear this last just and proper, and suitable to their objects; and, on the contrary, when, upon bringing the case home to himself, he finds that they do not coincide with what he feels, they necessarily appear to him unjust and improper, and unsuitable to the causes which excite him’ (*TMS*, I. i. 3. 1; quoted in Raphael 2007, 17).

The important point is this: there is a sense in which we do approve or disapprove of actions depending on whether we find ourselves sharing the feelings of the agent (including potentially ourselves, when we are seeing ourselves from the perspective of the spectator). But moral judgement is by no means simply sharing those feelings: it is not that moral judgement simply consists in making-the-same-judgement-because-you-share-the-same-feelings-as-the-agent; certainly, as in the above two paragraphs in the example offered by Raphael, that happens to be the case – but it is not the case in the third paragraph. Indeed, the third paragraph would not make sense if there was not a role for the imagination: we enter imaginatively into the situation of another (or ourselves, as the case may be), and we see whether we are disposed to share those feelings or not, or whether another kind of feeling might strike us (as a result of taking an impartial stance) as more appropriate. It is only then that we judge accordingly.

How does all this feature in MacCormick’s book? I have already quoted MacCormick’s identification of sympathy and empathy. MacCormick also conflates Hume and Smith’s concept of sympathy. He says, for instance, that ‘Humans...have, as Hume and Smith pointed out, a yet more extensive capacity for sympathy with others of their own kind’ (PRLM, 33), and he goes on to elaborate on this in the following way

We are capable of feeling, and indeed we simply do in appropriate circumstances feel, the pain of others. We do so, for example, witnessing a road accident, or a physical assault by one person or another, or a TV clip of a suicide bombing and its aftermath, or one of the planes flying into the Trade Towers – albeit less acutely than the direct victim(s). We can also feel in a pallid way, except when masked by pangs of envy, the joy of those who are happy, when we see or envisage the occasion of their happiness. Put of sympathy (or ‘empathy’) we can take others’ good as part of our own good, and thus natural other-regarding reasons for action which yet have also an element of the self-regarding in them. (PRLM, 33)

MacCormick does not limit his reading of sympathy to Prinz’s negative form, to a kind of sadness: he extends it also to happiness, and indeed to a wide range of emotions. But he does appear to confine it to what we defined above as empathy: as the capacity to share the feelings

of others. Further, his reference to feeling the feelings of others less acutely than those others themselves suggests a very Humean reading. Here, it must be said, MacCormick is only faintly Smithian.

In a later passage, where his account of Smith is most elaborate ('Turning to Adam Smith', section 5 of chapter 3, PRLM, 57-62), MacCormick also confines the idea of sympathy to being 'affected by the perception of others' feelings. I wince as the blow falls on your head. I cower behind my steering wheel when I see your car heading apparently inexorably for a head-on collision. I feel distressed at the sight and sound of someone else's weeping...' (PRLM, 57). He then asserts that it is in such sentiments that Smith found the 'foundations of our capacity for moral judgement' (PRLM, 57), going on to describe it follows:

Moral judgement, he (Smith) argued, is based on a sense of approval or disapproval of our own conduct and that of others. Since approval and disapproval are sentiments of our own that can move us to action, the practical character of morality is sufficiently guaranteed by its having a sentimental basis. The acts I consider obligatory for me to do are those I approve of my doing, where failure to do them would arouse my own self-disapproval. The shared sympathies of humankind make it probable that you will, or would if you were aware of all that is relevant, approve and disapprove similarly (and everyone else, too). Moral motivation is a matter of avoiding disapproval, both by the agent and others in the vicinity. (PRLM, 57-8)

This is most certainly an idiosyncratic reading of Smith. More accurately, it imposes a good deal of Hume on Smith and thereby arguably does not capture what was unique about Smith. Hume had already argued that moral judgement consisted in the capacity to feel approval or disapproval: as Raphael puts it, 'These feelings, he (Hume) said, are feelings of pleasure or displeasure of a particular kind, and they arise from sympathy with the pleasure or pain of the person or persons affected by the action judged' (Raphael 2007, 29). If we were to restrict moral judgement to that, we could easily do better with Hume than Smith.

MacCormick goes on to argue that Smith called for two corrections to this account of moral judgement based on sympathy. The first was a need for impartiality, given our propensity to favour our narrow range of family and friends; and the second concerned what MacCormick calls 'knowledge', primarily of the 'motives and intentions from which and with which a person acts towards another' (PRLM, 59). Again, we may wonder whether these are distinctly Smithian qualities. As Raphael points out, Hume also had recourse to a spectator device, and also recognised the need for the spectator to step back from the most nearby objects of his affection: 'When a man speaks the language of self-love', said Raphael paraphrasing Hume, 'he expresses sentiments "arising from his private and particular situation"; but when he speaks the language of morals, he must "depart from his private and particular situation, and must choose a point of view, common to him with others: He must move some universal principle of the human frame, and touch a string, to which all making have an accord and symphony' (Raphael 2007, 30; internal quotation is of Hume from the *Enquiry Concerning the Principles of Morals*, 1751, 9, I, para. 6). Similarly, in the case of the knowledge of the motives and intentions from which a person acts: it is not merely the fact of causing us pleasure or pain that disposes us, well or ill, to a person; as David Fate Norton reminds us, Hume thought that that person 'must do so from some "durable" feature of mind: he must either act "knowingly, and with a particular design and intention", or from a settled character.'" Generally speaking, a person who "harms us by accident, becomes not our enemy upon that account, nor do we think ourselves bound by any ties of gratitude to one, who does us any service after the same manner. By the intention we judge of the actions, and according as that is good or bad, they become causes of love or hatred" (Norton 1993, 160-1; internal

quotation is from Hume's *Treatise of Human Nature*, 1739-40, 2.2.3). Similar statements can be found in the *Enquiry Concerning the Principles of Morals* (see Norton 1993, 161-2).

