

Doubting and Defending the Principle of Fairness
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The Hart-Rawls principle of fairness:

“When a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission.”

Example: Suppose the farmers in a village are menaced by bandits. Some of the farmers organize a mutual defense scheme. The scheme provides that on a rotating basis, the farmers will take turns standing in sentry position at the borders of the valley. If a sentry raises an alarm upon seeing approaching bandits, all the farmers are to take up arms and defend the valley residents, until the bandits are killed or dispersed. Provided that almost all the farmers in the valley participate in the scheme, each farmer’s chances of avoiding premature death or the loss of her possessions at the hands of the bandits are significantly improved by the scheme. Above some threshold level of participation, each farmer’s net gains from the scheme increase, the more individuals join and contribute.

The Hart-Rawls principle is invoked to explain the putative moral obligation to obey the law, just because it is commanded by state authority, up to a point. Example: from each of our moral standpoints, there are great benefits in coordinating our behavior on one code of legal rules, even though the code is imperfect from every individual’s standpoint. If other citizens generally obey the law even when it is obnoxious to their conscience, I have some duty to reciprocate by doing the same, subordinating my private conscience up to a point. The duty is owed to cooperating fellow citizens.

Robert Nozick’s criticisms:

1. Others may benefit a lot from the good cooperation provides, whereas you benefit only a little, or not at all.

Response: If the scheme is just, the benefit and burden sharing arrangements specified by the rules are fair.

2. The cooperative scheme now in place may preempt a far better scheme that you might prefer instead.

Response: The scheme must be “good enough,” or no obligations arise. If a scheme blocks the emergence of a significantly superior scheme, it’s harmful, not beneficial.

3. It’s not generally true that merely by showering benefits on people, one thereby brings it about that they are obligated to reciprocate. Certainly no enforceable obligations arise in this way.

Response: Agreed. If prior negotiation is feasible, and you decline to negotiate to a contract, the benefit you bestow on another is a gift. Matters are different if prior negotiation is unfeasible. Let us say people have a right not to be treated unfairly in the provision of goods and services. If you can avoid being treated unfairly by a person by declining to provide her the good, but you proceed and provide the good without obtaining

her prior agreement to pay, you have waived your right not to be treated unfairly in this transaction.

Response: Prior negotiation is generally unfeasible when schemes for providing public goods are emerging or in place. Perhaps the relevant feature of public goods is nonexcludability. With respect to a group of people, a good is nonexcludable to the degree that if one person consumes any of the good, it is difficult or impossible to prevent any other member of the group from consuming it. So let's stipulate that the principle of fairness is to apply only when nonexcludable goods are provided—call this the amended principle of fairness.

Three objections to the amended principle:

1. If cooperation generates a good such that, for a group of people, one member's consumption of the good leaves no less for others, why is it unfair for a noncooperating member to consume some of the good? Doing so harms no one.

Response: If there are costs incurred by members in providing the good, and some beneficiaries decline to pay their fair share of these costs, others must pay more. The free rider who consumes the good but does not pay her fair share of the costs is in this way harming others.

Response: In some cases, there is nothing one can do to pay one's fair share of the costs. If one complies with the rules of the scheme, one incurs costs, but these do no good to anybody. In such cases, consuming some of the good provided without paying one's fair share of the costs of provision is not unfair, not wrong. This may be so even if nonrivalry of consumption does not obtain. Example: The inefficient water-rationing scheme to prevent contamination of the town reservoir.

2. A. John Simmons objection: The amended principle is unfair to beneficiaries, by virtue of its failure to insist that obligations to contribute under the principle of fairness arise legitimately only if the beneficiary freely and voluntarily (or at least, willingly and knowingly) accepts the benefits. One is a free rider in the pejorative sense only if one is motivated to exploit cooperators by choosing to consume benefits without contributing one's fair share to the costs of their provision.

Further Simmons objection: Obligations arise under the principle of fairness only if there is a genuine cooperative practice in place, and whether this is so depends on the motivations of the people acting to provide the good. If they do not have the right, cooperative intentions, no obligations are generated merely by the fact that their actions happen to produce benefits for people.

Further comment by Simmons: Given the two points just made, we see that the principle of fairness cannot be invoked to show that members of large modern political societies acquire obligations to obey the laws and support the state that rules the territory they inhabit. As a matter of fact, those who act to provide the goods of the rule of law do not have the intentions of cooperators and those who receive the benefits without being disposed to pay back by compliance with law do not have the motivations that would brand them as free riders.

