

Part Two

Responses

Scottish Constructivism and The Right to Justification

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At the centre of *The Right to Justification*¹ is a striking and original claim, namely that the force and content of morality can be grounded in our nature as *justifying beings*, as creatures that cannot but engage in practices of reason-giving and reason-taking. The aim of this paper is twofold. First, I aim to unpack this claim by understanding it as a specific, Kantian form of rationalist constructivism. Second, I will argue that the argument can only take us part of the way: any adequate account of the grounds, force and content of morality must secure a much more central place to the social emotions and their associated capacities and dispositions, the most important of which is empathy. I will end by reflecting on some passages within the book that suggest that Forst is aware of the limits of his own rationalist constructivism, and himself betrays a (hidden?) desire to throw off the Kantian shackles that he otherwise freely accepts. My argument should therefore be read as a kind of immanent critique: I accept most of the premises of Forst's position, but suggest that, when rightly understood, they point us towards Scotland and away from Germany.

¹ R. Forst, *The Right to Justification: Elements of a Constructivist Theory*, trans. by J. Flynn. New York: Columbia University Press, 2011. All page references in the text refer to this book.

Constructivisms: Metaethical and normative, restricted and unrestricted

There are mountains, plants, bacteria, tigers, out there, in the world. Their existence does not depend on our attitudes towards them; they exist whether or not we do. Tables, knives and houses are different. Whether something is a house, or a knife, or a table, depends on the use we make of it, and hence on the attitudes that we take towards it. A tree stump could be a table, but so could a pile of books, or the hood of a car. There are no natural, causal, attitude-independent properties shared by all these disparate things that explain why they count as tables. It is our (volitional, cognitive, practical) activities that make it true of a tree stump, or the hood of a car, or a pile of books, that it is a table.

Are moral claims by which we ascribe moral properties to, for example, actions, or states of affairs, or dispositions, more like the claim that something is a mountain, or more like the claim that something is a table? Do such claims depend for their truth (assuming, for the moment, that moral claims are genuinely truth-evaluable) on our attitudes towards the actions, states of affairs, dispositions which they purport to describe? Or are they true independently? Many have been moved by the thought that moral claims are true, when they are true, not in virtue of their correspondence with a mind-independent reality (like the claim that something is a mountain) but in virtue of bearing the right relations to our practical activities and attitudes (like the claim that something is a table).

Constructivists, among others,² are moved in just this way (and, as a constructivist, so is Forst, and so am I). Constructivists believe that moral claims are made true, when they are true, by being the output of a certain (hypothetical or actual) procedure of deliberation. A claim

² McDowell and Wiggins, for example, also believe that moral truths are stance dependent, but are not constructivists. See J. McDowell, 'Values and Secondary Qualities', in T. Honderich (ed.), *Morality and Objectivity*. London: Routledge, 1988, pp. 110–29; D. Wiggins, 'A Sensible Subjectivism?', in *ibid.*, *Needs, Values, Truth: Essays in the Philosophy of Value*. Oxford: Oxford University Press, 1987, pp. 185–214.

such as 'happy-slapping is wrong' is true, they say, if and only if it would either be endorsed by an appropriately motivated actual or hypothetical deliberator (or group of deliberators) or entailed by norms that would be selected for mutual governance by appropriately motivated actual or hypothetical deliberators. Constructivists endorse what is sometimes referred to as the *stance-dependence* of moral claims.³

Stated in this way, constructivism is ambiguous. This ambiguity is often overlooked, but it is important.⁴ Does the right side of the just-stated biconditional give us a test for determining when moral claims are true or does it tell us what moral truth itself consists in? Is it a claim about what it takes to *justify* a moral judgment or a metaphysical claim about the *status* or *nature* of moral truths? Understood in the former sense, constructivists give us a procedure or standpoint for generating (true) moral principles, norms and reasons. Understood in the latter sense, the right side of the biconditional either gives us the moral statement's truth conditions or tells us what it is for an action (like happy-slapping) to be wrong. To prevent confusion, I will call forms of constructivism that affirm only the former, *normative*, and those that affirm only the latter, *metaethical*. Metaethical constructivists aim to provide an account of the logic, semantics and ontology of moral claims. Normative constructivists, on the other hand, remain neutral on such questions. Normative constructivists could hold, for example, that realists or expressivists (rather than metaethical constructivists) provide the best account of the logic, semantics and ontology of moral claims. To illustrate: Imagine that moral properties are best construed as stance-independent, irreducible and non-natural (i.e. a form of realism is true); the normative constructivist could then say that the

³ See, for example, R. Milo, 'Contractarian Constructivism', *The Journal of Philosophy* 92(1995), 181–204.

⁴ Scanlon, for example, is systematically ambiguous throughout *What We Owe To Each Other*. Cambridge, MA: Harvard University Press, 2008, on whether he should be read as defending primarily a metaethical or a normative constructivism. He concedes unclarity on the issue in T. Scanlon, 'Replies', *Ratio* 16(2003), 424–39, in response to questions by Mark Timmons and Derek Parfit. Mark Timmons is particularly helpful in drawing this distinction. See his M. Timmons, 'The Limits of Moral Constructivism', *Ratio* 16(2003), 391–423.

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procedure identified by the right side of the biconditional provides the best way of *discovering* such moral truths rather than *creating* or *legislating* them.⁵ I will take Forst to be proposing a form of primarily normative constructivism. While there are points at which Forst seems also to favour a metaethical constructivism, he ~~does not~~ spend any time defending the position, and the most important and interesting arguments in the book do not contribute to debates on the ontology, logic or semantics of moral claims.

The central obstacle facing any normative constructivism is to specify an account of hypothetical or actual deliberation such that we are warranted in affirming its results as morally correct. Overcoming this obstacle requires the completion of four interconnected tasks. First, the constructivist must show how his proposed procedure of deliberation yields determinate results. The outputs of the procedure must, that is, be at least informative enough to help us in solving the practical problems they are designed to address. In a constructivist theory of *justice*, for example, the procedure ought to identify principles, reasons or norms that tell us more than that we ought to give each person their due, or that we ought to eliminate illegitimate exercises of power. (We still wonder: What counts as a person's due? What forms of power are illegitimate?) The results of construction need not provide solutions to every possible question within the domain of the procedure, of course, but they must at least be capable of meaningfully orienting us with respect to the most important ones.

Second, the constructivist must show that his proposed procedure avoids objectionable forms of subjectivism or relativism. If moral truths are discovered or legislated from the point of view of the deliberating agent, then why doesn't each person get to legislate morality for themselves? Why take the point of view of a single *hypothetical or ideal* agent (or agents) as authoritative for every person (and every group of persons) whatever their particular, contingent views on the matter? Or,

⁵ Cf. Forst: 'Whether with its help we "make" or just "perceive" a world of norms, like facts that we discover, can be left open' (???)

if we believe that the judgments of some *actual* deliberator or group of deliberators is authoritative, why give *them* rather than some other group such dispositive power? Call this the problem of *objectivity*.

Third, morality is usually taken to generate categorical (or at least very weighty) reasons: moral norms and the reasons they recommend bind us whether or not we desire to be so bound or have an interest in being so bound. But how does merely being the output of a procedure (or selected from a privileged deliberative standpoint) generate such normative force? Why, that is, should we accord the outputs of the deliberative procedure with the importance, priority and authority that we usually accord moral claims? Put another way: Why does the fact that an action is proscribed by norms legislated from the privileged deliberative standpoint provide one with a weighty (or even conclusive) reason not to do it? This is the problem of *normativity*.

