Canadian Journal of Law & Jurisprudence XXX No.2 August 2017, 339-362
© *Canadian Journal of Law & Jurisprudence* 2017 doi: 10.1017/cjlj.2017.16

Refugee Law and Its Corruptions

Colin Grey

> The fortunate and the proud wonder at the insolence of human wretchedness, that it should dare to present itself before them, and with the loathsome aspect of its misery presume to disturb the serenity of their happiness.[1]

1. Introduction

Should we trust in the morality of refugee law? I refer here not to the many controversial practices of refugee governance, such as the peremptory return of asylum seekers to countries where they allege they are at risk or their long-term detention. Rather, my concern is with the national and international body of law which determines who are refugees, and who are not, and what treatment we owe them, or not, before and after adjudicating their status as refugees. This body of law purports to provide a justificatory infrastructure for debates over refugee governance. Should we trust that, morally speaking, we have got it right?

I elaborate in this paper a hypothesis that supports a sceptical answer to this question: There are many reasons not to trust in the morality of refugee law. This conclusion is deflating, but also valuable. Understanding the reasons for scepticism may allow us to take steps toward practices that will lend refugee law greater moral trustworthiness. It may lead us to adopt more hospitable attitudes to claimants. Most importantly, it may refute an even more sceptical conclusion, namely that refugee law's promise of normative constraint is simply false.

This extreme, sceptical answer descends from Carl Schmitt, surfacing as an illustrative claim in support of his larger broadside against liberal legality. Thus a "Schmittian hypothesis", as I will call it, holds that migration governance, and therefore the governance of refugee migration, is not subject to normative constraint because no such constraints are available. However hard you look, it says, all you will find is a blank screen onto which liberals project their moral-legal ideology. The troubling implication of the Schmittian hypothesis is that refugees, like other migrants, can be excluded at will, using whatever means necessary.

Although it is tempting to ignore the Schmittian hypothesis as profoundly misguided, it calls for a response. To begin with, it often seems grimly plausible to claim that the governance of migration occurs in an exceptional realm beyond normative constraint. Such plausibility seems heightened these days

---

I thank David Dyzenhaus and Joseph Palumbo for comments, as well as audiences from the following fora: the Contextualizing Social Justice in International and Transnational Law conference at Windsor Law; the Political Theory on Refugees Conference in Augsburg, Germany; a workshop at the Centre de recherche en immigration, ethnicité et citoyenneté (CRIEC) at the Université du Québec à Montréal; and the McGill Legal Theory Workshop, particularly Jaye Ellis, Hoi Kong, and Daniel Weinstock.

1. Adam Smith, *The Theory of Moral Sentiments*, ed by Knud Haakonssen (Cambridge University Press, 2002) at 62 [I.iii.2.1] [*TMS*].

as anti-immigrant sentiment rises across the liberal West, giving rise to more restrictive practices, thereby inevitably excluding more refugees, forcing migrants in general to resort to riskier routes, and leading to ever-worse tragedies. The plausibility is further bolstered by the sense that we have been here before, that our disregard of the fate of, say, Syrians and Eritreans refugees today echoes the disregard of Jewish refugees in the run up to and during the Second World War.

In what follows I will discuss primarily two aspects of refugee law that reinforce this sense of normative elusiveness. The first is that the fundamental doctrine regarding state power to control immigration, laid down by a series of cases at the turn of the last century which upheld race-based exclusion policies, at its strongest seems to claim something like an absolute and arbitrary power.[2] Therefore, immigration law at its foundation makes something like a (paradoxical) disavowal of legality. Of course, a complex legal architecture now sits atop this foundation. This architecture includes the international refugee law regime, most importantly the 1951 *Convention relating to the Status of Refugees*, its 1967 *Protocol*. It also includes corresponding regional and national instruments, as well as the various levels of jurisprudence and soft law that reflect, elaborate, and at times expand on this regime. To these we should add other human rights instruments and constitutional constraints. This legal regime is meant to guide and limit the exercise of state discretion with regard to refugees. However, studies consistently show that the outcomes of refugee claim adjudication remain arbitrary. That is, such studies show that the success or failure of refugee claims depends to a troubling degree on the identity of the decision-maker, both at first instance and on judicial review.[3] Since much of international refugee law has largely been developed through such decisions, and since that law is in turn meant reflexively to limit and guide future decision-making, their apparent arbitrariness casts doubt on the entire enterprise of limiting state discretion with regard to refugees through law. Thus arbitrariness in decision-making is the second aspect of refugee law upon which I will concentrate.

---

2. *Musgrove v Chun Teeong Toy*, [1891] AC 272; *Nishimura Ekiu v United States*, (1892) 142 US 651; *Fong Yue Ting v United States*, (1893) 149 US 698 [*Fong Yue Ting*]; *Canada (Attorney General) v Cain*, [1906] AC 92 [*Cain*].

3. Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39:2 Ottawa L Rev 335; Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1; Jaya Ramji-Nogales, Andrew I Schoenholtz & Philip G Shrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press, 2009); Andrew I Schoenholtz, Philip G Shrag & Jaya Ramji-Nogales, *Lives in the Balance: Asylum Adjudication by the Department of Homeland Security* (New York University Press, 2014). Non-statistical analyses of asylum determination include Cécile Rousseau et al, "The Complexities of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15:1 Journal of Refugee Studies 43; Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart, 2011); Didier Fassin & Caroline Kobelinsky, "Comment on juge l'asile: L'institution comme agent moral" (2012) 53:4 *Revue française de sociologie* 657; Sule Bayrak, "Contextualizing Discretion: Micro-dynamics of Canada's Refugee System" (PhD Thesis, Université de Montréal, 2015).

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

All this should be enough, I believe, to motivate the inquiry. The Schmittian hypothesis also requires a response, however, because in recent years it has been given new theoretical respectability by Giorgio Agamben, who has become *the* "charismatic legitimator" in critical refugee studies.[4] Agamben adopts a core component of Schmitt's theory, namely Schmitt's conception of the nature of sovereignty as the power to decide on the state of the exception, which may be understood as a general suspension of legality. Agamben sees the refugee as the exemplary figure of contemporary politics, a "sacred man" (*homo sacer*) within the state of exception who can be killed with impunity.[5] The prescription of those purporting to follow Agamben is to engage in forms of political action that highlight the violence contemporary states impose on the body, as in cases where refugees sew their lips together to protest their prolonged detention, thereby disputing the sovereign's power to distinguish between bare life and politically qualified life.[6] Proposals of this kind, mistakenly I believe, accept as true the core claim underlying the Schmittian hypothesis, that moral and legal normativity are unavailable to constrain migration governance, including refugee governance.

In this paper, I take aim at this claim by asking about the ability of our legal institutions to serve as a trustworthy guide to what political morality requires in this domain. To do so, I inquire into the applicability in the domain of refugee law of Adam Smith's sentimentalist theory of moral and legal judgment. I appreciate that, for some, this approach may come out of left field. Without wishing to suggest, anachronistically, that Smith provides a full account of what takes place when we reason morally and legally regarding refugees, I believe quite simply that there is much to be learned from his theory. In particular, it provides both a way of understanding the nature of the judgment being made when refugee claims are adjudicated, and perhaps more importantly how such judgments can go wrong: first because of the "corruption", or distortion, of our moral sentiments; second, because the usual counterweights to such corruptions—that is, rules (here, rules of law)—lose their presumptive trustworthiness in this context. These difficulties do not exclude the possibility of normative constraint, however; they merely explain why such constraint is harder to get at. The most important lesson to be learned from Smith, then, is how normative constraint can be in principle available despite obstacles.

---

4. Patricia Owens, "Reclaiming 'Bare Life'?: Against Agamben on Refugees" (2009) 23:4 International Relations 567.

5. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford University Press, 1998); Giorgio Agamben, *Means without Ends: Notes on Politics*, translated by Vincenzo Binetti & Cesare Casarino (University of Minnesota Press, 2000).