Response. It is not correct that one is a free rider unfairly benefitting from the cooperation of others only if one intends to free ride or otherwise treat the cooperators unfairly. If I take your car without your permission and treat it as my own, I act wrongly, whether or not I intend to mistreat you or have bad motives. We need to distinguish wrongness (impermissibility) and culpability. Whether one's conduct is morally impermissible depends on the objective relations in which one stands to others. If I consume public goods without paying my fair share, when the conditions of the principle of fairness are satisfied, what I do is impermissible even if I am ignorant of the relevant facts and so perhaps not culpable. "Perhaps not culpable," because I might be blameworthy for being ignorant of morally relevant facts that bear on the question, what I should do.

Response: In the case of an important category of public goods provided by cooperation, the possibility of choosing to consume or not to consume the goods simply does not arise. If my neighbors guard the borders of the valley in which I live, their conduct keeps me safe from attacks by bandits. Regarding such cases, Simmons's insistence that no obligation is incurred by a beneficiary unless she consumes the cooperatively provided good freely and voluntarily (or as a fallback: willingly and knowingly) is just inappropriate. Suppose national defense and the rule of law provide me with great benefits, without the mediation of my choice, but I have weird views, and incorrectly do not regard these benefits as good for me. If I decline to contribute my fair share to the costs of the provision of these goods, I am a free rider, and behaving wrongly, even if I do not believe this is so.

Response: Although beneficiaries of cooperative schemes can run afoul of the principle of fairness without intending to cheat or exploit, obligations under the principle of fairness are not triggered unless there is a cooperative scheme in play, and whether there is a cooperative scheme depends on the intentions of the cooperators. If they lack the intentions to cooperate, to provide public goods, and to establish a fair distribution of benefits and burdens, the conditions for generating obligations of reciprocity on the part of beneficiaries are lacking, even if it so happens that what is being done does provide benefits to group members and distributes the benefits and burdens fairly. I disagree with Simmons on the broad empirical issue, whether members of large modern societies who pay their taxes and generally obey the law regard themselves as contributing to a cooperative practice for the good of all. I think most members do have the intention to cooperate in this way. Hence I think the principle of fairness does help to explain the obligation to obey the law in some actual societies. Second, consider cases in which the requisite intentions may be absent, but the conditions of the principle of fairness are otherwise satisfied. Suppose that if people were made aware of the character of their interaction, they would accept that they are engaged in what is effectively a cooperative practice and would acquire the intentions of cooperators. Their latent intention may suffice to trigger the application of the principle of fairness. Suppose on the other hand that if they were made aware of the character of their interaction, they would not acquire the intention to cooperate. But absent a cooperative intention, obligations do not arise under the principle of fairness.

3. Garrett Cullity objection: Cullity thinks nonexcludability is irrelevant to the possibility of being a free rider whose actions violate the obligation generated by the

principle of fairness. Consider this example: there is an honor system in place regulating the method of payment for a public transport system. When one gets on the subway train, the accepted procedure is that the rider should deposit a dollar in a collection box. Other people observe the honor system code. The price of the train ride is uncontroversially fair. I ride the train without paying the fare.

Response: Here there are two goods in question, the ride on the train, and the low price of the service that is made possible by the cooperating train riders who conform to the honor system payment requirements. The honor system obviates the need for costly monitoring. The low price made possible by the honor system is a nonexcludable good with respect to the group of people who ride the train. The amended principle of fairness applies to this second good.

Further loose end: enforceability: How does one get enforceable obligations from the principle of fairness? I say there is no issue here. Any and every moral obligation is *prima facie* apt for enforcement. One must keep in mind that any enforcement that is carried out must satisfy a proportionality requirement: the penalties used to enforce the scheme should not be disproportionate to the nature of what is at stake and the degree of culpability of offenders. Note also that people give up certain enforcement rights when a state is functioning adequately. Then private enforcement has only a limited role.

Further loose end: Authority. What renders it the case that a group of people has the right to organize a cooperative scheme? I hold that no special license is required. Anyone may initiate a scheme. Spontaneous cooperative schemes and cooperative obligations cannot multiply excessively, because at some early point new schemes crowd existing schemes and are not on balance advantageous to all.

Final objection: the principle is objectionably paternalistic.

Christopher Wellman: the principle of fairness is vitiated by its paternalistic character. "Even if everyone benefited from political coercion, it would be objectionably paternalistic to suppose that this alone justifies the state's imposition because each of us has a right to choose whether and precisely how we would like to be benefited." He adds, "I object to the paternalism implicit in any account that justifies nonconsensual coercion in terms of potential benefits to the coercee."

Response: The principle of fairness justifies nonconsensual coercion for the purpose of preventing free riding, exploitively unfair treatment of cooperators. If paternalism is restriction of a person's liberty, against her will, for her own good, the principle of fairness is not paternalistic. The principle of fairness purports to justify coercion directed against noncooperators for the benefit of other people, the cooperators. Right or wrong, this sort of justification is not correctly characterized as paternalistic.