Fourth, the heart of any constructivist view will specify relevant constraints on the deliberative procedure (including constraints on admissible motivations for its deliberators). These constraints serve not only to make the procedure determinate but also to motivate it. If one asks—‘why this set of constraints rather than that one?’—the constructivist will need to provide an answer that explains why these constraints are required to produce results that have all the hallmarks of genuinely moral claims, including special significance and weight. But there is a problem. What is the moral status of the constraints *themselves*? In justifying the constraints, the constructivist might recommend them on explicitly *moral* grounds. The constraints, the constructivist suggests, are impartial, or fair, or the ideal deliberator benevolent, conscientious, or even-handed. In choosing this path, the constructivist finds himself on the first horn of a dilemma. For we then wonder: Are the moral grounds for the constraints themselves constructed from the deliberative point of view? But how could that be, given that they are meant to define and delineate the procedure in the first place? Fearing the first horn of the dilemma, the constructivist might instead try his hand at the second. He might, that is, appeal to *non-moral* grounds for the constraints. The constraints, for example, might be entirely derived from a conception

of prudential rationality, or from a purely conceptual analysis of moral terms, or from widely accepted, uncontroversial social conventions governing moral choice. But, here too, the constructivist will find himself impaled, since he now lacks a reason for us to take the outcome of the specified deliberative procedure seriously. Why should we have any moral reason to care what bare prudential rationality requires of us, or what our social conventions happen to be, or what is entailed by our moral *concepts* (don't we care about morality *simpliciter* rather than the peculiarities of our moral concepts or their meanings)? Call this is the *Euthyphro* problem.⁶

In the following, I will leave aside the *determinacy* and *objectivity* problems; instead, I will focus on the *normativity* and *Euthyphro* problems. As we will see, there are two common strategies adopted by contemporary constructivists to address both problems. The first is to limit oneself to what Sharon Street has called *restricted* constructivism; the second is to adopt an *unrestricted* constructivism, but argue that the constraints on the procedure are necessary constituents of any practical deliberation or activity.⁷ I will discuss both strategies in turn. Forst, as we will see, adopts a version of unrestricted constructivism. Seeing how Forst's view compares to his closest cousins (including Scanlon, Rawls, Habermas and Korsgaard) will be instructive in highlighting the obstacles he faces, and the degree to which he is successful in overcoming them.

Restricted constructivism

According to the restricted constructivist, not *all* moral principles, values or reasons are constructed from the privileged deliberative standpoint;

⁶ Cf. R. Shafer-Landau, *Moral Realism: A Defence*. Oxford: Clarendon, 2003.

⁷ See, for example, S. Street, 'Constructivism About Reasons', in R. Shafer-Landau (ed.), *Oxford Studies in Metaethics*. Oxford: Oxford University Press, 2008, pp. 207–45; S. Street, 'What Is Constructivism in Ethics and Metaethics?', *Philosophy Compass* 5(2010), 363–84.

only *some* are. Both Rawls and Scanlon are restricted constructivists. For Rawls, for example, only principles of justice are constructed from the original position. The structuring constraints and conceptions that underlie and frame the original position are not. These include the conceptions of the citizen as free and equal, reasonable and rational, and of society as a fair system of cooperation, as well as the argument in favour of the moral arbitrariness of talents. Each of these elements represents a moral commitment flowing from values – toleration, fairness, impartiality, reciprocity – that are not themselves selected from behind the veil of ignorance. For Scanlon, similarly, only those principles that govern ‘what we owe to each other’ are selected using the contractualist formula. Although often overlooked, the reasons we have for rejecting principles are not themselves constructed (including reasons stemming from our well-being or from considerations of fairness). Neither are the reasons we have for justifying ourselves to others nor, for that matter, the more general ‘individualist (or personal reasons) restriction’, which limits the kinds of reasons that are admissible in rejecting the principles governing what we owe to each other.⁸ Restricted constructivism is best understood, therefore, as a substantive moral view in which a privileged procedure or standpoint is used to connect and organize a set of (often inchoate or incomplete) prior commitments and values, and then to trace their implications for a restricted domain (whether of justice, as in Rawls’s case, or what we owe to each other in Scanlon’s). Put in Rawlsian terminology, the prior commitments and values are the ‘materials’ of construction, the privileged standpoint is the ‘procedure’ of construction, and the restricted domain is the ‘target’ of construction.⁹

By taking a restricted view, the constructivist adopts a less ambitious position, but also one that allows him to evade, in one stroke, both the normativity and Euthyphro problems. The Euthyphro problem is circumvented by partitioning the grounds for the constraints and

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⁸ On the individualist restriction, and its importance for Scanlon’s contractualism, see D. Parfit, ‘Justifiability to Each Person’, *Ratio* 16(2003), 368–90.

⁹ Cf. J. Rawls, *Political Liberalism*. New York: Columbia University Press, 1993, p. 222.

the grounds for the target principles. To maintain the partition, the restricted constructivist must ensure that the principles that lie in the domain of the ‘target’ are not used to motivate the prior commitments and values that serve as ‘materials’ of construction. As long as this is done successfully, the vicious circularity threatened by the first horn of the Euthyphro dilemma is thereby avoided. The restricted constructivist can then go on to justify all the constraints, inputs and inferences that serve to structure the deliberative standpoint in explicitly moral, non-constructivist terms with a clear conscience. A cursory look at Scanlon’s justification of the ‘individualist restriction’ (most evident in a reply to Parfit) shows exactly an instance of this strategy: nowhere does Scanlon say that the individualist restriction could not reasonably be rejected as a basis for uncoerced, general agreement.¹⁰ This is as it should be: The individualist restriction is meant to tell us which reasons are admissible in rejecting (and hence accepting) the principles that define what we owe to each other. If Scanlon had made the restriction itself a member of the set of principles defining what we owe to each other, he would have squarely begged the question.

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The same is true of Rawls. As he writes in Lecture III of *Political Liberalism*,

What does it mean to say that the conceptions of citizen and of a well-ordered society are embedded in, or modeled by, the constructivist procedure? It means that the form of the procedure, and its more particular features, are drawn from those conceptions taken as its basis. . . . To conclude: not everything, then, is constructed; we must have some material, as it were, from which to begin. In a more literal sense, only the substantive principles specifying the content of political right and justice are constructed. The procedure itself is simply laid out using as starting points the basic conceptions of society and person, the principles of practical reason [viz. the reasonable and the rational], and the public role of a political conception of justice.¹¹

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¹¹ Rawls, *Political Liberalism*, pp. 103–4.

Once again, vicious circularity is avoided by partitioning the justificatory grounds for the ‘materials’ of construction from the ‘targets’ of the procedure itself. On this view, the constructivist procedure (i.e. the original position) serves to draw out the implications of a set of (prior) moral commitments to publicity, toleration, reciprocity, fairness, impartiality and so on, in view of (a) a set of specific political problems (e.g. reasonable pluralism and the ‘great political evils’)¹² and (b) a specific understanding of the role principles of justice and legitimacy are meant to play in solving those problems (namely to publicly order a basic structure via an overlapping consensus).

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Once one adopts restricted constructivism, the normativity problem also becomes easier to solve than for an unrestricted view. An unrestricted view needs to explain why taking up the privileged deliberative standpoint or procedure generates results that have the categorical (or near-categorical) nature expected of moral reasons and principles. The explanation will need to make exclusive reference to the characteristics and nature of the deliberative procedure; this is because the procedure is meant to give birth to (or at least provide a way of revealing) the *entire* moral order. There is no morality outside of the procedure, and so no moral normativity; as a result, the deliberative procedure must generate or reveal not only the governing moral reasons or principles but also explain their force. The restricted constructivist, on the other hand, is under less pressure to anchor his account of normativity to the specific features and character of the privileged deliberative standpoint. He can either appeal directly to the normativity of the grounding ‘materials’, and argue that the target principles simply inherit the normativity of those starting points, or he can provide an entirely independent, first-order, non-constructivist account of moral normativity.