6. Jenny Edkins & Véronique Pin-Fat, "Through the Wire: Relations of Power and Relations of Violence" (2005) 34:1 Millennium: Journal of International Studies 1; for critical discussion of Agamben's view of refugees, see *supra* note 4; see also Braun's observation that "[t]he problem with [Agamben's acceptance of Schmitt's views regarding sovereignty] is that it tends, willingly or unwillingly, to subscribe to the Schmittian notion that the suspension of the law forms an inevitable part of modern law, leaving critique with the option of a vague messianic anarchism as the only way out", Kathrin Braun, "From the Body of Christ to Racial Homogeneity: Carl Schmitt's Mobilization of 'Life' against 'the Spirit of Technicity'" (2012) 17:1 The European Legacy 1 at 2.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

Section 2 begins by clarifying what it means to ask about the moral trustworthiness of refugee law. Section 3 sketches Smith's theory of moral and legal judgment, as well as a basis for the claim that trust in the morality of the common law, at least, may be an appropriate attitude. With the common law in place as a contrastive model, the balance of the paper takes up the explanatory power of Smith's theory in the context of refugee law. Section 4 situates refugee law relative to a framework of practical reasoning about migration governance and states a provisional, Smithian hypothesis regarding the way that refugee adjudicators approach their task. Section 5 complicates this hypothesis by setting out the obstacles under Smith's theory to sound legal and moral judgment in the refugee context. Section 6 then concludes.

2. Asking about Trust in Refugee Law's Morality

I will largely assume the importance of asking whether we should trust in refugee law's morality. But I must first explain what I am assuming.

The framing of the question is inspired by Smith's discussion of public law. In public law, on Smith's account, the sovereign must evaluate the appropriate responses to apparent injustices and other matters of policy. He must also judge how far to command duties of beneficence: "Of all duties of a law-giver … this, perhaps, is that which it requires the greatest delicacy and reserve to execute with propriety and judgment."[7] Because of the broad array of interests involved and the difficulty of judging such matters, so long as the sovereign steers clear of "absurdity and impropriety of conduct and great perverseness"[8] or is not characterized by "lunacy, nonnage, or idiotism,"[9] Smith counsels an attitude of trust: "You must agree to repose a certain trust in them," he writes, quickly adding the following, "tho if they absolutely break thru it, resistance is to be made if the consequences of it be not worse than the thing itself".[10] On Smith's telling, then, one must trust the sovereign in matters of public law because of the general difficulty of verifying the justice and wisdom of the sovereign's actions. The injunction dissolves, however, if the sovereign's commands exceed some indeterminate, but quite elevated, threshold of great impropriety or if those in power are constitutionally incapable of proper judgment.

Although the concept of trust is prominent in Smith's discussion of public law, and the concept of trustworthiness implicitly so in his suggestion that there are limits to appropriate trust, Smith does not elaborate on either concept anywhere in his work.[11] In this article, I adopt Karen Jones's account that *to trust* a person,

---

7. *Supra* note 1 at 95 [II.ii.1.8].
8. Adam Smith, *Lectures on Jurisprudence* (Liberty Fund, 1982) at 321 [LJ(A) v.127] [*Lectures*].
9. *Ibid* at 320 [LJ(A) v.126].
10. *Ibid* at 323-24 [LJ(A) v.134-35].
11. There are two fascinating discussions of trust in *TMS*, at *supra* note 1 at 132, [III.ii.15] and 398-400 [VII.iv.26-28]. Neither of these discussions, however, presents a conception of trust or trustworthiness. The idea appears several times, but only in passing, in other parts of the *Lectures* and in Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vols 1 and 2, William B Todd, ed (Oxford University Press, 1975).

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

group, or institution is to hold an affective attitude of optimism that the trusted person, group, or institution is both competent in some relevant domain and will take our reliance on them as a compelling reason in their practical deliberations.[12] Importantly, while trust includes the concept of reliance, it is not the same thing. Reliance does not incorporate the idea that the person or thing relied on takes your reliance as a reason for action. You rely on a car, but you trust a driver. Further, still following Jones, to deem a person, group of persons, or institution trust*worthy* with respect to some other person, group, or institution is to say, first, that they are competent in the domain of activity with respect to which they are trusted; second, that they take the fact that the other person, group, or institution is counting on them to be a compelling reason for acting as counted on.[13]

When we ask about the trustworthiness of *institutions*, we are asking about the trustworthiness of the decisions and actions that issue from them, viewed as the collective product of the individuals who operate within its structure of procedures and rules. One might think that institutions are more like cars than drivers, reliable but not capable of being trustworthy. I think this would be a mistake. The trustworthiness of an institution is parasitic on the trustworthiness of the individuals acting within it. You trust that they will, in general, be moved by your and others' reliance on the institution when they establish its rules and procedures, as well as when they apply or elaborate on those rules and procedures to arrive at particular decisions. The qualifier "in general" is included to acknowledge that it would be implausible to require such trustworthiness of every individual, all the time. However, I take it that an institution can still be trustworthy so long as it can rein in individuals within it who might act on untrustworthy motives, such as ill-will, or who might otherwise fall prey to occasional error or indifference.

To ask about the trustworthiness of the multi-level, multi-jurisdictional institution that is *refugee law*, then, is to ask whether this body of law has been elaborated and applied, and continues to be elaborated and applied, by officials competent in the domain of refugee law and moved by the thought that certain others are counting on them. It is also to ask whether refugee law is capable of reining in those officials who might be moved by sentiments inconsistent with trustworthiness.

To ask about refugee law's *moral* trustworthiness is to single out a domain of competence salient to the proper elaboration, application, and evaluation of this body of law. Though the relationship of morality to law as a whole is controversial, I take the historical record to establish the distinctive salience of morality to refugee law. It seems accurate to say that contemporary refugee law was created precisely to ensure states' immigration laws and policies do not reproduce the gross injustice or inhumanity of the mass rejection of Jewish refugees during

12. Karen Jones, "Trust as an Affective Attitude" (1996) 107:1 Ethics 4, modified in accordance with Jones, "Trustworthiness" (2012) 123:1 Ethics 61 at 66-69, 72 n16. Obviously, these concepts are not definitively settled by Jones's account, but I want to avoid delving into the broader debate about the nature of trust and trustworthiness.

13. Jones, "Trustworthiness", *ibid* at 70-71.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

the Second World War.[14] The origins of refugee law demand therefore that legal competence track moral competence: it is part of the aims of this body of law that it identify objectively defensible moral norms that properly delineate when international protection ought to be extended to certain refugee claimants, as well as questions about the content of such protection.

A final clarification has to do with the relevant *we* with respect to whom refugee law's moral trustworthiness is at issue. The constituency of potential trusting individuals is determined by the nature of the claim made by those who seek refugee protection. This claim can be understood as having two parts, the second of which derives from the first. Refugee claimants assert first that they are subject to great injustice in their country of origin. Second, and as a result, they claim the country of asylum must admit them or let them stay; there is a morally and institutionally significant ambiguity about whether this second claim should be understood as an appeal to humanitarianism or as a claim that lies in justice.[15] Whatever its nature, when this second claim is made, both claimants and claimees (the citizens and officials of receiving states) are forced to rely on refugee law. Refugee claimants rely on the law to track the requirements of morality properly and they rely on the officials charged with refugee law matters to interpret and apply the law in a way that reflects the seriousness of their circumstances. Citizens of receiving countries, on the other hand, rely on officials to elaborate and apply the law in a way that takes account of whatever appropriate limits should be placed on immigration, but that also does not make them, as citizens, complicit in injustice or inhumanity.