In effect, things are more complicated in Smith. For one, there is a distinction – not discussed by MacCormick – that Smith draws between judging an action to be proper or improper and judging some conduct to be meritorious or not. There are two forms of moral judgement in Smith, not one, and the knowledge that underpins each is different. In the case of judgements of propriety and impropriety, the knowledge in question depends on knowledge of motive; in judgements of merit and demerit, the knowledge needs to be knowledge about intended effects:

In the suitableness or unsuitableness, in the proportion or disproportion which the affection seems to bear to the cause or object which excites it, consists the propriety or impropriety, the decency or ungracefulness of the consequent action.

In the beneficial or hurtful nature of the effects which the affection aims at, or tends to produce, consists the merit or demerit of the action, the qualities by which it is entitled to reward, or is deserving of punishment. (*TMS*, I. i. 3. 5-7; quoted in Raphael 2007, 22, who supports the above reading, though he regards it an unpersuasive theory)

Where Smith is unique, at least according to Raphael, is in 'the development of the concept' of the spectator 'so as to explain the judgements of conscience made by an agent about his own actions', and, more precisely, not about what he has done, but about what he ought to do (Raphael 2007, 31). Certainly, this spectator has to be impartial, as in the case of Hume, but what is so distinctive about Smith is the extent to which he shows both the spectator in question is a creature of imagination (and not any actual spectator) as well as the extent to which the spectator has to be imaginative. Raphael quotes, in this respect, a passage from the first edition of the *TMS*:

To judge of ourselves as we judge of others...is the greatest exertion of candour and impartiality. In order to do this, we must look at ourselves with the same eyes with which we look at others: we must imagine ourselves not the actors, but the spectators of our own character and conduct.... We must enter, in short, either into what are, or into what ought to be, or into what, if the whole circumstances of our conduct were known, we imagine would be the sentiments of others, before we can either applaud or condemn it. (Smith quoted in Raphael 2007, 35)

Raphael argues that when we miss the sense in which Smith speaks of the imaginary spectator, of 'the man within', we may very well mistake this device simply as representative of general social attitudes (Raphael 2007, 36). The literature on Smith points to an objection raised by George Eliot in a letter written soon after the publication of the first edition of the *TMS*, in which Eliot raises precisely the issue as to whether the judgement of the spectator is only ever the judgement of society. Smith replied in a letter: 'You will observe that it is intended both to confirm my Doctrine that our judgements concerning our own conduct have always a reference to the sentiments of some other being, and to shew that, notwithstanding this, real magnanimity and conscious virtue can support itself under the disapprobation of all mankind' (Smith quoted in Raphael 2007, 37).

Sometimes, when MacCormick's speaks of Smith's impartial spectator, he presents him precisely as a representative of the society: he asks, for instance, 'What then leads us into attempting to cultivate "ideal spectator" sympathies, rather than simply act on the basis of raw feelings? The answer Smith gives is in terms of our social character. We find it disagreeable to have reactions that are out of keeping with those of others' (PRLM, 59). Further, the

reference to an ‘ideal spectator’, as in that quote, but also throughout PRLM, does suggest MacCormick has in mind the possibility of some ideal (perhaps objectively valid) judgement – for what else would the notion of the ideal add that impartiality does not cover?

The way out of this difficulty is to suggest that what Smith had in mind, and that MacCormick may have, or at least should have if he is to make his use of Smith plausible, is that the importance of the social character arises in the formation, precisely in the *cultivation*, of the impartial spectator, of ‘the man within’, of our conscience – but that it does not necessarily determine the *content* of the impartial spectator’s judgement. It is true that for Smith conscience is a social product, developing as a kind of mirror of social feeling (Raphael 2007, 35) – but if Smith’s remarks (including his above-mentioned response to Elliot) are to make sense, then we must assume that the impartial spectator is not necessarily merely a *vox populi*. In other words, our capacity to evaluate – anything, including ourselves – is dependent on the social formation of judgement; we can only ever come to scrutinise our conduct by learning to see ourselves as others might see us. But none of this needs to indicate that just because we have this capacity, which has been formed and cultivated in this way (as, for Smith, it could not emerge in any other way), so it follows that we either must, at any particular moment, judge as others would, or that we ought to. The key point is not to judge as everyone else might, but to force ourselves to engage in the imaginative task of impartially observing ourselves.

This reading of Smith is supported by his extensive endorsement of the virtue of self-command – an aspect of his account that appeals strongly to MacCormick. As MacCormick puts it, the virtue of self-command ‘involves restraining oneself from hasty or impulsive responses to the unfolding drama of everyday life. It involves a capacity to stand back and consult “the man within the breast”’ (PRLM, 60) – though one could perhaps say, more accurately, consulting the man within the breast precisely is the capacity to stand back; the cultivation of the impartial spectator is, as it were, the cultivation of the virtue of self-command.