Once again, both Rawls and Scanlon provide good illustrations of the latter two strategies. Let us start with Rawls. In response to the question, ‘Why should principles of justice be given such a categorical, normally conclusive status in public affairs?’, Rawls answers: because

¹² [cite LP].

they provide the most reasonable basis on which to coerce others in conditions of reasonable pluralism. We might then wonder: 'Yes, but why does their being "reasonable" give them (normally) conclusive authority in political conflict? What explains their priority, for example, with respect to people's conception of the good?' Here Rawls points to conception of the free and equal citizen as willing to offer fair terms of cooperation to others similarly motivated. Someone who believes that his own comprehensive conception of the good should govern others' lives, or that denies the authority of principles of justice justified from a freestanding perspective, must therefore deny others' status as free and equal, and hence deny that they are entitled to mutually acceptable terms of justification for the use of coercive power. Notice that, on this picture, the normativity of political principles is explained in terms of a (prior) moral conception of citizens as free and equal, which is itself grounded in a specific (moral) understanding of what is reasonable, and a particular (moral) account of reciprocity and fair-mindedness. None of the latter ideas is constructed; rather, they are merely 'drawn' from the public political culture of a constitutional democracy and justified as fair interpretations of what that culture (already) requires of us. The normativity of principles of justice is, in this way, inherited from the normativity of the (moral) conception of citizens as free and equal.

Scanlon takes a different tack. One of Scanlon's main aims is to explain why the fact that an action is wrong gives us a strong, normally decisive, reason not to do it. It is very important to remember that, on the Scanlonian view, to say that an action is wrong is not just to summarize the balance of reasons against an action. To say that an action is wrong *adds* a further reason not to do it. Say that an action will harm someone but benefit no one. This gives one a conclusive reason not to do it. Compare an action that will cause some discomfort to oneself and benefit no one. This also gives one a conclusive reason not to do it. Stated in this way, both considerations 'weigh' decisively against the action in question. But how much, and in what way, do they count against the action in question? How do we determine the importance and priority of the reasons at stake, including the role they

should play in our practical deliberation? The fact that the first action harms someone *else* whereas the second only harms *oneself* makes, let us assume, the first action wrong in a way that the second is not. Someone who performs the first action is subject, as a result, to forms of serious criticism that someone who performs the second is not. But why does the fact that the second action hurts someone else without compensating benefits relevant to the importance and priority of the reasons against it (and the kinds of criticism it merits)? Why, that is, does its wrongness give us not only a decisive reason not to do it, but also a much more weighty one than in the first case?

When we seek to justify ourselves to others, we imply that we are alive to the reasons others might have for stopping us from performing certain actions. By entering into practices of mutual justification, we signal our willingness to desist if it turns out that others cannot reasonably be expected to license our actions. Scanlon argues that the wrongness of an action can be explained as a failure of such mutual justification. If others have decisive reasons to reject any principle allowing us to act, then the action in question, Scanlon argues, is wrong; that fact – the failure of mutual justification – is what makes it wrong. But, assuming that justifying oneself to others implies something like the reasonable rejection test, why ‘must’ we seek to justify ourselves to others? Why are we subject to criticism if we don’t much care what reasons others might have for asking us to stop? Scanlon, at this point, points to the *independent value* of living with others in ways that are mutually justifiable; he points, that is, to the value of a social practice in which people trade in and respect each other’s reasons. According to Scanlon,

When I reflect on the reason that the wrongness of an action seems to supply not to do it, the best description of this reason I can come up with has to do with the relation to others that such acts would put me in.¹³

¹³ Scanlon, *What We Owe to Each Other*, p. 155.

Here Scanlon points to an analogy with friendship. Loyalty to one's friends is often demanding, requiring us to do things that are costly or otherwise difficult. So why, then, should we be loyal? An answer of the wrong kind would invoke the instrumental benefits of friendship. A person moved only by such instrumental considerations has missed something essential about friendship (just as a person moved only by instrumental considerations has missed something essential about morality). Loyalty itself has to provide one with sufficient reason to do things for one's friends (just as an action's wrongness itself has to provide one with sufficient reason not to act in that way). A loyal friend is moved by the value of the relation itself, by the intimacy and concern and care and love for a specific person that are constitutive of it. Scanlon writes:

The contractualist ideal of acting in accord with principles that others (similarly motivated) could not reasonably reject is meant to characterize the relation with others the value and appeal of which underlies our reason to do what morality requires. This relation, much less personal than friendship, might be called a relation of mutual recognition. Standing in this relation to others is appealing in itself—worth seeking for its own sake. . . . [Moral] requirements are not just formal imperatives; they are aspects of the positive value of a way of living with others.¹⁴

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While, ~~of course,~~ relations of mutual recognition are not founded on the same concern, care, intimacy ~~and so on,~~ as friendship, they are valuable for their own sake in much the same way as friendship is. This is why Scanlon often says that the importance of justifiability to others reflects our awareness of the value of seeking to live our lives, quoting J. S. Mill, 'in unity with our fellow creatures.' Indeed, Scanlon goes on to claim that the value of mutual justifiability provides the basis of respect, underlying *any* relationship between human beings, whether among family, friends, colleagues or citizens.

¹⁴ Ibid., p. 162.

In this way, Scanlon grounds the morality of right and wrong in the value of intrinsically valuable relationships. The right, we might say, is grounded in a further conception of the good.¹⁵ For our purposes, what is important is that nowhere does Scanlon suggest that the ideal of justifiability itself cannot reasonably be rejected. If Scanlon had done that, he would have begged the question. The ideal of justifiability to others undergirds and justifies the contractualist test but is not itself justified by it. It is also important to note that there is no explanation for why we ‘must’ recognize the value of mutual justifiability. Scanlon does not attempt to show that failing to recognize this value would land one in some sort of practical or rational contradiction or incoherence. The normativity of the ideal itself is assumed; Scanlon believes his readers are already (implicitly) motivated to act in accordance with the ideal, and his aim is merely to show them *that* they are. The normativity of the principles that issue from repeated applications of the contractualist test simply *inherit* the normativity of the ideal that justifies the test itself.

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Many have found restricted accounts of this kind not only incomplete but also precariously contingent. Scanlon sets out to explain the special character and role of morality in our lives; he claims to provide a novel and ambitious account of moral normativity that is intended to compete with both consequentialist and Kantian alternatives. Yet, at the crucial point, he seems to simply assume the normativity of the central ideal motivating his entire account. The final appeal to the value of relations of mutual recognition, furthermore, seems – according to this critique – altogether too contingent and underspecified. Is a failure to recognize this value simply a failure to recognize something good (since the failure cannot itself be wrong)? And what, exactly, *is* the value of living in relations of mutual justification? Scanlon seems to assume the value of justifiability (elucidated via a cryptic analogy to friendship) rather than to explain it. After all, relations among strangers *lack* all the crucial features of friendship, including care, love, intimacy, shared

¹⁵ Cf. Forst, who writes ‘it is necessary for moral action and for being moral at all not to ultimately lead back to an ethical motive’ (???)

history and so on. What is the basis for respecting others in relations of mutual recognition, if *not* the special relations and history that are important in relationships like friendship? In what sense are friendship and relations of mutual justification relevantly analogous, if not in those more intimate dimensions? Usually accounts of this kind appeal to something like the value of humanity, dignity or rational agency, or alternatively to the importance of mutual recognition for the formation of a practical identity, yet there is no such appeal here. In the end, the ‘positive value of living with others’ seems to rest on nothing more than the security we might feel in knowing that others are (or, rather, *should be*) happy for us to carry on. The unconditional, categorical character of morality seems ultimately to rest on quicksand. The same can be said of Rawls, who finally grounds his account of the reasonable in ideas that contingently occur only in liberal democracies. Is there really no further (freestanding) ground for the normativity of his principles of justice?