Further response: on some views, to qualify as paternalistic, restriction of liberty must involve an overriding of the coerced person's judgment by the coercing agent. The person who restricts someone's liberty in the putatively objectionable way that we call "paternalistic" does so at least in part because she believes the person being restricted would act on an unreasonable or incorrect judgment if left free. But nothing of the sort

need be involved in coercion justified by the principle of fairness. One might think the free riding person is correctly judging it is to her interest to free ride on the cooperative practice. The coercing agent need not think the free rider is making any bad judgment about where her own interests lie. Nor need the free rider be making any other mistaken judgment. She might judge correctly that she has an obligation to cooperate, but not be motivated to desist from free riding on this ground.

In passing, I note that I doubt that paternalism necessarily involves a belief on the part of the coercer that the coerced person if left free would be acting on the basis of a mistaken judgment about where her own good lies or how best to achieve it. The coercer might judge the person is very likely inept at acting for her own good in a self-regarding manner, and the coerced person may agree that she is inept but hold she has a right of personal sovereignty to assume the risk. This looks to be a case of paternalism even though there is no overriding of the coerced person's judgment by the coercing agent.

But consider the case where one must get the benefit the scheme provides, but if that were not so, and voluntary acceptance were possible, one would not accept the benefit, because one regards the good provided as not worth its cost. Here enforcement of the principle of fairness arguably would involve overriding of the judgment of the person who is coerced. Were the good provided not worth its cost, coercion of the beneficiary to prevent her being a free rider would not be justified. However, this case still fails to be a plausible instance of paternalism, because the coercion is not imposed for the good of the person who is coerced.

Anyway Wellman's objection to enforcement of the principle of fairness could not simply be that doing so is paternalistic and paternalism is wrong because it involves a claim that the person being coerced would be acting on an incorrect judgment if left free. Wellman affirms that it can be morally acceptable to coerce people to comply with their good (or maybe Minimally Decent) Samaritan obligations to help others in peril. He surely would not hold that it would be wrong to force the individual to comply with a genuine Samaritan obligation just on the ground that she mistakenly believes that in the circumstances she is under no such obligation. The advocate of enforcing the principle of fairness holds in a similar way that people have moral obligations not to be free riders and in some circumstances it can be morally acceptable to force an individual to comply with her obligation not to be a free rider even when she mistakenly believes she is under no such obligation. (Consider the special case in which the person incorrectly believes she is not bound by a Samaritan duty to help another person because she makes a mistake about her own good and overestimates the expected cost she must incur if she were to help the person in need in this circumstance. I suppose Wellman would allow that coercive enforcement of the Samaritan duty to help would be morally acceptable in cases of this type, and he would be right to make this judgment. He would then be allowing that coercion justified in part by a judgment that the person coerced is making a mistake about her own good, call it "paternalistic" or not, can be justified. This case, I claim, is close to that of coercing the free rider into paying a fair share of the good she gets, when the justification involves overriding her judgment regarding her own good and where it lies.)

Restatement of objection: One might urge that in an extended sense, a claimed justification for the restriction of someone's liberty is paternalistic if the justification must include a claim that the coercing agent (or those on whose behalf she is acting) is conferring a benefit on the person being coerced. Example: suppose I impose a benefit on you, without prior negotiation or contract, and then, when you balk at paying me what I claim is a fair price for the benefit provided (let's assume this claim about fair price is correct), I force you to pay for the good provided. Something is fishy here. The claimed justification of coercion may not be exactly paternalistic, but is wrong, and in the neighborhood of paternalistic.

Response: in the example, voluntary contracting is feasible, and eschewed by the person who confers benefits and then claims the right to coerce. Where such voluntary contracting is feasible, the principle of fairness does not apply.

Further restatement of objection: we should interpret the no-paternalism norm, in an extended sense, as ruling out restricting someone's liberty in order to force her to pay a fair share of a public good scheme that bestows a good on her independently of her will. This suggests a revision in the idea of a public good to be employed in this context. Besides nonexcludability or No Exclusion, a good might have a feature we can call "No Choice": with respect to a group of people, a good is no-choice if it is the case that if anyone consumes any of the good, everyone must consume some of the good. Where not only No Exclusion but also No Choice obtains, the principle of fairness purports to justify coercion to force someone to pay a fair share of a public good scheme that bestows a good on her independently of her will.