To close with an example: When Frederick Blair, the anti-Semitic director of immigration for Canada during the Second World War, personally oversaw the rejection of all but a few Jewish applicants to Canada between 1936 and 1943, he might be described as having been unworthy of the trust of both Jewish refugees and citizens, for related but different reasons. He was unworthy of Jewish refugees' trust both because of his moral incompetence and because he was seemingly unmoved by the fact that they were counting on him. While he may have been moved by citizens' reliance upon him, he was nonetheless unworthy of their trust because he was not competent to judge what morality required when faced with

---

14. Joseph H Carens, *The Ethics of Immigration* (Oxford University Press, 2013) at 193-94.

15. This ambiguity reveals itself in the case law. In many countries, human rights law is used to interpret the terms of the Convention, and the language of human rights seems to place us squarely within the moral terrain of justice: see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 69 (per LaForest J., dissenting). More generally, see James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge University Press, 2014); Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007) [*International Refugee Law and Socio-Economic Rights*]. However, in the important case, *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and Others (Appellants)*, [2004] UKHL 55 [*Prague Airport*], Lord Bingham begins his analysis, at para 12, with the following premise: "It has been the *humane* practice of this and other states to admit aliens (or some of them) seeking refuge from persecution and oppression in their own countries. … But even those fleeing from foreign persecution have had *no right to be admitted and no right of asylum*" [emphasis added].

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

Jewish refugees.[16] That some refugee adjudicators today still have 100 per cent rejection rates, without facing rebuke on judicial review, seems to raise similarly acute problems of trust and trustworthiness.[17]

3. Smith's Theory and the Trustworthiness of the Common Law

3.1. Smith's Theory

The Schmittian hypothesis is a construction drawn from Schmitt's attack on liberal normativity, including legal normativity, in migration governance and elsewhere. In mounting this broader attack, Schmitt took Hans Kelsen as his principal liberal foil. Even as he did so, however, Schmitt assumed Kelsen's positivist view that legal normativity is founded on rules, the proper application of which is exclusively rational.[18] Schmitt further agreed with Kelsen that rationally-applied rules could not comprehensively dictate outcomes in all cases.

Kelsen insisted that in the face of such indeterminacy, officials had to make decisions based in part on "legal politics."[19] Kelsen's commitment to democracy led him to affirm that such politics could not be based on any sort of objective morality.[20] In one sense, all Schmitt had to do to attack Kelsen's conception of legality was to substitute an existential vision of politics for Kelsen's relativist judicial politics. He did so by asserting that discretionary decisions are versions in miniature of the ultimate sovereign decision to establish a legal order, through a sorting of friends from enemies, with designation of an enemy entailing the possibility of killing them. On Schmitt's account, some discretionary decisions are closer to the ultimate sovereign decisions than others.[21] Decisions regarding immigration governance, with its constitutive role with regard to the body politic, are among the closest: "A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity."[22]

---

16. For discussion of Blair, see Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (University of Toronto Press, 1998) at 259-60.

17. See *Xuan v Canada (Minister of Citizenship and Immigration)*, [2013] FC 673; *Turoczi v Canada (Minister of Citizenship and Immigration)*, [2012] FC 1423.

18. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2005) at 30-31. For the claim that Schmitt saw positivism as the legal theory associated with liberalism, see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press, 1997) at 39; see *ibid* at 62: "Schmitt's conception of the judicial function was a purely executory one and, indeed, crudely positivistic. Judges fulfill their function when and only when what they do is apply the content of a legal norm to the facts of a case."

19. Hans Kelsen, *The Pure Theory of Law*, translated by Max Knight (University of California Press, 1967) at 353.

20. Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007) at 134-41; Dyzenhaus, *supra* note 18 at 234.

21. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) at 34, 60.

22. Carl Schmitt, *The Crisis of Parliamentary Democracy*, translated by Ellen Kennedy (MIT Press, 1985) at 9; Carl Schmitt, *Constitutional Theory*, ed and translated by Jeffrey Seitzer (Duke University Press, 2008) at 262-63. See also Dyzenhaus's reference to Schmitt's spoken comments that it was right that those forced to leave Germany had been "spat out", *supra* note 18 at 84.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

This compressed account is enough to show that, on Schmitt's theory, trust in refugee law's morality would be grotesquely inappropriate. According to Schmitt, nothing inhibits legal officials from designating refugee claimants as enemies, entailing the possibility of killing them and, presumably, of subjecting or abandoning them to other inhuman treatment.

The account also shows, though, how Schmitt's argument depends on Kelsen's rationalist, rule-based conception of legal normativity and the space that conception leaves for arbitrary decision-making. Because that is the case, the force of the Schmittian hypothesis may be blunted, and the possibility of appropriate trust in refugee law's morality restored, if one can provide an alternative to this conception of normativity.[23]

Smith provides such an alternative.[24] Smith's theory of moral, and ultimately of legal, judgment, is founded on the faculty of sympathy, which he claims allows any person (a spectator) to imagine themself as another (an actor) in the situation of that actor and, up to a point, to share in that actor's sentiments. Moral judgment results from the comparison made by the spectator of their own sentiments (or passions, motives, emotions) to those of the original actor once the spectator has carried out this imaginative projection into the actor's situation. If the spectator feels the same emotion as the actor, the spectator will consider the emotion proper and approve of it; if there is no such coincidence, the spectator will consider the actor's emotion improper and disapprove. Judgments of propriety may be theoretical, aesthetic, and practical (including moral). In all cases, they rely on an evaluation of "suitableness or unsuitableness" or "proportion or disproportion"[25] based on a comparison of sentiments between spectator and actor.

Smith therefore provides a model of judgment according to which the proper response of sentiment to context is the key feature. Kelsen's view of law's normativity, which Schmitt adopted, is top-down, rational, and derived from general rules; Smith's is bottom-up, sentimentalist, and constructed from particular judgments. In the remainder of this section, I explain how Smith's model gives rise to social and then to a supra-social morality, each achieving a greater degree of moral objectivity and trustworthiness. I then explain how this account can be extended to the common law, such that legal normativity is simply institutionalized morality. The hope is to show that Smith's theory of judgment allows one to resist Kelsen's conception of legal normativity and therefore the manner in which Schmitt exploited that conception to advance his own arguments.

---

23. *Supra* note 21 at 61-62. Dyzenhaus relies on the work of Ronald Dworkin and Lon Fuller to provide an alternative to Kelsen's picture of legal normativity.

24. Surpassingly good exposition of Smith's theory of moral judgment now exists in some abundance. I have been most influenced by the following: Knud Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge University Press, 1981); Charles L Griswold, *Adam Smith and the Virtues of Enlightenment* (Cambridge University Press, 1999); Fonna Forman-Barzilai, *Adam Smith and the Circles of Sympathy: Cosmopolitanism and Moral Theory* (Cambridge University Press, 2010); Michael L Frazer, *The Enlightenment of Sympathy: Justice and the Moral Sentiments in the Eighteenth Century and Today* (Oxford University Press, 2010).

25. *Supra* note 1 at 22 [I.i.3.6].

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

Initially, it is not clear that Smith's theory can bear this burden. Even if we grant the theory's description of how moral judgments are made, such judgments may seem to be simply reports of our feelings.[26] It is not obvious our feelings should have practical authority over us. It is certainly not clear why they should have any authority over others. If so, Smith's account may only offer a different kind of relativism—an emotional politics in comparison with Kelsen's judicial or Schmitt's existential politics.

A first-level response to this concern is that sympathetic judgment yields the possibility of a social morality if one grants Smith's further claim that spectators and actors innately desire mutual sympathy: "[N]othing pleases us more than to observe in other men a fellow-feeling with all the emotions of our own breast; nor are we ever so much shocked as by the appearance of the contrary."[27] This desire leads many spectators to exert themselves toward inhabiting the actor's perspective.[28] Yet their imaginative projections inevitably remain less vivid than the actor's experience, and so their sentimental responses will also always be less powerful. An actor desirous of mutual sympathy will therefore in turn seek to lower "his passion to that pitch, in which the spectators are capable of going along with him."[29]

To do so, the actors imaginatively project themselves into the situation of the spectator—imagining the spectator imagining them, sympathetically calling up the spectator's sympathetic passions—and then moderate their own emotions accordingly. This intersubjective process turns out to be regulative. The desire for mutual sympathy leads us to adopt a higher-order perspective encompassing the perspective of the actor-spectators around us. The iteration of such mutual, sympathetic adjustments throughout a population leads to a social morality sufficiently congruent to establish "the harmony of society."[30] This process has been variously described as mutual persuasion,[31] negotiation,[32] or conversation.[33]

Such social moralities are *more* objective than our individual sentimental judgments because they permit us to adjudicate between such judgments from a perspective that has taken a plurality of perspectives into account. But as described, the trustworthiness of a given social morality will vary. First, it will

---

26. The concern, as Charles Griswold has pointed out, is that Smith's theory is nothing but what Alasdair MacIntyre calls "emotivism", Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 3rd ed (Bloomsbury Academic, 2013) at 13.