Unrestricted (Kantian) constructivism

My aim is not to defend this critique of restricted constructivism. Rather, my aim is to give vent to what I believe underlies the ambition to develop a more *unrestricted* constructivism, the most popular versions of which are all, not surprisingly, Kantian. The Kantian ambition is to show that the full set of foundational, ground-level standards of morality can be understood as constitutive of an inescapable practice, such as rational agency, action, communication or deliberation. Korsgaard is representative:

[T]he only way to establish the authority of any purported normative principles is to establish that it is constitutive of something to which the person whom it governs is committed—something that she either is doing or has to do. And I think that Kant thought this too. The laws of logic govern our thoughts because if we don’t follow them we just aren’t thinking. . . . [T]he laws of practical reason govern our actions

because if we don't follow them we just aren't acting, and acting is something we must do. A constitutive principle for an inescapable activity is unconditionally binding.¹⁶

The basic idea, in outline, is quite simple. To act, reason, deliberate or communicate successfully requires guiding one's activity according to the standards constitutive of those domains in the same way as, say, playing chess successfully requires following the constitutive rules and aims of chess. If activities like acting, reasoning or deliberating are inescapable, and if the Kantian can convincingly demonstrate that the moral law (whether understood as the Categorical Imperative, or an ideal discourse procedure, or as a procedural ideal of reciprocity and generality) is a constitutive standard for those practices, then morality itself would be inescapable as well. The problem of normativity would be solved. At the same time, the Euthyphro problem would also be solved. Because fundamental moral constraints (on deliberation, or reasoning, or communicating) necessarily govern a set of unavoidable practices, there is no 'external' standpoint available from which it can meaningfully be asked whether the constraints themselves are morally desirable. Asking the question – 'Are the basic constraints justifiable?' – would itself require a further stretch of the very deliberation, reasoning or communication that is constituted by the standards in the first place. Notice that if the Kantian project were successful, then it would deliver a comprehensive first-order moral system that also avoided the incompleteness and contingency of more restricted accounts. But is it successful?

In the following, I will argue that specifically Kantian versions of constitutivism (including Forst's) offer at most a set of necessary conditions for solving both the normativity and Euthyphro problems, but they are not sufficient. What is lacking is a place for the social emotions in constituting the moral domain. To prosecute this critique, I will first show that Forst's arguments from Chapters 1 and 2 are best understood

¹⁶ C. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity*. Oxford: Oxford University Press, 2009, p. 32.

as a novel form of constitutivism, namely what I will *justificatory constitutivism*. I then seek to reveal the weakest point in Kantian constitutivism (in whatever form) by querying what the constitutivist must say about cases of moral blindness. I will argue that this reflection shows that morality cannot be constitutive of mere deliberation, action, communication or justification; rather, morality is only constitutive of the deliberation, action, justification or communication of *social* beings, of beings, that is, with a distinctive range of social emotions. Perhaps unexpectedly, Forst's own account, I will conclude, already points us towards this (very Scottish) conclusion.

For Korsgaard, morality is a constitutive standard of *action*; for Habermas, it is a constitutive standard of *communication*; and for Forst, it is a constitutive standard of *justification*. Forst writes:

My own proposal starts from the assumption that the analysis of the moral point of view should begin with a pragmatic reconstruction of moral validity claims and, proceeding recursively, inquire into the conditions of justification of such claims and of the construction of norms. . . . If, starting from [the moral] validity claim, we inquire recursively into the conditions under which it can be redeemed, then the validity criteria of reciprocity and generality take on the role of criteria for discursive justification. It follows that, in justifying or problematizing a moral norm (or mode of action), one cannot raise any specific claims while rejecting like claims of others (reciprocity of contents), and one cannot simply assume that others share one's perspective, evaluations, convictions, interests, or needs (reciprocity of reasons), so that, for example, one claims to speak in the "true" interests of others or in the name of an absolute, unquestionable truth beyond justification. Finally, the objections of any person who is affected, whoever he or she may be, cannot be disregarded, and the reasons adduced in support of the legitimacy of a norm must be capable of being shared by all persons (generality). (???)

AQ: Please suggest what the symbol '???' here and in the subsequent occurrences denotes.

The idea, I take it, is this. We find ourselves necessarily implicated in practices of discursive justification, some of which require one to

justify oneself in the light of morality. Moral discourses of justification, in turn, have a certain structure, which can be reconstructed by considering what is (necessarily) demanded and expected of others in ‘redeeming’ a claim to rightness. This requires, in a Habermasian spirit,¹⁷ a reconstruction of the necessary presuppositions of moral argumentation. The argument is therefore classically constitutivist: we cannot but enter into practices of mutual justification; practices of mutual justification, in turn, are necessarily governed by norms of generality and reciprocity, which together make mutual justification what it is (which make it, i.e. a form of *justification* rather than, say, a form of command, advice, warning, exhortation or questioning). If we do not respect the standards, we therefore fail in justifying ourselves to others, and hence fail in something we must do. As Forst writes in the first passages from *The Right to Justification*: ‘Human beings’ are ‘justificatory beings. . . . If we want to understand human practices, we *must* conceive of them as practices bound up with justifications; *no matter what we think or do*, we place upon ourselves (and others) the demand for reasons, whether they are made explicit or remain implicit’ (???, emphasis added).

A prominent way of putting pressure on constitutivists is to accept that morality is a constitutive standard of action, or communication, or deliberation, or justification, but claim that none of these activities is inescapable. This is often referred to as the ‘shmagency’ objection (due to David Enoch).¹⁸ If someone says to you, ‘If you act, you must obey the categorical imperative, and you must act,’ then the shmagent objector replies: ‘But why must I “act”? If “acting” requires adhering to the CI, then I’d rather “shmact”, which is just like “acting” but without the requirement that one must follow the CI.’ The objector continues: “Acting”, in the sense required by the constitutivist, is, after all, just like playing chess. Imagine you observe someone playing a game in which he and his opponent follow all the rules for moving pieces typical of

¹⁷ For Forst’s disagreements with Habermas, see below.

¹⁸ D. Enoch, ‘Agency, Shmagency: Why Normativity Won’t Come from What Is Constitutive of Action,’ *The Philosophical Review* 115(2006), pp. 169–98.

chess but where the winner is the one who is checkmated first. You protest: “That’s not chess! You’re playing it all wrong! One of the constitutive standards of chess is to try to checkmate your opponent rather than yourself!” The players reply: “OK, so this isn’t chess, but schmess, so what? Why *must* we play chess?” We can say the same thing with respect to action, deliberation, communication, justification:, why must we “act” rather than “shmacro” (or “communicate” rather than “shmmunicate”, and so on?) If ‘acting’ or ‘deliberating’ or ‘communicating’ or ‘justifying’ are not things we must do, then the constitutivist argument fails: morality is just as optional as whether to play chess or not.