I mentioned earlier, in the first part of this paper, that Kant read in a specific way (on the weaker reading of the CI), can assist in the Smithification of Kant, for Smith’s account of the genealogy of moral rules can supply the moral knowledge that Kant presupposes, and thus also make that moral knowledge less mysterious than it needs to be. As MacCormick notes, Smith’s account of the formation of these moral rules was based on ‘induction and generalisation from frequently recurring problem situations and from the judgements one arrives at in such cases. Examples might be cases such as wilful deceit, or physical assault, or breach of a promise...’ (PRLM, 61). There is perhaps more going on in Smith’s account than MacCormick supplies, for what is vital for Smith is that these rules emerge for us as we observe the ‘shocking conduct of *other people*. Awareness of one’s own reaction is reinforced by seeing that everyone else is affected in the same way, and also, of course by seeing that the particular kind of reaction is repeated whenever one encounters the particular kind of conduct’ (Raphael 2007, 54; original emphasis). But MacCormick is generally right in his portrayal of Smith’s account of moral rules, as he is also right in emphasising that for Smith the point is that the general rules in question depend ‘upon initial particular judgements, as contrasted with the view of philosophical rationalists that all particular moral judgements depend upon their conformity to general rules’ (Raphael 2007, 55). Certainly, MacCormick finds appealing the fact that Smith does not assume any ‘pre-existing or complete moral rule-book’, always prioritising ‘considered judgement...over rules’ (PRLM, 60-1).

In short, Smith’s account, when read in such a way as to make room for as much imagination as sympathy, can help provide a pleasingly non-mysterious and social account of the formation of certain capacities needed in order to make judgements. Further, again when imagination is built in, Smith’s account of any one act of judgement, especially of what one

ought to do, points to the sense in which some distance from oneself is needed in such cases, but not in such a way as to let go of the sentiments, but so as to be informed by them – in a way using the sentiments to orient the spectator’s judgement. Smith’s account can also help us understand the formation of moral rules, to the extent, of course, that we want to picture moral knowledge as, at least in part, a matter of the knowledge of rules – doing so, once again, in a pleasingly non-mysterious and social fashion, relying on repeat experiences, and reflection on them, in the company of others.

How much of this Smith is in MacCormick? Smith for MacCormick appears more as a source of very plausible explanation – more ‘earthy’ than Kant (PRLM, 57) – of our capacity for moral judgement and the formation of moral knowledge (encapsulated in the above-mentioned rules). MacCormick also finds Smith attractive because of certain Kantian-friendly features, such as impartiality and the virtue of self-command. But, as far as I can tell from PRLM, MacCormick was sceptical about Smith’s own model of moral judgement being sufficient – hence, as we shall see in a moment, the postulation of the Smithian Categorical Imperative. My point in the above has been to show MacCormick’s understanding of Smith – and thereby prepare us for the next part of the paper – but also to indicate that if MacCormick sought to capture more of what is unique about Smith’s contribution to moral philosophy, he also may have found more resources in Smith. That need not mean we lose sight of the importance of Kant – it is hard to imagine moral philosophy without Kant. The point is Smith acknowledged in full may have even made the prospective rapprochement between Kant and Smith even more attractive.

Before leaving Smith, I should clarify that nowhere in the above do I wish to describe Smith as providing, or seeking to provide, us with an infallible procedure for determining what we ought to do. Smith did not set out to give us a guide as to how to make objectively valid judgements. His project was indeed, on the whole, a descriptive one – though by the time of the sixth edition of the *TMS*, and the introduction of the entire part on virtue, Smith perhaps became more of a prescriptivist than some characterise him. For my money, the important point is the emphasis on fallibility, not the status of the judgements based on the procedure that Smith describes. Smith says: ‘the present inquiry is not 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 a weak and imperfect a creature as man actually and in fact approves of it’ (Smith 1759, 2. IV. 10; 2002, 90, fn. 10). The point I would stress about this is not that Smith’s theory is somehow weaker because it follows a certain kind of method (naturalistic), and is therefore incapable of giving guidance to persons; the point is more that it is to be applauded for not trying to say too much (here, I cannot but help think of Wittgenstein’s ‘Lecture on Ethics’, 1929-30 (1997), i.e. for not offering itself as a method for moral infallibility. After all, I can read Smith’s book and tell myself: it would be worthwhile for me to cultivate my capacity to impartially observe myself, taking into account the sentiments that others might feel in such-and-such a situation. I could do that, and I could take Smith’s own modest remark about his theoretical method to be a warning: none of this secures the validity of my judgements; I remain a person, and nothing more, trying to do my best, never able to say, with any certainty, that my conduct is faultless, or even praiseworthy, because I followed such-and-such a method.