27. *Supra* note 1 at 17 [I.i.2.1]. For a recent discussion of this aspect of Smith's moral psychology, see John McHugh, "Ways of Desiring Mutual Sympathy in Adam Smith's Moral Philosophy" (2016) 24:4 British Journal for the History of Philosophy 614.

28. *Supra* note 1 at 26 [I.i.4.6].

29. *Ibid* at 27 [I.i.4.7].

30. *Ibid*.

31. Thomas J Lewis, "Persuasion, Domination, and Exchange: Adam Smith on the Political Consequences of Markets" (2000) 33:2 Canadian Journal of Political Science 273.

32. McHugh, *supra* note 27 at 616 and passim.

33. Griswold prefers "conversation", *supra* note 24 at 197-98; see also Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment* (Harvard University Press, 2001) at 91; Henry C Clark, "Conversation and Moderate Virtue in Adam Smith's 'Theory of Moral Sentiments'" (1992) 54:2 Review of Politics 185.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

depend on whether the individuals in a society are in general moved by the fact that other members are relying on them. This may be more plausible in smaller rather than larger societies. Even in such societies, however, mutual sympathy is about accord, not proper accord. Following John McHugh, we can see that for Smith the desire for mutual sympathy can be a self-centered desire by a dominating individual to have others' sentiments accord with their own; a situation where the terms of the intersubjective negotiation are take-it-or-leave-it. Alternatively, a dominated individual may be too quick to subjugate their own sentiments to those of another. The desire for mutual sympathy may have an overall moderating effect, but there is no guarantee that participants in a social morality will take one others' counting on them as a reason to meet those others halfway, sentimentally speaking. As a general matter, we should be leery of social morality despite its relative objectivity.

Morality becomes both more objective, and potentially more trustworthy, on Smith's account once we take into account our further imaginative capacity to inhabit the situation of an impartial spectator. The impartial spectator is neither wholly neutral nor dispassionate. Rather, it is free of eliminable sources of human bias. By striving to inhabit this impartial point of view, we come to see "opposite interests … with the eyes of a third person, who has no particular connexion with either, and who judges with impartiality".[34] Thus it is the highest-order perspective to which we can appeal in trying to resolve disagreement in our attempts to achieve mutual sympathy. Its objectivity derives from the fact that it places all points of view, and all claims made from them, in proper proportion. It is more trustworthy because the effort to enter the impartial spectator's perspective requires a more or less conscious attempt to take into account the situation of all relevant parties.

This trustworthiness increases with the provision of institutional guarantees that a person who must judge between competing perspectives will be moved to do so by each parties' reliance. That is, Smith's theory of moral judgment leads directly to an ideal of legality,[35] according to which, faced with actual conflicts about justice, members of a society seek out or designate authoritative persons—first a sovereign, then a delegate thereof—to assume the role of impartial spectator.[36]

3.2. The Common Law's Trustworthiness

Smith scholars disagree about whether appeals to an impartial spectator in fact achieve anything more than a relativist social morality.[37] I believe the resulting model provides two markers of supra-social objectivity. These markers will be

34. *Supra* note 1 at 157 [III.iii.3].
35. Haakonssen, *supra* note 24 at 137: "[T]he principles of practical reasoning employed by the impartial spectator [are] at the same time principles of legal reasoning."
36. *Supra* note 8 at 104 [LJ(A) ii.90], 211-13 [LJ(A) iv.31-34], and 406 [LJ(B) 23-24]; Adam Smith, *Lectures on Rhetoric and Belles Lettres*, JC Bryce, ed (Oxford University Press, 1983) at 174-75 [198-201]; Haakonssen, *supra* note 24 at 115, 127, 137.
37. See references in Forman-Barzilai, *supra* note 24 at 91-92, see also the related discussion at 250-54.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

familiar to Rawls scholars, since they are the same forms of objectivity Rawls claims for his principal method of moral inquiry and justification, reflective equilibrium.[38] Not incidentally, they are also markers of objectivity that can be claimed on behalf of the common law.

The first marker of objectivity that arises from Smith's theory depends on the ongoing scrutiny of the judgments made. All judgments are subject to further appeal to and deliberation from the perspective of the impartial spectator. This possibility of ongoing, impartial deliberation is the most we could ever hope for in terms of objectivity. As Thomas Scanlon has written in his discussion of reflective equilibrium, "apparent alternatives to it"—such as appeals to foundational moral facts—"are illusory."[39] One can never have full confidence in the results of such deliberation, because the best we can achieve is the ongoing *efforts* at impartiality of *actual persons* living in *actual communities*. However, the sting of relativism is reduced because no judgments are immune from revision from the perspective of the impartial spectator.

Ongoing testability is also an ideal that belongs to the common law, although one that is partly compromised by two forms of binding rules, namely precedent and statute. The principle of ongoing testability is maintained despite the doctrine of precedent, however, if we return to an understanding advocated by classical common lawyers. On this view, past decisions guided future courts to the extent that they exemplified proper reasoning; but it was "always open to… judges to test any prior court's formulation of a rule or doctrine of common law in light of the legal community's shared sense of reasonableness."[40] Thus the common law maintains the ideal of ongoing testability to the extent that past decisions are respectfully analyzed and, if found wanting, revised. Today, this possibility continues to be available when a court is considering precedents established at its own level in the judicial hierarchy. Statute can also be understood in these terms if one accepts that, at times (famously, in *Dr. Bonham's Case*[41] and, more recently, in courts' resort to unwritten constitutional

38. John Rawls, *A Theory of Justice*, revised ed (Harvard University Press, 1999) at § 9 [*Theory*]; John Rawls, "The Independence of Moral Theory" in Samuel Freeman, ed, *John Rawls: Collected Papers* (Harvard University Press, 1999) 286. For good discussion, see Gerald Gaus, "Moral Constitutions" (2013) 19 The Harvard Review of Philosophy 4. For a comparison of Smith's theory of judgment and reflective equilibrium, see Carola von Villiez, "Double standard—naturally! Smith and Rawls: a comparison of methods" in Leonidas Montes & Eric Schliesser, eds, *New Voices on Adam Smith* (Routledge, 2006) 115. Haakonssen claims there is a requirement of coherence among the judgments of the impartial spectator, which suggests an affinity with reflective equilibrium, Haakonssen, *supra* note 24 at 137-38. See also the telling remark by Griswold, *supra* note 24 at 189: "Moral reasoning therefore consists, in good measure, of a conversation in which moral perceptions and rules are adjusted in light of each other"; *ibid* at 191. Griswold is not discussing reflective equilibrium as described by Rawls, but he may as well be.

39. TM Scanlon, "Rawls on Justification" in Samuel Freeman, ed, *The Cambridge Companion to Rawls* (Cambridge University Press, 2003) 139 at 149.

40. Gerald J Postema, "Classical Common Law Jurisprudence (Part II)" (2003) 3:1 OUCLJ 1 at 13 [Postema II]. This approach, which gives great weight to precedent but allows that it may be overcome by new arguments or new facts, is consonant with the case law on *stare decisis* in many jurisdictions: in Canada, see *Canada (Attorney General) v Bedford*, 2013 SCC 72.

41. See *Dr Bonham's Case*, (1610) 8 Co Rep 1136.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

principle[42]), the common law can be used to invalidate legislation. More often, judges resorted to means of statutory interpretation to integrate statutes into the ongoing project of creating a body of doctrine the authority of which overall represented the accumulated wisdom of a large number of individual, impartial judgments. In this way, statutes, like precedents, are evaluated for their reasonableness in various situations, and various legal methods are available to eschew their unreasonable operation.