AQ: Please suggest the placement of the closing parenthesis for the opening parenthesis starting with “(or..”

I don’t believe this objection – as popular as it is – is successful. The objection trades on interpreting the constitutivist argument as providing an analysis of the *concept* of action, or deliberation, or communication (or, alternatively, of the *social conventions* governing deliberation, communication, action). But then the constitutivist can simply say: ‘I’m not interested in the *concept* of action, deliberation, communication, justification, or in the *social conventions* governing these activities, I am interested in what action, deliberation, communication, justification actually *are*. I am interested in providing an account of the activities that make up the fabric of our practical lives; those things, in other words, which our concepts are trying to latch onto and our social conventions trying to shape. What I mean by action, deliberation, communication, justification is just what it is that you must do when you reflect on whether you prefer to be a “shmagent” rather than an “agent”, or whether you want to play “chess” or “schmess”. Morality is a constitutive standard of *that* activity, not simply of the concepts that might be used (some successfully, some unsuccessfully) to refer to the activity, or of the social conventions that may (or may not) contingently govern those activities in particular societies.’¹⁹

¹⁹ A similar response is mooted by L. Ferrero, ‘Constitutivism and the Inescapability of Agency’, in Shafer-Landau, *Oxford Studies in Metaethics*, pp. 303–33.

Going Scottish

The objection I will pursue in the rest of the chapter takes a very different form. I accept that action, deliberation, communication, justification are inescapable activities. What I will question is whether morality is, in fact, a constitutive standard of those activities *taken on their own*. More precisely, I will claim that, though those activities are necessary conditions for the existence and normativity of morality, they are not sufficient. Morality does not come into being and apply to us simply insofar as we are acting, or communicating, or justifying, or deliberating beings. Morality comes into being and applies to us in virtue of the fact that we are also *social* beings whose interaction is shaped by a characteristic range of emotions and dispositions, the most important of which is empathy.

Consider cases of moral blindness. What I have in mind is someone who simply does not *see* others in the way characteristic of someone with a moral sense. The contrast is with someone who is morally bad. The morally bad person acts immorally, but is subsequently moved by guilt or remorse. It is of course possible for someone morally bad to become morally blind (at least in some areas), but to do so would require training or habituation (modern-day soldiers, for example, undergo specific kinds of training whose purpose is to allay or dissolve feelings of moral aversion to killing). Importantly, people trained in this way will often continue to have the characteristic range of moral attitudes in other aspects of their lives.

Moral blindness of the kind that is relevant for our purposes is best exemplified by the psychopath. Psychopaths are identified by the possession of the following characteristics: glibness and/or superficial charm, grandiose sense of self-worth, deceitfulness, manipulativeness, lack of remorse or guilt, shallow affect, callousness, irresponsibility, poor behavioural control, lack of realistic, long-term goals, and impulsivity.²⁰

²⁰ R. D. Hare, *The Hare Psychopathy Checklist-Revised*. Toronto: Multi-Health Systems, 1991.

Psychophysiological studies of psychopaths show a marked lack of emotional responsiveness to portrayals of others in severe distress and a lack of fear or shock in disturbing situations involving harm to others.²¹ This is sometimes explained by lack of what psychologists call a ‘Violence Inhibition Mechanism’ [VIM], a schema that causes a withdrawal response in the presence of signs of acute distress (e.g. the sights and sounds of someone crying).²² Lack of this mechanism also seems to contribute to a general difficulty in distinguishing between different types of violations (e.g. between violations of moral and conventional rules) and to judge the seriousness of different violations.²³

AQ: Please provide text for note 23.

Whereas normal people use their own emotional reactions to mediate and judge the seriousness of violations, psychopaths have trouble doing so. Psychopaths, furthermore, often have a working knowledge of common moral expectations and norms, and are able to predict the reactions of others to violations of them; what they lack is the care and concern for others’ interests and well-being that underlies normal moral responses. The most important mediating deficit in explaining the psychopath’s moral blindness is therefore widely recognized to be a deficit in *empathy*, the capacity to both accurately represent the mental states of others and, more importantly for the psychopath, to respond in an emotionally appropriate way to them.²⁴

Other psychological disorders – especially autism – have been associated with lack of empathy, but the way in which such a lack manifests itself is very different from the way it manifests in psychopathy. This difference will become very important in the elaboration of Scottish constructivism below. I will focus on high-functioning autism spectrum

²¹ A. S. Aniskiewicz, ‘Autonomic Components of Vicarious Conditioning and Psychopathy’, *Journal of Clinical Psychology* 35(1979), 60–7; C. J. Patrick, ‘Emotion and Psychopathy: Startling New Insights’, *Psychophysiology* 31(1994), 319–30; J. Blair et al., ‘The Psychopathic Individual: A Lack of Responsiveness to Distress Cues?’, *Psychophysiology* 34(1997), 192–8.

²² R. Blair et al., ‘Is the Psychopath “Morally Insane”?’, *Personality and Individual Differences* 19(1995), 741–52.

²³ ?

²⁴ R. Blair, ‘Responding to the Emotions of Others: Dissociating Forms of Empathy through the Study of Typical and Psychiatric Populations’, *Consciousness and Cognition* 14(2005), 698–718.

disorders, in which there is little or no impairment in linguistic ability (though there may have been language delay) or IQ. Those suffering from high-functioning autistic spectrum disorders – to which I’ll refer using the general term ‘autistics’ in what follows – are characterized by severe social impairment, limited capacity to engage in role-playing, narrow interests and repetitiveness of behaviour. Autistics are often confused by others’ reactions, and find social situations very difficult to negotiate. A growing consensus traces the autistic’s difficulties in social adjustment and response to a failure to ‘mind-read’, that is, to predict or attribute mental states (such as desires and beliefs) to self and others.²⁵ Autistics can learn to predict and attribute mental states to others, often on the basis of mere correlation between cues and outcomes, but such learning is difficult and often inaccurate. However, autistics typically report feeling bad if someone indicates that their behaviour was hurtful, and feel that hurt should be avoided where possible.²⁶ They are also able to distinguish moral from conventional violations in the same way as normal individuals, and have normal physiological arousal responses to perceived distress.²⁷ Importantly for our purposes, autistics are much less prone to the range of anti-social and criminal behaviour characteristic of psychopaths. The problem is that they are typically unable to determine both when someone is in distress and what they should do as a response to the distress. This is why the failure to mind-read is often invoked to explain the absence of ‘pro-social’ responses (i.e. empathy) in the presence of others’ suffering. Oliver Sacks reports the response to distress of one of his patients, Jim Sinclair, who says:

I have to develop a separate translation code for every person I meet. . . . Does it indicate an unco-operative attitude if someone doesn’t

²⁵ See, for example, S. Baron-Cohen et al., ‘Does the Autistic Child Have a “Theory of Mind”?’ *Cognition* 21(1985), 37–46; S. Baron-Cohen, *Mindblindness: An Essay on Autism and Theory of Mind*. Cambridge, MA: MIT Press, 1995.

²⁶ S. Baron-Cohen and S. Wheelwright, ‘The Empathy Quotient: An Investigation of Adults with Asperger Syndrome or High Functioning Autism, and Normal Sex Differences’, *Journal of Autism and Developmental Disorders* 34(2004), 163–75, at p. 169.