III. The Smithian Categorical Imperative

I have now mentioned MacCormick’s Smithian Categorical Imperative (‘SCI’) a number of times, without as yet quoting it. So here it is:

Enter as fully as you can into the feelings of everyone directly involved in or affected by an incident or relationship, and impartially form a maxim of judgement about what is right that all could accept if they were committed to maintaining mutual beliefs setting a common standard of approval and disapproval among themselves. (PRLM, 64)

This is the principal formulation, and then comes a ‘subsidiary imperative’:

Act in accordance with that impartial judgement of what it is right to do in respect of the given incident or relationship. (PRLM, 64)

Let us now work backwards, for a moment, seeing why MacCormick thinks this rapprochement between Smith and Kant necessary, and then, forwards, seeing how MacCormick applies it.

MacCormick is not entirely clear on why it is that Smith, on his own, or Kant, on his own, would be insufficient – this is so because, as he himself says, his book is not a work of exegesis; it is an attempt to get at the truth of what he thinks about moral judgement (with a little help from Smith and Kant along the way). In that respect, what he says about the limits and weaknesses of Smith and Kant’s views has to be taken with a grain of salt: they are not supposed to be read as judgements of Smith and Kant, but as purported judgements that set up the attractiveness of the SCI.

Having said that, MacCormick does say that the SCI improves, for instance, on the Kantian reliance on the analogy with a legislature, rather than a judiciary. Kant, says MacCormick, ‘prescribes our acting as though we were universal legislators making or confirming a law for everyday. But we are not, and there are great difficulties in conceptualising the activity of this ideal law-maker’ (PRLM, 64) – I have already indicated that this may be a somewhat unfair reading of Kant, but what is clear here is what MacCormick is distancing his account from. The legislative analogy is not practical enough: the point of moral ‘judgement’ is to ‘facilitate decision – “so that is what I’ll do”, followed sooner or later by actually doing that thing rather than an alternative (not all decisions are for immediate execution)’ (PRLM, 65). Kant was also, MacCormick states (though tentatively), apprehensive of appealing to emotions at any moment: not only was our action not to be determined by an inclination, but even in deciding whether such-and-such a course of conduct could be willed as a universal law, ‘it would be inappropriate to investigate the emotions of those affected. Emotions are contingent and variable, and belong to the animal nature of human beings. Morality concerns reason and universality, not emotion and contingency’ (PRLM, 63) – again, we need not, in the context of this part, evaluate this on exegetical grounds (I already indicated above, following Schneewind, that there is evidence that would cast doubt on this characterisation of Kant). The point is that MacCormick wants to show that it is possible and important to take into account the emotions of those affected.

In relation to Smith, it is more difficult to see what MacCormick finds so dissatisfying as to require the need for Kant. Certainly, he criticises Jeremy Bentham for misunderstanding Smith, when the former criticised the latter for thinking that ‘right and wrong are determined simply by a person’s momentary sentiments of sympathy or antipathy that have been aroused by the actions of others’ (PRLM, 116-7). MacCormick quite rightly says that if this is what Smith said, Bentham would have been right to have criticised it for arbitrariness and caprice; but it is not what Smith said, so Bentham is mistaken (PRLM, 117). Perhaps the best that can be said is that MacCormick believes it is possible and desirable to push Smith further, rather than there being any fatal flaw in Smith’s own view. In other words, by introducing Kant, MacCormick wants to translate Smith’s sensitivity to the vital role of the emotions in social life into a guide for reasoning about what to do. The clearest passage in this respect, which I cite at length, is the following:

Humans with the emotional or sentimental characteristics that Smith has identified are also rational and speaking animals. They thus have to live in quite close communities, and in some wider congeries of communities in some kind of society. Do they then have to acknowledge any basic mutual observance if this is to be possible? It seems that they do. To will the end is to will the necessary means for its realisation, or, rather, the necessary conditions of its realisation. Whoever will live in a community must will the conditions of viable community. This means willing the norms that define basic mutual duties as a foundation of possible reciprocal actions and abstentions based on mutuality of beliefs and (indeed) ‘mutuality of restrictions.’ This ‘rational will’ modification of Smith goes beyond what he himself allowed for. He saw this as a matter of people deriving moral rules from inductive reflection on recurring particular judgements. The Kantian revision allows for a way of confirming or re-issuing in a fully universal-normative form the merely inductive generalisation. This revision also expresses a form of reasoning that calls upon one to think articulately about the interaction between any such universalised rule of conduct and an overall moral view. Such a view, if it is to be rational, has both to be self-consistent internally and to express an overall coherence. Only by being rational in that way could it be an element in a reasonable plan of life. (PRLM, 117-8)

MacCormick is right to give a restrictive role to the rules that Smith speaks of. In fact, Smith refers to the rules mainly to show their foundation is not rationalistic, but empirical: his real object is not the use to which we put the rules, but a demystification of their origin. Actually, Raphael reminds us of one restricted use: Smith says we do appeal to the rules when we are ‘debating concerning the degree of praise or blame that is due to certain actions of a complicated and dubious nature’ (*TMS*, II. 4. 11; quoted in Raphael 2007, 55), which Raphael interprets to refer to moral dilemmas, where there is a ‘need to choose when two or more moral notions are involved and there is a conflict between them’ (Raphael 2007, 55). In such cases, Raphael says, ‘we are indeed thinking about general rules that we have already acquired, and we “appeal to them as to the standards of judgement”’, but the important point for Smith is that excessive attention to such cases has misled ‘rationalist philosophers into thinking that “the original judgements of mankind with regard to right and wrong were formed like the decisions of a court of judicatory”’, which’, continues Raphael, ‘proceeds by first considering a general rule and then asking whether the particular action brought before it falls under the rule’ (Raphael 2007, 56). In this respect, to attempt to translate Smithian rules into a ‘fully universal-normative form’ is certainly to depart from Smith. The only point we can add in that respect is that this is of course hardly a weakness of Smith’s: it is just that Smith’s attitude to the role of such rules does not suit MacCormick’s purposes. Let us, then, turn to MacCormick’s application of the SCI.