Thus ongoing testability, a marker of objectivity expressly defended with respect to reflective equilibrium, is a feature both in Smith's theory and one that survives the extension of that theory to the common law. A second marker of objectivity is compatibility between the rules derived from our judgments and human moral psychology; we might call this *human nature compatibility*. In Rawlsian terms, we would say that an objectively defensible conception of social justice is one that can come to characterize an individual's sense of justice.[43] In Smith's terms, we would say that the objectivity of a social morality is revealed by its compatibility with the "reflective stability" of its members, where the latter is understood (now quoting Michael Frazer) "from the peace and satisfaction of a mind able to bear its own holistic survey, rationalism sees normativity as authoritative legislation by the faculty of reason—here identified with our true, autonomous self."[44] Once again, this is the maximal objectivity we can aspire to: the achievement of a social charter that can be internalized by the members of society in a manner consistent not with "abnegation but in affirmation of our person."[45] A supposedly perfect morality that was more impartial yet incompatible with human nature would be one we could never hope stably to put in place. It too would be illusory.

Human nature compatibility, or something very much like it, is also found in common law thinking. Although the "reasonableness" of either past decisions or statutes to some extent turned on rational evaluation, in classical common law thinking reasonableness was also demonstrated by the extent to which posited rules reflected and were reflected by "custom."[46] One interpretation of appeals to custom by common lawyers was as an appeal to the authority of long usage as such.[47] Another interpretation, one that avoids disputable claims to antiquity, is that appeals to custom are instead appeals to the fact of the successful incorporation of principles into the relevant community's social life. Thus Sir Matthew Hale argued that the rules and maxims of the common law may "by a long experience and use" by the members of a society become "incorporated into their very temperament, and, in a manner, become the complection and constitution

---

42. *Reference re Secession of Quebec*, [1998] 2 SCR 217.
43. Rawls, *Theory*, *supra* note 38 at 397-449.
44. Frazer, *supra* note 24 at 7. See also *supra* note 1 at 151 [III.ii.31], where Smith writes that the "natural effect" of impartial judgment is "securing the tranquillity of the mind".
45. Rawls, *Theory*, *supra* note 38 at 436; John Rawls, *Political Liberalism*, revised ed (Columbia University Press, 1996) at 317.
46. Discussed in Gerald J Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2:2 OUCLJ 155 [Postema I]; see Postema II, *supra* note 40.
47. Postema I, *ibid* at 169-72.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

of the English commonwealth."[48] Some classical common lawyers, then, saw the common law as a means of providing a social charter that could be internalized by the psychologies of a society's members.

All this may be well and good. Someone might yet question the equivalence between Smith's theory and the common law simply because they might deny that sentiment plays a role in proper legal judgment. One can address this concern first by noting that Smith does not deny that rationality operates alongside sentiment.[49] First, rationality allows us to better grasp an actor's situation, as well as the effects of their actions.[50] Further, Smith accepts that, through induction, our individual judgments "in a great variety of particular cases" lead to the formation of general rules and maxims[51] that regulate "the greater part of our moral judgments[.]"[52] Judgments of propriety are fundamentally sentimental, but they also rely on beliefs capable of demonstration, arguments that use rules as premises, and so on.[53] A Smithian interpretation of the "artificial reason" of the common law, then, is one in which rationality guides moral and legal judgment and may serve to retroactively support it, sometimes by way of reference to rules. Nevertheless, rationality does not constitute legal judgment exclusively. Even in law, sentiment is ultimately basic.

4. Adjudicating Refugee Claims

The Schmittian hypothesis rests on a model of legal judgment according to which, within the inevitable gaps left when one conceives of law as process of rationally applying rules to particular situations, decisions made by tribunals reflect political decisions. As Schmitt elaborates that model, such decisions are free from normative constraint and trust in the morality of law, including refugee law, is therefore inappropriate. An alternative model, from Smith's theory, suggests legal decisions are contextualized, sentimental judgments of propriety. On this model, trust would be appropriate to the extent legal institutions actually secure the conditions necessary for impartial judgment. I now ask whether the institutions of refugee law do, or whether they may, actually secure such conditions.

The two models face different argumentative burdens when confronted with the realities of refugee law and refugee claim adjudication. Schmitt's theory must confront the fact that refugee adjudicators do in fact make frequent

---

48. *Ibid* at 175, quoting Matthew Hale, *The History of the Common Law of England*, ed by Charles M Gray (University of Chicago Press, 1971) at 30. Postema usefully summarizes Hale's view this way: "The rules, at first rough and clumsy, are refined over time, softened to fit the contours of the community's daily life. Simultaneously, following the rules and practices shapes the dispositions, beliefs and expectations of the people."

49. Haakonssen, *supra* note 24 at 92; Haakonssen also notes that Smith's dispute with rationalism in ethics was quite narrow, as indicated by his many references to reason in his *Lectures on Jurisprudence*, *ibid* at 137.

50. For an emphasis on the need for "well-informed impartiality", see von Villiez, *supra* note 38 at 122.

51. *Supra* note 1 at 377 [VII.iii.2.6]. I note that elsewhere Smith writes that we form rules "insensibly" based on the results of our many individual judgments, *ibid* at 184 [III.iv.7].

52. *Ibid* at 377.

53. Griswold, *supra* note 24 at 215.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

references to the law and purport that it binds them. A ready-to-hand response is simply that such allusions to legal norms create a veneer of legality, the fragility of which is revealed by other, more telling aspects of refugee law. That is, a defender of the Schmittian hypothesis may point out that the international instruments and domestic legislation that constitute refugee law overlay a traditional common and international law principle according to which states have a "right" to decide which migrants to admit or to exclude, to impose conditions upon admission, and to deport those migrants admitted.[54] At its broadest, this "right" is sometimes claimed to be "absolute and unqualified"[55] or one that can be exercised "at pleasure"[56] without the constraints of due process.[57] In such formulations, this traditional principle seems to endorse normatively unconstrained immigration decisions. Defenders of the Schmittian hypothesis may also point to the striking variability observed by researchers who have studied refugee claim outcomes.[58] Such results, so the claim would run, are the effect of the traditional principle reasserting itself against, and in the interstices of, states' supposed international and legislative constraints. Such an account may become quite conspiratorial, alleging that adjudicators in effect carry out the sovereign's secret will, although I do not think that is the only available interpretation. The Schmittian may simply claim, more plausibly, that in the absence of sovereign guidance, each individual adjudicator is free to make their own friend/enemy decisions.

A Smithian model has an easier time with the rules and practices of refugee law itself, but a harder time with the traditional principle and apparent arbitrariness in refugee claim outcomes. In this section and the next, I seek to provide an alternative explanation of these two features of refugee governance in a manner consistent with Smith's theory.

Still following Smith, I conceive of injustice as unjustified injury, where justification is understood as resting on a Smithian judgment of propriety or impropriety.[59] Justice, a "negative" virtue, is the absence of injustice.[60] Just migration governance would therefore obtain globally in the unlikely event that no migrants were unjustifiably injured as the result of such governance. I will further assume that the key decision for the purposes of the justification of immigration policies is the decision by individual states to allow, or not, a migrant to enter or remain. Denial of the right to enter may be seen as injurious in itself. It therefore must be justifiable if it is not to be unjust. In addition, migrants' vulnerability to many forms of injury can be traced back to exercises, or exposure to exercises, of this power to deny the right to enter or remain. Here I am thinking of prolonged detention, deportation out of communities in which one has settled, exposure to the exploitation of smugglers, and others—all of which are either measures put

54. See cases cited in *supra* note 2.
55. *Fong Yue Ting*, *supra* note 2 at 707.
56. *Cain*, *supra* note 2 at para 6.
57. See *Fong Yue Ting*, *supra* note 2; *Knauff v Shaughnessy*, (1950) 338 US 537 at 544.
58. See references cited in *supra* note 3.
59. *Supra* note 1 at 93 [II.ii.1.5].
60. *Ibid* at 95-96 [II.ii.1.9].