²⁷ R. James and R. Blair, ‘Brief Report: Morality in the Autistic Child’, *Journal of Autism and Developmental Disorders* 26(1996), 571–9, at p. 577.

understand information conveyed in a foreign language? Even if I can tell what the cues mean, I may not know what to do about them. The first time I ever realized someone needed to be touched was during an encounter with a grief-stricken, hysterically sobbing person who was in no condition to respond to my questions about what I should do to help. I could certainly tell he was upset. I could even figure out that there was *something* I could do that would be better than nothing. But I didn't know what that something was.²⁸

The morally inappropriate behaviour of autistics is therefore more often seen as a failure to coordinate an appropriate behavioural response to distress or the prospect of distress (both their own and others') or explained as a failure to understand the moral valences of more complex social situations.²⁹ It is not triggered by a lack of general concern for others.

We can now compare the lack of empathy characteristic of autism and psychopathy. Recall the definition of empathy I gave above, which emphasized *both* the ability to accurately represent the mental states of others *and* the ability to respond in an emotionally appropriate way to them. As we have seen, both psychopaths and autistics do not respond in an emotionally appropriate way to signs of distress in others. The key difference is that this failure in autistics can be traced to a failure to mind-read – namely to accurately simulate the mental states of others – and then to coordinate socially appropriate responses to them. Psychopaths, on the other hand, have no impairment in their ability to mind-read; indeed, this is what makes them particularly good at deceit, charm and manipulation. The lack of empathy for psychopaths is entirely traceable to their 'cold' emotional responses to violence, harm and fear. Psychopaths understand what other people are doing, what they are thinking and what reactions they are likely to have, but they just do not care (except insofar as it might further some end). It is

²⁸ Quoted in J. Kennett, 'Autism, Empathy and Moral Agency', *The Philosophical Quarterly* 52(2002), 340–57.

²⁹ See James and Blair, 'Brief Report: Morality in the Autistic Child' at p. 577ff.

no surprise that psychopaths are typically not very good at carrying out systematic plans that extend beyond the very near future: such an ability requires a kind of empathy for one's own future selves. Once again, the way in which the lack of empathy manifests itself in autism couldn't be more different: there is no sense in which autistics are left entirely 'cold' to the responses of others. Quite on the contrary, they often care very much what others think, and why they are thinking it; what makes them anxious and clumsy in their responses is, first, others' perceived opacity and unpredictability and, second, the perceived indeterminacy and malleability of social rules and conventions, whose application, of course, varies quite significantly (and to autistics, often unintelligibly) according to context and circumstance. We might say that where psychopaths are morally blind, autistics are merely short-sighted. This difference will become quite important in our development of Scottish constructivism.

Of what relevance are such cases of restriction in moral vision? Psychopathy (and amorality generally) is usually invoked either in discussions of moral motivation and its connection to moral judgment, or in an attempt to answer the amoralist in terms he might accept, or as a step in an argument for skepticism. Those are not the questions I am interested in here. I am also only indirectly interested in whether and to what extent psychopaths and autistics should be held morally responsible. The question I want to pose is another one: How do we understand the moral failures, insofar as they do fail, of psychopaths and autistics? What capacity or faculty or disposition do each of them lack that diminishes or extinguishes their moral sight, which we can gloss here (for the sake of argument) as a failure to see or respond to moral reasons?

If the Kantian constitutivists are right, then moral failures of these kinds must ultimately lie in an incapacity to reason, or to communicate, or to act, or to justify oneself to others. When the Korsgaardian, for example, observes someone who does not respond to or see the moral reasons that apply, she will (ultimately) say: 'You are failing to see and act according to the standards that make what you are attempting to

do an *action*! (And you must perform actions.)’ The Habermasian will say: ‘You are failing to see and act according to the standards that make what you are attempting to say a form of *communication*! (And you must communicate.)’ The Forstian will say: ‘You are failing to see and act according to the standards that make what you are attempting to vindicate (e.g., a claim, an action, an attitude) a *justification*! (And you must justify.)’ The Kantian will say: ‘You are failing to see and act according to the standards that make what you are doing a conclusion of practical *reasoning*! (And you must reason.)’

Let’s take each one in turn. In what sense are the moral failures of psychopaths and autistics due to a failure to *reason*? Psychopaths and (high-functioning) autistics have normal inferential capacities, normal IQ and normal (or superior) mathematical abilities. Deficits in none of these areas seem at all relevant to explaining the particular ways in which each of them fails to see or respond to the moral reasons that apply (when they do fail). Similarly, in what sense do psychopaths or autistics lack the ability to *act* in the relevant Korsgaardian sense? Both, after all, can act for reasons; both of them are capable of ‘intentional movement . . . that is guided by a representation or conception . . . of [the] environment.’³⁰ Both have the ability to ‘constitute themselves’ through their choices; both, that is, can give themselves a practical identity by choosing what to do. There is no sense in which either of them is acting from merely ‘external’ causes (as long as one does not beg the question by saying that all ~~immoral actions~~ are by definition caused ‘externally’). What about *communication*? While it is true that, sometimes, autistics will not be very effective communicators, this failure is due to an inability to express or recognize their own or others’ mental states; it is not an inability to understand the presuppositions of argumentation or their implications (unless one builds in the capacity to express or recognize mental states as part of the necessary presuppositions of communication). And, whatever we say about autistics, there is surely no similar impairment in the case of

AQ: Please check whether the edits made in the sentence “Deficits in none of these areas . . .” are acceptable.

AQ: Please check whether changing the phrase from “either of them are acting” to “either of them is acting” is OK in the sentence “There is no sense in which . . .”

³⁰ Korsgaard, *Self-Constitution*, p. 97.

psychopaths, who are as able to communicate as normal individuals. And, finally, much the same thing can be said of the capacity to justify oneself to others. Both psychopaths and autistics understand what is needed to enter into practices of justification (indeed, one might say that psychopaths are particularly good at it, given their ability to deceive and manipulate others).

As should be clear by now, the incapacity that best characterizes the moral failures of both psychopaths and autistics is not an incapacity to reason, communicate, act or justify but an incapacity to *empathize*. Continuing with the analogy to sight, the ‘organ’ that is responsible for the inability to see or respond to moral reasons is empathy, the capacity to represent others’ mental states and to coordinate appropriate behavioural responses to them. It may seem that so far the constitutivist need not deny anything I’ve said so far. Why can’t constitutivists simply reply: ‘You may be right that empathy is required to see or respond to moral reasons, but the moral reasons there are and that apply to us are either discovered or created by reflecting on the conditions necessary for action, justification, communication, and so on; empathy has nothing to do with that (more fundamental) task. It is one thing to *justify* or *create* moral reasons, another to explain what might aid us in recognizing them?’ This response only raises a further question: If empathy has nothing to do with the creation or justification of moral reasons, then why does its *lack* cause such a profound impairment of our moral sense? Why is the capacity for empathy so fundamental in ‘seeing’ the reasons there are?

This is a relevant question *especially* for a constructivist view. The constructivist position, as we have seen, is motivated by one of two metaethical starting points. It is either motivated by the view that there are no stance-independent moral facts that make moral claims true (when they are true). On this view, the truth of a moral claim simply *consists in* being the outcome of a certain (stance-dependent) deliberative procedure. For constitutivist versions of such a metaethical constructivism, the truth of higher-order moral claims consists in being the necessary constituents of a necessary activity, and the truth

of any lower-order moral claims consists in being entailed by the higher-order claims. Alternatively, constructivism is motivated by the view that, whatever the nature of moral truth, there is no *access* to such truths except insofar as we see them as the output of a certain (stance-dependent) deliberative procedure. On this more agnostic view, the constitutivist would say that reflection on the necessary constituents of deliberation, justification, action and so on is necessary to know the true moral claims that apply to us. With this reminder of the motivation for constructivism, our question to the objector can be put more pointedly: 'If stance-dependence is so important (on either metaethical version of constructivism), and if empathy is a necessary capacity required to see the moral reasons there are, then why *shouldn't* empathy be part of the characterization of the appropriate morality-generating (or morality-discovering) procedure?' The pointedness of the question is reinforced when we reflect (as we have above) that there is a plausible sense in which the psychopath and autistic have unimpaired capacities to act, reason, communicate and so on. The argument can be recast in terms of our visual analogy. The constitutivist answer to our question has the same structure as someone who, when presented with multiple cases of colour blindness, replies that, though he agrees that the eye is essential for explaining most patients' colour blindness,³¹ denies that the eye is essential in either discovering (or constituting) the colours there are, which are discovered (or constituted) by (say) the brain alone. If that were true, then how is most patients' colour blindness caused by a defect in the eye rather than the brain?