Perhaps the best place to start is to see how a merely Kantian CI would fall short of what MacCormick believes is desirable for moral judgement to achieve. This is clearest in the case of a discussion of the running example in the book, the ‘decision to embark on writing a book to fulfil a promise to my publisher’ (PRLM, 75). Universalised, this becomes, as MacCormick puts it (in the most general form): ‘Whoever makes a promise to do anything that may legitimately be done must fulfil the promise by doing the thing promised’ (PRLM, 75; there is an interesting question here lurking in the background concerning degrees of generality in prospective universalisations, but I shall ignore this). Turning to Kant, MacCormick then asks whether this universalisation could be willed as a universal law of nature. He reasons that ‘the importance of mutual trust and reliance in any human community’ makes it seem obvious that ‘every person must keep her or his promises unless some relevant (universally justified) exception applies to a given promise’ (PRLM, 76).

In his analysis, here, MacCormick arguably goes beyond anything that Kant may have endorsed. Certainly, there are the famous passages in Kant’s *Groundwork*, which have

generated such great theoretical debate, concerning the exact kind of contradiction entailed by the prospective universalisation of lying (see the discussion in Korsgaard 1998, xix-xxi). But Kant does not enter into a discussion of the kind MacCormick provides, i.e. one in which we examine what general values human nature might require. MacCormick argues that ‘human nature is essentially revealed in our very capacity to be speaking animals and to live in communities of fellow speakers, and to rear our children to become competently speaking members of our own community. In this sense,’ he says, ‘the promise-keeping norm is a law essentially built into our nature’ (PRLM, 76). This reference to human nature, and what kinds of values might flow from it, is not an aspect of PRLM (discussed in detail in chapter 2) that I have had recourse to here: my focus, as I indicated at the outset, has been on the interpretation of Kant and Smith, as these lead MacCormick to formulate the SCI. But it is important to mention this here, for it forms part of MacCormick’s analysis of the manner in which what he characterises as a Kantian reading might fall short of the kind of judgement provided by the SCI.

MacCormick’s conclusion as to the Kantian analysis, in relation to this example, is that ‘What one wills in the Kantian sense is or (as it seems to me) ought to be a will for there to be a common norm, reciprocally endorsed among all rational people that no one shall...break a promise’ (PRLM, 76). The emphasis here is on a genuinely common norm, and not just a matter of each person individually willing the same norm: ‘the point of truth-telling and promise-keeping norms lies in their being shared norms, commonly held and observed norms supported by mutual beliefs’ (PRLM, 76). Again, this reference to common norms held up by mutual beliefs goes beyond the kind of test envisaged by the Kantian CI (indeed, MacCormick is here referring to conventionalism, which receives a brief discussion in PRLM, 50-3, and a more sustained one in chapter 1 of *Institutions of Law*).

Having proceeded in this way, MacCormick then shows us what he finds dissatisfying about this form of universalisation. Most importantly, he says, it ‘does not fully capture one’s sense of what is wrong or outrageous about cases of cheating and deceit’ (PRLM, 77). What is missing is precisely what he sees Smith as capturing for us: the sense of indignation, for instance, that will meet any betrayal of trust (via a lie or the break of a promise), or the sense of guilt felt ‘even when my lie is undetected (to say nothing of the shame I feel if or when it is uncovered’ (PRLM, 77). The point, then, is that under the SCI, the ‘judgement one reaches...is one of unhesitating disapproval, with a degree of weight proportioned to the depth of the trust betrayed and the severity of the deception involved – what exactly was the false belief into which the innocent person was led?’ (PRLM, 77). It follows from this that the liar ought to apologise, and to learn to live ‘under a cloud of unhappy suspicion and suspended trust’ as long as such time as ‘he or she has worked a passage back into restored (if never quite so deep or unthinking) trust’ (PRLM, 77) – feeling, meanwhile, justified grief and shame.

And yet, this attention paid to the ‘immediate judgement of anger, resentment and the spectator response’, as itself universalised by the impartial spectator (e.g. ‘such lying is intolerable’), is by no means incompatible with what MacCormick sees as the ‘further test applying Kant’s “universal law of nature” formula’ (PRLM, 77-8). Certainly, the Smithian perspective (as MacCormick thinks of it) is vital: ‘it does...seem right that from the very ground floor one should write into one’s criteria of judgement ordinary human emotions, wishes and needs of a kind that can be shared among persons’ (PRLM, 78) – but this does not of itself hamper (on the contrary, it aids) the plausibility and desirability of the Kantian test (as MacCormick understands it). Everything here comes together for MacCormick:

Always, as moral deliberators we are primarily concerned with judgement about our own conduct and that of others in our vicinity, and about what to do in the light of such judgements. We have to presuppose some universal common standard, and it has to take

account of all feelings, those of the potentially deceived and those of potential deceivers, and it has to be a possible basis of workable mutual beliefs. There seems no reason to doubt that anyone applying this as a procedure of justifying judgements would reach the conclusion that confirms what is the ordinary judgement of conventional morality. In this case, at least, this is a strong but not conclusive point in favour of the Smithian justification procedure. (PRLM, 78)

MacCormick's application of the SCI in the above example rests, to a large extent, on his reading of what follows from human nature (the value of trust and mutual reliance, as exemplified in language use, follows from human beings as speaking animals). This is perhaps neither properly part of Kant or Smith. Nevertheless, one can see here the kind of procedure MacCormick wants to introduce: one that pays attention to the feelings of those concerned, and all potential feelings of the wider community, in the very process of understanding what might be, and what one finally endorses to be, the appropriate course of action or appropriate judgement as to whether some conduct is justified or not. In the above application, however, the legwork is being done more by the argument from human nature, than by an application of the SCI.

The second illustration – perhaps the most spectacular in the book – will show how MacCormick uses the SCI to lead to determinations of what one ought to do (as distinct from the example above, namely an example concerning what humans, given a certain nature, should value). Indeed, it will be useful to compare the above application of the SCI to the one below.

The example is that of MacCormick's discussion of the conjoined twins case (*Re A (children) (conjoined twins)* [2001] Fam 147; [2000] 4 All ER 961). This book is by no means the first time that MacCormick has turned his attention to the case: it formed one of the leading examples discussed in his chapter for the *Universal and Particular* collection of essays mentioned in the introduction (Bankowski and MacLean 2006), and also featured, in revised form, in *Rhetoric and the Rule of Law* (2005). In *Rhetoric and the Rule of Law*, MacCormick refrained from moral criticism of the case, pointing out only the importance of the universalisation formulation provided by Ward LJ (see MacCormick 2005, 90). That importance rested on the fact that 'the rationality of any system of precedents depends upon this fundamental property of normative justification, within any justificatory framework, its universalisability' (MacCormick 2005, 91). The focus in PRLM is squarely on the moral justifiability of the decision in that case.

Briefly put, the case concerned conjoined twins, called Jodie and Mary (these were not their real names). As a result of being conjoined at thorax and abdomen, Mary was entirely dependent on Jodie's cardiovascular system. However, the strain on Jodie was such that if they were not separated, Jodie (and thereby also Mary) would die in a matter of weeks. If, however, they were separated, then Mary would die immediately and Jodie had a chance of not only surviving, but also leading a reasonable life, though one that would demand continuous (and expensive) treatment and supervision. In fact, as Kenyon Mason pointed out in a paper shortly after the decision (Mason 2002; and then also in the above-mentioned collected essays, Mason 2006; MacCormick acknowledges this analysis: PRLM, 173, fn. 6), the issue as put to the court may have exacerbated the difficulty of the case, for it was by no means obvious that Mary was in fact alive (legally speaking), as she did not have her vital organs under her own control. For present purposes, and as discussed by MacCormick, the important point is that the court proceeded as if to separate the twins was to, in effect, kill Mary, whereas not to separate them would be to let both die of natural causes.

The parents, who were devout Catholics, opposed the operation, and MacCormick spends a good deal of time – and we shall soon see why – recounting their reasons. The physicians and surgeons at the hospital where the twins were treated, however, supported the

operation, believing this to be in Jodie's best interests. The issue, then, for the Court, was whether the operation was lawful. The Court found that it was, and authorised the procedure to go ahead.

The importance of the case for MacCormick's purposes in PRLM is not the legal quality of the decision; it is, instead, its moral quality. To ascertain that quality MacCormick applies the SCI. The conclusion he reaches is that the decision was morally wrong: the operation ought not to have gone ahead. Rather than paraphrasing his judgement, I here include it in total, for, though long, it provides the best indication of how MacCormick conceived his SCI applying to difficult cases of this kind:

Even several years after the event I find myself sharing the parents' grief and distress at the situation in which they found themselves. They face the early death of at least one of the babies. Mary's death will be accelerated on one possible solution of the dilemma, namely performance of the operation that will kill her. That operation may (though it will not certainly) save Jodie's life. The quality thereafter of Jodie's life may be problematic, though the medical and surgical prognosis was reasonably hopeful about the possible outcome of a series of operations. A further problem will concern the possibility that she can during such a period of treatment be cared for by her parents. They cannot provide much specialist care in Malta and they are not in a position to move permanently to England. The parents are appalled at the prospect of trying to care adequately for Jodie, or providing suitable surrogate care, if the operation does go forward, with all its foreseen aftermath.

In a countervailing way, a sense of common humanity and human potentiality enables me to understand that Jodie's chance of life is drained by the innocent conjointure of her sister Mary on to her. She could live and breathe for a long time but that Mary uses up too much of her oxygen, and will do so the more as they grow larger. There is a sense in which non-intervention amounts to standing by while Mary innocently causes Jodie's death. There [is] much sorrow attached to that, and it weighs to some extent against the parents' distress. Are the parents actually being selfish in preferring their own convenience to their daughter's potential for life? On the other hand, Mary's heart and lungs are not and cannot be made strong enough to enable her to breathe for herself and oxygenate her blood adequately to sustain vital functions. Whatever distress and pain we impute to her or imagine sympathetically on her behalf, could we really go along with a demand by her or on her behalf for continuing support by Jodie when this support will in due course cause Jodie's death and Mary's at the same time?