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

in place to carry out, or indirect consequences of, restrictive admissions policies. An argument that such second-order injuries are not themselves unjust, or a showing that states are not complicit in such injustice, must include a defence of admission and exclusion policies.

If these stipulations are accepted, then in determining whether justice requires the admission of refugees, we need a sense of the different reasons that come into play, and how, in the justification of decisions about admission and exclusion. One possibility would be to say that our practical reasoning about migrant admissions requires us to compare the value of migration for a given migrant or group of migrants (including derivatively the value of migration for, say, the migrant's family or community in their country of origin), suitably weighted, against the potential value or disvalue to the receiving state of the immigration of that migrant or group of migrants (in the form of, say, contributions to gross domestic product or the erosion of social trust).[61] Note that this framework of practical reasoning can take into account Schmitt's chief worry, that states lose their "vitality" to the extent they fail to foster a homogenous population.[62] Rather than saying, with Schmitt, that this decision is not constrained, we say instead that the value for the state of homogeneity *cum* vitality, if there is such value, is to be assessed against the value of migration, suitably weighted and in light of the relevant, available information. In other words, in deciding whether justice requires the admittance or not of a migrant, we must make what amounts to a judgment of proportionality that accounts both for the value of migration for migrants and the potential impact of migration on the value of states. Under Smith's theory, this would reduce to an immensely complex, sympathetic judgment requiring the synthesis of huge amounts of information and the perspectives of potentially billions of actors.

On this view the power claimed by states to control immigration is a power to *judge* when the admission or exclusion of a given migrant or group of migrants is justified, hence not unjust.[63] On their face, and in contrast to Schmittian decisions, such judgments seem at least possible objects of appropriate trust. A demand for trustworthy judgment regarding immigrant admissions, however, seems to rule out several claims that might be read into the strongest statements of this power, when taken literally. These broadest statements of the traditional doctrine would allow a state to exclude all migrants *or* to open its borders *or* to adopt any possible intermediate policy (admission of some, under any possible condition), *and* to take any action necessary to carry out such policies. But such a reading would permit, as a *reductio*, a decision to admit large numbers of some ethnic or religious group to alter the balance of power between competing factions within the state, or even vast numbers of dangerous criminal or terrorist

61. My most thorough presentation of this scheme of practical reasoning is found in Colin Grey, "The Rights of Migration" (2014) 20 Leg Theory 25 at 32-34; a shorter version is found in Colin Grey, *Justice and Authority in Immigration Law* (Hart, 2015) at 154-55.

62. Dyzenhaus, *supra* note 18 at 41: "Vitality can be restored only by a decision to establish a state properly based in the life of an utterly homogeneous people."

63. Grey, "The Rights of Migration", *supra* note 61 at 36-37.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

migrants.[64] It seems doubtful even proponents of the strongest possible immigration power would countenance such policies, since they would suggest the value of states is as negligible as the value of migration.

The only readings of the doctrine that can avoid such possibilities but still retain the power to exclude all migrants at pleasure would be those that either claimed that the value of migration was always negligible or that it should be afforded little or no weight as against the value of states. Since the first possibility is not plausible—migrants often have very pressing reasons to migrate—the traditional doctrine seems to rest on a claim that the value of migration can always be drastically discounted.

Against such a view, proponents of refugee protection may wish to claim that it would be unjustifiably injurious—hence unjust—to *refoule* (return) those who face a well-founded fear of persecution in their countries of origin. For such proponents, the value of migration for refugees is such that exclusion or expulsion to a home country, in general, cannot be justified and is therefore inappropriate. Alternatively, however, it might be claimed that because the interests of migrants, including those migrants who are refugees, may be discounted, the admission of refugees is ultimately a matter of humanity or benevolence, not of justice. The international refugee protection regime arguably reflects one or the other of these judgments: as an agreement to abide by a certain understanding of what justice requires or as an agreement to commit signatories to make this peculiar form of humanitarianism legally binding. Whichever is the case, one may understand the definition of "refugee" found in the *Convention relating to the Status of Refugees* and the rights the *Convention* attaches to refugee status as a record of the judgment made by signatory states about how the framework of practical reasoning outlined above applies with respect to this category of migrant. The enshrinement of this definition in various countries' national legislation means those countries' legislators have adopted this reasoning, understood as a matter of justice or humanity, as their own.

Given these prior judgments, it might be thought that all that must be done by refugee adjudicators is to determine whether those migrants fall within the scope of the *Convention*'s refugee definition. That is, it might be thought that all adjudicators must do is apply the definition to the case before them, leaving no room for discretion and judgment. Such an understanding of the task of refugee adjudication fits the orthodox view in international refugee law that it is the facts, and not refugee status determination, that makes one a refugee.[65] On this view,

---

64. Christopher Heath Wellman discusses this possibility in Christopher Heath Wellman, "In Defense of the Right to Exclude" in Christopher Heath Wellman & Philip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford University Press, 2011) at 44.

65. United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva: UNHCR, 2011 at para 28: "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."

the function of refugee claim adjudication is merely declaratory: to affirm a status that exists in fact.

Such orthodoxy is a fiction. To see why, we must turn to the indeterminacies of the *Convention*'s refugee definition and the nature of the fact-finding exercise refugee adjudicators perform. First, the *Convention*'s refugee definition is founded upon the questionable supposition that adjudicators are actually in a position to determine that a fear of a future event is "well-founded" or that a given "risk" exists.[66] Second, substantive indeterminacies abound. Most intractable under the refugee definition found in the *Convention* are the meanings of "persecution", "membership of a particular social group", "serious non-political crime", and the "purposes and principles of the United Nations". Third, the fact-finding exercise in which refugee status adjudicators engage is fraught with difficulties. They must predict the future. To do so they generally must assess the credibility of a claimant's account of past events, in the light of documentary evidence regarding countries and cultural milieus, regarding which most adjudicators will have no direct experience. Added to these three features is the supervening issue of the overall interpretive stance that should be taken toward the *Convention*. Should they be interpreted in light of developments in human rights law?[67] Should they be treated as determinations meant to condemn the illegitimate actions of other governments?[68] Should they simply be interpreted, as are ordinary treaties, by trying to identify the terms to which the state parties agreed?[69]

The orthodox view of refugee adjudication as declaratory may be a fiction, but it is convenient in that it provides a way of denying that refugee decisions are political in the Schmittian sense. However, instead of pretending that adjudicators must merely apply the *Convention* to identify those who actually are refugees or not, an alternative, *Smithian* hypothesis asserts that refugee adjudicators are making sympathetic judgments regarding whether it is appropriate to extend refugee protection to the claimant or claimants before them. These judgments inform the way adjudicators resolve the various areas of controversy left open by the *Convention*'s refugee definition. That is, if one were relentlessly to press adjudicators to justify the approach they take to such matters as credibility or the definition of persecution, the discussion would ultimately return to some evaluation of the proportionality or disproportionality between the value of migration for particular migrants or groups of migrants, weighted somehow, against their potential disvalue to the state, as perceived by the adjudicator. Pressed further, they would ultimately point not to some detailed calculus, but to a sentimentalist judgment of propriety or impropriety.

---

66. This requirement has been translated in most jurisdictions into some rough test of the statistical probability of suffering persecution in the future. In Canada, see *Adjei v Canada (Minister of Employment & Immigration)*, [1989] 2 FC 680 at para 8 (F.C.A.).

67. For a defence of this view, see Foster, *International Refugee Law and Socio-Economic Rights*, *supra* note 15 at 27-86.