AQ: Please suggest whether the sentence "That is, it's not a case of cerebral achromatopsia, where colour blindness is caused by a lesion to the brain, rather than a deformation of colour receptor cells in the retina" can be changed to "That is, it's not a case of cerebral achromatopsia, where colour blindness is caused by a lesion to the brain, but rather a deformation of colour receptor cells in the retina" in footnote 31.

³¹ That is, it's not a case of cerebral achromatopsia, where colour blindness is caused by a lesion to the brain, rather than a deformation of colour receptor cells in the retina. The analogy to cerebral achromatopsia would be to someone who behaves in ways that would otherwise be considered immoral, but for the fact that the person has Tourette's syndrome. In that latter case, there is no sense in which the person is an agent during an episode; he is not acting for a reason, or in the light of a conception of the world. His capacity to act, reason, communicate and so on really is impaired, and it is that impairment which causes his apparently immoral behaviour (once again, recall that we are leaving aside whether autistics and psychopaths should be held morally responsible for their actions). As I have already said, I do not deny that action, communication and so on are necessary conditions for the knowledge or generation of moral reasons, I am only denying they are also sufficient.

Perhaps, at this point, the Kantian constitutivist might try ^{change} [▲] tack, and deny that empathy ultimately explains the moral failures of our two psychological disorders (analogous to the way in which someone might deny that no colour blindness is caused by the eye). Instead, they might try to argue in the following way: ‘I reject the view that the psychopath and autistic have unimpaired capacities to act, reason, and so on. Indeed, their lack of empathy is only important *insofar as* it impairs their capacity to act, reason, communicate and so on. The lack of empathy triggers the impairments in action, communication and so on, but it is ultimately those further impairments that explain the relevant moral failures.’ Once again, the constitutivist’s response raises the following question: ‘Yes, but *how* does a lack of empathy trigger a failure of action, communication, and so on?’ Imagine our objector answers in this way: ‘Lack of empathy impairs our ability to act, communicate, and so on, precisely because lack of empathy leads people to fail in successfully taking the moral point of view. And because morality is a constitutive standard of action, communication, and so on, failing to act morally necessarily counts as a failure to act, communicate, and so on.’ This answer begs the question. What we are putting in question is whether action, communication and so on can be sufficient conditions for the existence and/or knowledge and application of moral reasons; the response just assumes that at least one of them is. A more plausible response would go like this: ‘Empathy is *itself* constitutive feature of successful communication, action, and so on; therefore, a failure of empathy is necessarily also a failure of communication, action, justification, and deliberation in the relevant sense.’ The response is a good one, but it concedes exactly the point I am trying to make, namely that empathy is a crucial (constitutive) component of the activities that create or justify the moral reasons that apply to us. Action, communication, justification and deliberation are only jointly sufficient conditions for the existence/justification of moral reasons *in conjunction with* the operation of empathy.

What is the upshot of the discussion thus far? If what I have said is correct, then whatever one’s metaethical point of view, and whatever

AQ: Please suggest whether the sentence “the Kantian constitutivist might try change tack” can be changed to “the Kantian constitutivist might try to change tack.”

one's preferred specification of normative constructivism, the deliberative standpoint from which we either create or discover moral reasons must also model the particular character of our shared human empathy. The substantive claims that morality makes on us cannot be understood without such a model. This is also true of constitutivist views like Forst's: whatever one thinks about the constitutive relation between action, reason, communication, justification and fundamental moral norms, the operation of our shared human empathy must also be considered as one of the 'activities' that creates (or gives us access to) moral reasons. The important role given to empathy ('sympathy') makes the view under consideration best understood as a form of *Scottish* constructivism:

When a man denominates another his enemy, his rival, his antagonist, his adversary, he is understood to speak the language of self-love, and to express sentiments, peculiar to himself, and arising from his particular circumstances and situation. But when he bestows on any man the epithets of vicious or odious or depraved, he then speaks another language, and expresses sentiments in which, he expects, all his audience are to concur with him. He must here, therefore, depart from his private and particular situation, and must chuse 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 mankind have an accord and symphony. If he mean, therefore, to express, that this man possesses qualities, whose tendency is pernicious to society, he has chosen this common point of view, and has touched the principle of humanity, in which every man, in some degree, concurs.³²

AQ: Please suggest if the word 'chuse' in the phrase "and must chuse a point of view..." should read 'choose'.

The mechanism that takes us from the personal point of view to the 'common point of view' is, of course, empathy ('sympathy' in Hume's vocabulary), which connects, transmits and harmonizes our emotional responses with those of others. 'As in strings equally wound up, the motion of one communicates itself to the rest; so all the affections

³² D. Hume, *An Enquiry Concerning the Principles of Morals*, ed. T. L. Beauchamp. Oxford: Oxford University Press, 1998, IX.1.

readily pass from one person to another, and beget correspondent movements in every human creature.³³

Before concluding with the promised demonstration that Forst's own arguments point in this direction, I want to suggest one important advantage of the Scottish constructivism when compared to his Kantian cousin, and mention some of the obstacles standing in the way of a full elaboration of such a view. The advantage is this. One of the difficulties Kantian constitutivists face is that they seem to mischaracterize the special force of moral requirements. According to Scanlon, for example, constitutivists do

not give a very satisfactory description of what is wrong with a person who fails [to care about morality]. The special force of moral requirements seems quite different from that of, say, principles of logic, even if both are, in some sense, "inescapable." And the fault involved in failing to be moved by moral requirements does not seem to be a form of incoherence.³⁴

This seems right. The wrong involved in someone's failing to take up the moral point of view – to see its special importance – is not simply a type of first-personal rational inconsistency.³⁵ About someone unmoved by others' moral claims, we ought to be able to say more than: 'They're failing to act according to very norms which constitute them as agents! (And they must act.)' or 'They're engaged in a pragmatic contradiction, violating the very norms of argumentation they invoke in communicating!'. The wrong involved should at the very least take into account the importance of others' independent interests or perspectives. As we have seen, Scanlon tries to account for this special importance via an invocation of the independent value of relations of mutual recognition. But, as we have also noted, this seems to leave important questions open including: 'What, exactly, is the special value

³³ D. Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge. Oxford: Oxford University Press, 1978, 3.3.1.

³⁴ Scanlon, *What We Owe to Each Other*, p. 151.

³⁵ For a similar critique see R. Forst, *The Right to Justification*, pp. 101m, 4m.

of mutual recognition (and how does an explanation of that value not appeal to the very moral notions it was meant to explain)? And, whatever value explains the importance of mutual recognition, what explains the special importance of that further value?