...One principle seems to me of real importance, namely that where the parents are concerned and contentious, they ought to have a prior say in questions concerning treatment of their children, the younger the more so. I do not deny that parental selfishness, feckleness [fickleness?] or sheer callousness frequently justify an override, an indeed a removal of children from parental care to some safer situation as possible for their safe upbringing. Where such an override is not justified, it is likely that natural parents will always care more and more conscientiously for their own children than anyone else will or can, although there are indeed many examples of highly successful infant adoptions. Children's interests are best served even when they are not particularly well served, by their being embedded in a family in which in their early years their parents have the primary say about how they are to be looked after.

On this assumption, I cannot see any sufficient reason in the conjoined twins' case to override the parents' view. It is a difficult matter of balanced sentiment and marginal judgement. To impose a decision about the children over the head of the parents is morally unacceptable. (PRLM, 177-8)

This application of the SCI is considerably different from the one we encountered above. There, recall, in the case of the practice of lying and promise-breaking, MacCormick applied the SCI to the effect that a certain kind of value, a natural law, followed from the nature of

human beings, including their sentimental nature (as I have said, this strikes me as a strange application of the SCI, for the legwork is being done by an argument from human nature). Here, the SCI is applied to offer a moral critique of a legal decision on moral grounds, where the specific test of the SCI is one that ends up giving priority to the feelings of the persons directly affected by the decision.

In fact, it is important that we do not mischaracterise MacCormick's application in this second example. It would seem to be an implausible and unwarranted application of the SCI (and one that would not conform to the formulation MacCormick himself provides) that merely gives priority to those most directly affected: that is not the kind of application we should take MacCormick to be performing here. The point is that it is only after the various sentiments at stake are considered, that MacCormick ends up favouring that of the parents. That sentiment just happens to be the one MacCormick, having gone through the procedure, believes to be most appropriate.

Still, I must confess that the very fact that MacCormick's application does end up favouring one of parties' actual sentiments, especially when combined with his emphasis on empathy (rather than Smithian sympathy), makes me anxious. The Smith-like approach, as I read it, is a description of a process according to which, with the requisite imagination and impartiality, a spectator constructs what the appropriate emotional response would be. This construction is not necessarily one that takes into account the actual feelings of those affected, and certainly not one that merely chooses between those actual sentiments (I do not think MacCormick endorses, or should endorse, either, though he is not entirely clear in this context what his position is). The matter is complicated because it is not entirely clear to what extent Smith himself thought we had access to, and always needed to have access to, the actual emotions of those directly and potentially affected. In any event, MacCormick's application of the SCI suggests, once again, that what is more important for him here is a universalisable judgement of empathy, rather than sympathy in an arguably more distinctively Smithian sense.

Before leaving this example, it is important to emphasise that MacCormick's criticism of it is levelled at its moral, and not its legal quality. He does say that there are three options available to those facing this decision, including, first, 'contentious resistance to the implementation of the decision', but he does not endorse this as 'a serious possibility, nor a desirable course of action' (PRLM, 180). Instead, he thinks, along Hartian lines (for this reading of H.L.A. Hart, see chapter two of MacCormick's *H.L.A. Hart*, 1981), that there may be, second, 'moral critique of the legal decision that will lead to its being reconsidered by the same legal authorities at a later date', or, third, that it may be possible to 'embark on a programme of "critical morality" seeking to raise legislators' consciousness about a problem and to motivate legislation to alter the established law about a matter' (PRLM, 180). This confirms the divide MacCormick sets up between the heteronomy of law and the autonomy of morality: what is important in the case of the former is that a universalisable decision is made, that it provides reasonably determinate guidance (especially in contexts of health services), and that it is on the whole obeyed by the population (excepting cases of extreme injustice); this does not mean, however, that in the case of morality, the legal decision 'cancels the validity of the contentious judgements of any issue by a moral agent. Autonomy in moral judgement means that each person is responsible for her / his view of what is good and bad, right and wrong and can never be overruled on the issue' (PRLM, 181).

Needless to say, the matter of the relation between moral and legal judgement is complicated. For one, it is difficult to see how the moral critique of a legal decision can neglect the kinds of considerations that officials in legal institutions are obliged to take into consideration. It is different if the SCI is being applied to help me determine what I ought to do in the absence of me having, as a judge say, certain obligations – those being, in

themselves, at least on some accounts of legal reasoning, including MacCormick's, ethical obligations (see his paper on 'The Ethics of Legalism', MacCormick 1989; and the views of other ethical positivists, such as Tom Campbell, 1996). It is one thing to consider the validity of a person's moral judgement vis-à-vis some institutional normative order, and another thing to criticise the moral validity of that order via a certain method for judging what one ought to do in non-institutional contexts. As one would expect, all this MacCormick endorses: he says, for instance, that rather than 'direct moral critique', the 'better mode in which to seek reconsideration of judicial decisions' is that of a 'technical-legal critique of a judgement' (PRLM, 180), and though he does not go on to elaborate on what he means, I think one should take MacCormick here to be warning against a kind of moral critique of legal judgement that does not take into account the specific moral duties imposed, in any one legal system, on the public officials of that system. Obviously, this does not mean that there cannot be moral critique of the outcomes of legal decisions on a policy level – that being precisely the third option that MacCormick notes above.