68. See Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, 2009).

69. This is the approach taken in the *Prague Airport*, *supra* note 15. It was also adopted by the majority of the Canadian Supreme Court in *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

5. Obstacles to Trust in Refugee Law

Synthesizing sections 3 and 4: If *a*) Smith's theory of ordinary moral and legal judgments and their trustworthiness is accepted, and if *b*) refugee adjudicators engage in Smithian judgments, then we should conclude that *c*) trust in refugee law, as the parallel claim runs with respect to the common law, is an appropriate attitude. However this conclusion is questionable in the light of facts already rehearsed. If adjudicators apply the above framework of practical reasoning in accordance with Smith's theory of judgment, by seeking mutual sympathy together through appeals to the impartial spectator, we would expect rough convergence in decisions. Research reveals instead seeming arbitrariness. Once again, then, the Schmittian hypothesis may have the upper hand. The most plausible explanation of the observed arbitrariness may be the unavailability of normative constraint.

There is, however, an alternative explanation, consistent with Smith's overall sentimentalist account of the sources of normativity, for the apparent untrustworthiness of refugee law. This alternative explanation begins by recalling that sympathetic judgment depends on our ability to enter into another's point of view, to call forth the sentiment we would feel in their situation, and then to form an evaluation from the perspective of an impartial spectator. On this picture, we can make differentiations regarding our capacity for the required imaginative acts based on two variables, the sentiment at issue and the degree of familiarity or proximity between spectator and actor. In this section, still drawing on Smith's theory, I describe how these variables may come into play to produce the kinds of outcomes observed by researchers. To do so, I itemize three ways relevant to refugee claim adjudication that our efforts at impartiality may be "naturally" impeded (enumerated as 1 to 3), along with several ways that Smith says our sentiments may be "corrupted" (4 to 7). I then turn to the fallibility of rules in the context of migration governance. To formulate the claim provocatively, the judgments of refugee adjudicators are systematically corrupted and rules cannot be trusted as a corrective.

One of the ways Smith elaborates his model of judgment is by providing a typology of the passions. Among other distinctions, he contrasts "social" and "unsocial" passions.[70] Social passions, such as generosity, call forth sympathetic accord more readily because both the donor and recipient feel pleasure. On the other hand, sympathy is conflicted in the case of unsocial passions, which divide our sympathy between two or more parties. Such (1) divided sympathy makes mutual sympathy harder to attain. Among the unsocial passions, most important is resentment, which arises in cases of felt injustice. Faced with an aggrieved victim, the aggressor fears punishment.[71] Knowing this, and knowing the instability that may result if injustice is not dealt with in a manner that both victim and

70. Forman-Barzilai, *supra* note 24 at 79-83; Griswold, *supra* note 24 at 117-18; Haakonssen, *supra* note 24 at 48. I do not mean to suggest that the social/unsocial distinction exhausts Smith's typology.

71. *Supra* note 1 at 41 [I.ii.3.1].

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

aggressor see as proper, a spectator proceeds with great caution. We also extend our sympathy less willingly in cases of injustice because (2) we have a tendency to sympathize more readily with joy and other passions associated with good fortune than with grief, sorrow, and other sentiments associated with misfortune. Just as grief and sorrow are painful emotions for an actor, sympathy with them is painful, though to a lesser degree. Therefore, the spectator sympathizes only with "reluctance."[72] Since resentment is unsocial, and since being victimized is a misfortune, claims of injustice encounter relative difficulty eliciting sympathy. A further aspect of human nature that Smith incorporates into his theory is (3) natural partiality. Every person "is first and principally recommended to his own care."[73] After that, our sympathies extend most readily to family members living in the same house,[74] then more distant relatives,[75] and then our friends.[76] These gradations of sympathy are rooted in the "habitual sympathy"[77] that follows from regular exposure to and knowledge of proximate actors' situations.[78] Next, Smith says, "come those who are pointed out … to our benevolent attention and good offices; those who are distinguished by their extraordinary situation; the greatly fortunate and the greatly unfortunate, the rich and the powerful, the poor and the wretched."[79] Among such persons, we naturally begin with the rich and wretched in our own societies.[80] Smith's theory therefore is not cosmopolitan; in Fonna Forman-Barzilai's phrase, we are sentimentally near-sighted.[81]

Clearly, features of our moral psychology do not track the perspective of a perfectly benevolent and impartial being. However, Smith's interest is in establishing the possibility of an objective morality for human society. His suggestion seems to be that the above ineliminable biases are features that must be incorporated into our moral judgments, and the rules to which they give rise, if our morality is to be compatible with human nature.

Smith also points to other tendencies in our judgment, roughly corresponding to those just mentioned, which he refers to as "corruptions." It is not easy to pinpoint what distinguishes a corruption from those less than perfectly impartial sympathetic tendencies that Smith considered natural. Charles Griswold has written that corruptions are features of our moral psychology that "interfere with (among [other] things) appropriate fellow feeling"[82] or, more evocatively, that they are instances of "moral blindness."[83] To understand what this might mean, recall that a relatively objective and trustworthy morality is identified on Smith's theory by examining the situation of a given actor through the eyes of an

72. *Ibid* at 54 [I.iii.1.4].
73. *Ibid* at 256 [VI.ii.1.1].
74. *Ibid* at 257 [VI.ii.1.2].
75. *Ibid* at 258 [VI.ii.1.5-6].
76. *Ibid* at 263 [VI.ii.1.15ff].
77. *Ibid* at 258 [VI.ii.1.7].
78. *Ibid* at 263 [VI.ii.1.16].
79. *Ibid* at 265 [VI.ii.1.20].
80. *Ibid* at 267-68 [VI.ii.2.1-2].
81. Forman-Barzilai, *supra* note 24 at 139.
82. Griswold, *supra* note 24 at 103.
83. *Ibid* at 134, 195, 202.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

impartial spectator. The impediments just outlined (1 to 3) represent natural limits on human impartiality once this exercise is carried out as far as possible. On the other hand—and offered here as a working approximation—the term "corruption" seems to be used by Smith to pick out features of our sentiments that block access to disinterested evaluation in the first place. Such blocking might take place several ways: by preventing us from striving to imagine another person's situation; by preventing us from gathering the relevant information needed to do so; or by preventing us from entering the perspective of the impartial spectator. Corrupted judgments are judgments in which the subjective perspective of the spectator unduly dominates. They will, as a result, be more unstable and tend toward disharmony.[84]

Refugee governance sees a distinct convergence of four corruptions catalogued by Smith. First is (4) national prejudice, a perverse form of natural partiality. It arises when there are conflicts among nations. In such cases, citizens of each are moved by the hostility felt by one's fellow citizens toward an enemy. Appeals to impartiality are blocked by the fact that everyone about whom we care is "commonly comprehended" within our own country.[85] We thereby tend toward a "savage patriotism."[86] Next, in part from our aversion to sympathy with painful emotions, comes a corruption in the form of (5) the "disposition to admire … the rich and powerful, and to despise, or, at least, to neglect persons of poor and mean condition".[87] The corruption is to conclude mistakenly that "the poor and mean" should be held in contempt or that they are not worthy of proper consideration. Contempt for the lowly and national prejudice may be reinforced, if the asymmetries of power are great enough, by (6) the love of domination, "natural to mankind," which is "a certain desire of having others below one, and the pleasure it gives one to have some persons whom he can order to do his work rather than be obliged "to persuade others"[88] or to "condescend to bargain and treat with those whom they look upon as their inferiors".[89] Perhaps most far-reaching, is (7) retrospective self-deceit. Following some misconceived deed, we frequently deceive ourselves by ignoring facts and circumstances that would lead to adverse judgments regarding our own behaviour.[90] It is painful to see yourself in a negative light and so we fool ourselves into thinking we have acted appropriately.

How do these features of our moral psychology play out in refugee law and, in particular, refugee claim adjudication? Refugee claimants, as I noted in section

---

84. They also tend toward a loss of virtue in the individual (see Ryan Patrick Hanley, *Adam Smith and the Character of Virtue* (Cambridge University Press, 2009)), but that is not relevant to the argument here.
85. *Supra* note 1 at 268 [VI.ii.2.2].
86. *Ibid* at 269 [VI.ii.2.3].
87. *Ibid* at 72 [I.iii.3.1].
88. *Supra* note 8 at 192 [LJ(A) iii.129].
89. *Ibid* at 186 [LJ(A) iii.114]. See also Smith, *Wealth of Nations*, vol 1, *supra* note 11 at 388 [III.ii]. Smith does not use the term "corruptions" in either his *Lectures on Jurisprudence* or *Wealth of Nations*, as he does in *TMS*, *supra* note 1, so I am inferring (I think safely) that love of domination is a corruption.
90. *Supra* note 1 at 183 [III.iv.4].