Scottish constructivism, on the contrary, maintains the structure of the constitutivist's solution to the normativity and Euthyphro problems (empathy-informed communication, deliberation, action, justification are activities that beings like us cannot avoid), but provides a much more plausible description of the failure of those who do not see the special force of moral reasons (when compared both with Kantians and with Scanlon). I have argued that those left cold by morality lack the capacity not merely to reason or communicate consistently but to 'vibrate in sympathy' with others' 'feelings and operations'. In Humean terms, what such individuals lack is the ability to see others' *humanity*, the ways in which others are moved and hurt in ways just like we are. So when we fail to take the moral point of view, we fail to see others as bearing the same range of sensibilities, concerns, emotions as we do, and that are typical of all human beings. Moral failures are failures to see, to *feel*, the humanity in others. Insofar as we fail in this way, we fail to 'touch a string to which all mankind have an accord and symphony'. On this view, the seat of normativity lies in the range of contingent human sensibilities, concerns and emotions evoked by the operation of empathy in contexts of action, communication, justification. Notice that this account also allows us to distinguish the moral failures of psychopaths from those of autistics. Recall that autistics *are* concerned and preoccupied with other people's concerns, emotions and interests; they are just not very good at determining what those are, or how to coordinate their behaviour in reaction to them. This makes their moral failure (in those cases in which there is such short-sightedness) much less vicious and thorough-going than the psychopath's, whose mind-reading and role-taking capacities are fully intact, but who simply does not care why others' perspectives should matter.

I have only given a very cursory sketch of Scottish constructivism. Much more would be needed to fill it out. I cannot do that here. But

it may be useful at least to outline what some of the obstacles in the elaboration of such a view might be. I will mention three. First, the Scottish constructivist must provide a more specific characterization of the deliberative standpoint from which moral claims are justified or created – a characterization that models the operation of empathy and that explains why the characterization helps us to account for the moral reasons there are. Second, he must provide an account of moral responsibility that coheres with the empathy-based characterization of the deliberative standpoint. For example, does a failure of empathy, or a general lack of empathy, provide ‘excusing’ conditions? Third, and closely related, he must explain how the Scottish constructivist can secure the right kind of objectivity for moral claims, especially in view of the wide differences in both our capacities to empathize and their structure. I do not think these are insuperable difficulties; indeed, many of them are just as difficult to overcome for Kantian constitutivists.

Forst’s humanity

At a critical point in the book, Forst bemoans Habermas’s attempt to overcome the gap between ‘a “must” in the sense of weak transcendental necessitation by “unavoidable” presuppositions of argumentation, and the “prescriptive ‘must’ of a rule of action”’ by pointing to our ‘existential’ interest as a species in maintaining a ‘communicative way of life’ (102). Forst worries that this makes morality optional: ‘[such an existential] interest cannot provide the basis of morality, for morality must possess a normativity of its own that makes the maintenance of such a form of life a duty that one simply has toward others’ (103). In response to Habermas’s ‘retreat’ to an ethical ground, Forst resists the temptation to reassert a more uncompromising, Kantian interpretation of discourse ethics. He explicitly recognizes the central difficulty facing any such purely ‘transcendental-pragmatic’ justification of morality, namely that it seems to make failures to take the moral point of view into failures of

self-relation – failures, for discourse ethicists like Karl-Otto Apel, merely to abide by the pragmatic presuppositions of one's own communicative acts. Just as we have above, Forst wonders about the place of *others* in this interpretation of Kantian constitutivism.

Forst's alternative is complex and nuanced, but I believe it points him well beyond his Kantian starting point. It is worth quoting him in full:

This reflection on the capacity for being a "rational animal" is bound up with the reflection on being a "social" and also a "natural" animal: not only a justifying being but also a being who *needs* reasons. This completes the second-order practical insight as a "human insight," which is at the same time an insight into the kind of being human that is relevant for morality. For one owes other humans reciprocal and general reasons not only as autonomous beings but also as finite beings with whom one shares contexts of action in which conflicts are unavoidable.

[The insight into finitude] is an insight into the various risks of human vulnerability and human suffering, bodily and psychological. Without the consciousness of this vulnerability and the corresponding sensibility, without the consciousness that one's own actions must account for the "wills of suffering subjects," as Kant puts it, moral insight that is an insight into human responsibility remains blind. A morality of justification also rests therefore on the insight that human beings as vulnerable and finite beings require moral respect and thus justifying reasons; and in this sense this is not a morality for mere "rational beings" but for those who have a sense of the evils that follow from denying someone's right to justification and not being respected as an author and addressee of validity claims. Here we see . . . that the moral point of view must combine cognitive (the capacity for justification), volitional (willingness to give justification and act justifiably), and affective (the sensorium for moral violations) components. . . . Precisely because, with the moral insight, the awareness of the *conditionality* of human beings as finite beings becomes part of a person's identity—and thereby also his or her emotional life—it represents an insight into the

unconditionality of the demand for moral respect and the criteria of reciprocity and generality, which cannot be replaced by other criteria (52-3m).

The way I read this passage is that the moral point of view is presupposed by any recognition of another as vulnerable, suffering, finite being. The moral point of view is always already included in any such recognition of another as a human being. On this view, when you fail to take the moral point of view, you fail to recognize the (vulnerable, finite, suffering) humanity of another person (rather than merely failing to recognize their capacity to set and pursue ends as on traditional Kantian accounts). But why, we might wonder, is the moral point of view always already included in any such recognition? Here Forst makes, I believe, a false move. He writes, referring to Levinas:

it is the “face” of the other that makes clear to me where the ground of being moral lies, namely, in a certain fundamental understanding of what “being human” means. It makes sense to describe this phenomenon as one of both cognition and recognition. For morality is concerned with the cognition of a human being *qua* human being (105m).

AQ: Please note that the single quote marks in the word ‘face’ and in the words ‘being human’ in the paragraph beginning with “it is the ‘face’ of the other that makes...” have been changed to double quote marks in accordance with the house style to be followed for indented quoted material (extracts).

What force does ‘being human’ have? Forst here seems to be appealing to something like the concept of ‘being human’, as if reflection on what we mean when we refer to human beings as human beings requires us to recognize them as finite, suffering and vulnerable. This is certainly true, but how does that recognition require us to treat them a certain way? Why does recognizing someone as a human being entail that I shouldn’t take advantage, say, of his finitude, vulnerability and suffering? Sometimes Forst refers to Wittgenstein and the idea that when we recognize another as person, we must recognize that the other is not merely an ‘automaton’ but a being with a ‘soul’. Yes, but why should the fact that he is a soul entail that we should treat him one way rather than another?

The Scottish constructivist can provide the missing piece in Forst’s puzzle. When we reflect on the finitude, suffering and vulnerability

of others, the capacity that moves us to be concerned for them, to take their perspective into account, to justify ourselves to them, is empathy. Human beings who have a normally functioning capacity for empathy *cannot but* feel others' finitude, suffering and vulnerability as if it were their own; they *cannot but* respond to their reasons (even if they end up *flaunting* them). For the Scottish constructivist, the reason that morality is inescapable is that we cannot avoid recognizing and then feeling others' perspectives on the world. It is in virtue of that recognition that we then owe them a justification, a reason, for our actions that they can accept from their standpoint. This is why the Scottish constructivist says that the existence and operation of this capacity, in conjunction with the capacity for deliberative reflection and action, is what grounds morality. And it is only by recognizing the central place of this social emotion that Forst's justificatory constitutivism can work. Or at least that is what I have tried to argue. Through a reconstruction of Forst's grounding of the right to justification, which I have tried to do by placing him in dialogue with his constructivist cousins, we have seen that Forst himself points the way from Germany to Scotland. Will he join us on the journey there?

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