The SCI is certainly MacCormick's own, distinctive contribution – though, as I have attempted to show in this part, it is not always consistently applied by him. In neither application of it that I have discussed above are we particularly close to either Kant or Smith. The fact that the SCI in its formulation and applications does not reflect Kant or Smith is not, of course, a criticism in itself: it only makes sense as a criticism if there are features of Kant and Smith that the SCI ignores or excludes and that it is desirable to keep. I will consider whether that is so in my concluding remarks.

Conclusion

The Smithian Categorical Imperative is, as we have seen above, a decision or test procedure. It is designed to give us guidance as to how go about forming a moral judgement, what its content should be, and how to act on it. Alternatively, it can be used to evaluate a decision already made as to its moral quality. In both senses, it constitutes a positive answer to the question that opens the book: 'can reason be practical?' (PRLM, 1). Reason, says MacCormick, can be practical, but only if supported and informed, as he has shown it can be in this book, by the sentiments. In previous works, such as *Legal Reasoning and Legal Theory* (1978) and *Rhetoric and the Rule of Law* (2005), MacCormick argued for the practicality of reason in legal judgement. As I indicated in the introduction, those works already contained stirrings as to the importance of the sentiments. Here, in a book dedicated to moral judgement and the moral life, MacCormick has made more room for the sentiments than ever before – and what he has found, as he ingeniously expressed it in the form of the SCI, is that properly acknowledged, the sentiments can support, rather than detract from, the practicality of reason. It is a great achievement, and one that deserves to be examined carefully by moral philosophers.

We can, however, also raise some questions about MacCormick's approach. Paying particular attention to the first two parts of this paper, we can, for instance, ask the following question: is the SCI the kind of rapprochement between Kant and Smith that may help us cherish what is most plausible and desirable, as well as distinctive and unique, about their contributions to moral philosophy?

A picture of the moral life that makes room for the four concepts identified above – autonomy, universality, imagination and sympathy – does seem to me to be highly attractive. When these concepts are further supported by the kind of interpretations I have urged above, namely a thin, weaker reading of autonomy and universality, i.e. as a matter of cultivating and exercising self-discipline and maximising accessibility to morality rather than a matter of producing allegedly objectively valid principles, and a robust interpretation of the need for

imagination and sympathy (rather than empathy), or even imaginative sympathy, then the picture strikes me as even more appealing.

With Kant, we recognise our capacity for self-love, for being capable of being swayed by passions and desires, for making decisions on the basis of certain ends that are too unpredictable to be reliable – in short, our capacity for self-deceit – and we thereby amplify our chances for acting not only out of duty, but also ultimately (as Kant himself in his later writings acknowledged) out of love and concern for others. Kant encourages us to take responsibility for our actions: to look deeply into ourselves and, on the basis of the recognition of our limitations (as these are emphatically on display in cases of self-deceit, to which we are particularly prone), to be more likely to be consistent and reliable in our relations with others. On the weak reading of Kant, his CI, in any of its formulations, does not produce any moral knowledge: it presupposes it, and disciplines our action in conformity with it. Further, its aim is not to impose any one ideal moral order, but rather to bring morality to everyone, and thus to minimise the danger of moral paternalism and tyranny.

With Smith, we encounter, first, a richly social and earthy (as MacCormick himself put it) source of moral knowledge: our sentiments; and second, equally important, we are shown the significance of the cultivation of the imagination: we are urged to look around, both in terms of the motives and the situational factors and consequences relevant to any judgement, and in terms of the construction of what we might tentatively and fallibly feel to be an appropriate emotional response. The emphasis on imagination as a kind of explorative looking, rather than a mere matter of recognising such-and-such allegedly actual properties or states of affairs, can also help alleviate concerns (articulated, for instance, by Iris Murdoch) as to the projection of the fantasies of the self or other aggressive and myopic versions of the autonomous will (see Murdoch 1970; notice, however, that this is at odds with most contemporary versions of moral perception, which remain thoroughly recognitional in character, e.g. see Goldie 2007).

Smith meets Kant in his emphasis on the virtue of self-command, but he is not as focused as Kant on self-discipline; he is more egregiously social in his outlook, though without endorsing the kind of complacency that accompanies mere conformity with social opinion. Smith also helps us to demystify both the capacities we come to acquire that are needed for judgement as well as the resources that we sometimes use (some of which we encounter in various degrees of formalisation, including rules, principles and the like). Both, in my view, remind us of the fallibility and limitations of ordinary, imperfect human beings, and both are equally eager to democratise access to morality.

These are, of course, rough brushstrokes. I am not suggesting that MacCormick would have disagreed with them. However, it does seem to me that they go some way beyond the Smithian Categorical Imperative that MacCormick chose as his favoured form of the rapprochement between Kant and Smith. There is an enormous amount to learn from MacCormick on this score. But I wonder whether we can also very profitably build on this, his last, and perhaps most precious of contributions.

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