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

2, can be understood as claiming that they should be admitted into the country of asylum because of the injustice they face in their country of origin; I also noted that, while the claim against their country of origin seems clearly to be one of injustice, the claim to admittance is ambiguous as to whether it is one of justice or humanity. By virtue of the first claim of justice that asylum seekers make against their state of origin, there would be a natural reluctance to sympathize with them. Further, the victimhood, hence misfortune, implied by a refugee claim calls forth only a reluctant sympathy: it is painful to enter their situation. These features, together with the fact that claimants come from afar, on Smith's theory, may explain why refugee law requires not simply injustice but *great* injustice (that is, persecution) before one is entitled to protection.

If this were all that would still not account for the apparent arbitrariness of refugee claims. This arbitrariness is explained by the fact that refugee law distinctively calls upon adjudicators to judge a claim against their own country by someone who must present themself as desperate and who, for contingent reasons, is today likely to be among the poorest international migrants. Referring now to the epigraph to this essay, adjudicators are among the "fortunate and proud" who "wonder at the insolence of human wretchedness, that it should dare to present itself before them, and with the loathsome aspect of its misery presume to disturb the serenity of their happiness."[91] These tendencies may lead adjudicators to seek to impose their will, rather than seeking to persuade claimants through their conduct in the hearing room or through their reasons, and to deceive themselves about what they have done after the fact.

The implication of the distinctive convergence of the corruptions in refugee law is that ongoing testability provides less assurance of objective defensibility. There is less assurance that whenever a judgment is made, it is being made with a proper effort to enter the perspective of the impartial spectator. The many indeterminacies of refugee law are accordingly more likely to be resolved from an unduly subjective perspective.

Smith's theory provides an antidote to these and other corruptions, in the form of rules. Rules, on Smith's account, develop from specific judgments. Faced with cases of clear injustice, we "naturally lay down to ourselves a general rule, that all such actions are to be avoided".[92] As noted at the end of section 3, the attribution of this role to rules lends greater plausibility to the parallel between Smith's theory and the common law. It may also be the case, then, that the rules of refugee law may palliate the corruptions just mentioned. Indeed the origins of the refugee *Convention* in the wake of the horrors of the Holocaust seems a perfect illustration of Smith's claim that rules are motivated by the observation of actions that "shock all our natural sentiments", leading us to resolve "never to be guilty of the like, nor ever, upon any account, to render ourselves in this manner the objects of universal disapprobation."[93] All that needs to be done to tailor this quote to the case of the *Convention* is to add "again" after "never" and "ever".

91. *Ibid* at 62 [I.iii.2.1].
92. *Ibid* at 184 [III.iv.7].
93. *Ibid.*

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

However, in both Smith's work and in classical common law theory the rules form a charter for a given society. The same is also implied in more recent theoretical discussions of the common law. Consider the following definition of common law constitutionalism from Mark Walters: "Constitutionalism is the basic ideal that government must be established by law from exercising arbitrary power, an ideal that seeks to reconcile the equal dignity of individuals with the pursuit of the *common good* by the *political community within which they find themselves*."[94] Or consider this account from T.R.S. Allan: "Our legal doctrine is only an attempt to summarize … a tradition that has its own deeper momentum. … We resolve doctrinal conflicts by interrogating *our tradition*, confident that it has the resources to guide our deliberations."[95] Even more on point, one can turn to Ronald Dworkin, whose non-positivist legal theory was rooted in the value of a "community of principle."[96] The picture painted by these accounts of common law reasoning is, returning to Walters, of a "web of strings shaped into a globe or a sphere" whose "interlocking strands of normative value … bend back upon themselves, never reaching an end."[97]

Such accounts recall the role of custom in the common law tradition. They are consistent with the second of the two markers of the common law's trustworthiness, namely the ongoing concern about the capacity to provide a social charter compatible with human nature. On this view, the compatibility between rules and human nature is verified by the ability of those rules to be internalized by members of a community who go on living with one another: the trespasser and trespassee, who continue to be neighbours; the murderer and the victim's family, who continue to live under the same body of laws and social programs. In contrast to such cases, migrants, including refugees, are initially outside the common good, etc. We might, from the perspective of the receiving state, inquire about the compatibility between the rules of refugee law and the psychologies of citizens. However, when refugee claimants are rejected, they leave. Therefore it is less clear how to ask if refugee claimants can internalize the rules that reflect such rejection in community with the citizens of the country of asylum that rejected them. At the very least, the standard non-positivist account of the common law requires considerable elaboration in this case. If no plausible elaboration is available, the general rules of refugee law are only one-sidedly tested for the compatibility with human nature. They would provide only a partial, in the sense of being both one-sided and incomplete, guarantee of trustworthiness.

We may now state a refined Smithian hypothesis. The potential for national prejudice to combine with contempt for the lowly suggests a distinctive, perhaps unique, convergence of two strong, corrupting dynamics, whose joint impact

94. Mark D Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 33 at 50-51 [emphasis added].
95. TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 2013) at 15 [emphasis added].
96. Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) at 211.
97. *Supra* note 94 at 33-34.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

may be reinforced in the hearing room by a love of domination and occluded afterward by self-deceit. Access to the impartial perspective that reveals to us the constraints of justice in matters of refugee governance may be regularly, though not universally, blocked. The extent to which these corruptions are overcome will depend on the adjudicator. But in cases of corrupted judgment, the rules and principles of refugee law cannot be fully counted on as a corrective, since such rules do not seem to take into account the perspective of rejected claimants when tested for human nature compatibility.

Therefore variability in acceptance rates among adjudicators reflects not only different applications of the framework of practical reasoning, as permitted by the various forms of discretion left to adjudicators, but also the susceptibility of adjudicators to corruption. It is a symptom of the moral untrustworthiness of refugee law.

6. Conclusion

As I wrote at the outset, this result is deflating. It is nevertheless importantly distinct from the Schmittian hypothesis with which I began. That hypothesis claims that the search for normative constraint in refugee governance is futile. According to the Smithian hypothesis, on the other hand, such constraint is in principle available. It may be rendered inaccessible, however, because of the corruption of our powers of judgment and because the rules we develop are not as trustworthy as they are in other settings.

To some—perhaps to refugee claimants themselves—this in principle difference may appear insignificant. But it is, I believe, crucial. Most importantly, the Schmittian hypothesis leads to cynicism about refugee governance and to the further error of mistaking "this cynicism for growing wisdom in the ways of the world[.]"[98] The Smithian hypothesis, in contrast, suggests one should not despair of normative constraint in this domain. There may be and likely are several mundane, practical steps that can be taken to minimize the corruptions and so to make refugee law more morally trustworthy. Such steps would build on practices already present in some national refugee adjudication systems: training of decision-makers, especially training to sensitize adjudicators to forms of bias currently overlooked (these would by no means be confined to those identified by Smith, who did not discuss, for example, the corruption of our sentiments by perceptions of race); guidelines that seek to address such biases; less deferential judicial review; and so on. These suggestions may seem banal but I hope this paper has illuminated what may be at stake in ensuring such practices are pursued.

Finally, the Smithian hypothesis instructs us to revise or question the attitudes that we may have, or that we may observe in public discourse, toward refugees. In particular it should lead us to question the view that migration from the developing to the developed world to claim refugee status is somehow illegitimate.

98. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace & Company, 1951) at 268.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press

The Smithian hypothesis says instead that a non-negligible number of such claimants are likely rejected due to decision-makers' corrupted judgments. The legal framework that has been built on such rejections, and our judgments of legitimacy based on that framework, should be treated with healthy scepticism when we debate the rights and wrongs of refugee governance.

https://doi.org/10.1017/cjlj.2017.16 Published online by Cambridge University Press