Response: Here there is perhaps rock-bottom disagreement between the advocate of the principle of fairness and the critic. (Brian Barry: One man's reductio is another's QED.) In the circumstances described, I don't see that imposing coercion on someone in response to her getting a good independently of her will is per se objectionable. Notice that if either No Exclusion or No Choice fails to hold of a public goods provision scheme, the justification of coercion to prevent free riding is not in place. If No Choice does not hold, and if in addition the person does not choose to consume any of the benefit being provided, arguably coercion to extract a "fair price" for the good the person is anyway not getting would be unfair. If No Exclusion fails to hold, then the cooperators have the option of carrying on the scheme and excluding the person who balks at paying from enjoying any benefits from the scheme. Arguably if the cooperators proceed when exclusion is possible and confer a good on the person anyway, no enforceable obligation on the part of the beneficiary is generated.

Here is **another possible criticism** to the effect that enforcement of the principle of fairness smacks of paternalism and is morally objectionable for much the same reason: It is morally wrong to restrict the liberty of a competent adult person's voluntary choices on grounds that include both (1) an overriding of the person's own judgment about where her good lies or about what are the best means to advance it and (2) the claim that those who would restrict liberty are providing benefits to those whose liberty is to be restricted.

In response: one should simply note that a restriction of liberty can be correctly described by (1) and (2) yet be a long way from paternalism. The paternalist aims to restrict someone's liberty for the good of the person who is restricted. One who restricts freedom in the name of the principle of fairness aims to prevent people from benefiting unfairly from a cooperative scheme undertaken by others. The aim is to block a type of passive exploitation. Whether this is right or wrong, it is neither paternalistic nor close to paternalistic. The cooperators aim to establish a scheme for the benefit of fellow cooperators. They must not be opposed to benefiting others, but their aim can be described as seeking to benefit all on whom the goods they generate will fall provided all reciprocate and no one rides freely on the scheme. I suppose that were it the case that technology changed and it became possible to create excludable rather than nonexcludable goods, they would be happy to create excludable goods and exclude those who decline to pay from the benefits of the cooperative scheme.

A related objection is that when nonoptional nonexcludable goods fall on people, it is wrong to say they are free riding on the cooperative scheme or exploiting the cooperators. As David Estlund writes, "The idea of free riding does not seem to cover cases where the advantages are not actively sought or taken. Arguably, I am not taking advantage of others unless I am somehow *taking* something, but it is difficult to establish that most citizens are taking benefits (as distinct from merely benefiting) in the relevant sense." This argument affirms that when the principle of fairness is applied to schemes supplying nonexcludable nonoptional goods, the argument against free riding is inapplicable, so perhaps a putative justification would have to veer toward paternalism.

In response, we can recognize that there may sometimes be an important distinction between doing and allowing, but still insist that not doing anything—declining to pay a fair share of costs—can sometimes amount to unfairly taking advantage of others. "Passive exploitation" is not an oxymoron. If other people in my vicinity are carrying out a robbery, the cash register springs open, and money is propelled into my lap, I would be doing wrong if I passively retained the illicit benefits I have not sought. If others are paying taxes to contribute an uncontroversially fair share of the cost of supplying uncontroversially beneficial public goods, my simply failing to pay the tax bill I am assigned can amount to unfairly taking advantage of others.

So far the argument has been that enforcement of the principle of fairness is not rightly described as paternalistic or close to paternalistic, so even if paternalism were always morally wrong, the wrongness of paternalism would not provide any reason to think that enforcement of the principle of fairness is morally wrong. **Assume for the sake of the argument that this line of thought is entirely mistaken.** Assume that at least in some possible instances of its application, the principle of fairness amounts to paternalism or something close to paternalism. This assumption only casts a shadow on the moral desirability of enforcing obligations incurred under the principle of fairness to the extent that one can establish the wrongness or presumptive wrongness of paternalism itself. At this point in the dialectic, the issue that is raised is too large to be settled in this essay. I limit myself to three quick remarks.

The paternalism at issue here is **hard paternalism**, restriction of a competent adult's fully voluntary choices against her will for her own good. My first comment is that if enforcement of the principle of fairness is not exactly paternalism but only close to paternalism, the wrongness of paternalism may fade as we move a greater distance from core cases to peripheral or marginal cases that only somewhat resemble the core, so the reasons generated by antipaternalism against the principle of fairness may be faded and weak. A second comment is that if arguments against paternalism only establish a presumption against it that may sometimes be overridden, many instances of enforcement of the principle of fairness may be supported by sufficiently strong moral reasons as to outweigh whatever presumption against it has been established. A third comment is that the principled arguments against hard paternalism may anyway fail. The fact that a restriction of liberty is hard paternalistic may be somewhat correlated with factors that tend to be wrong-making yet compatible with the further claim that in principle, nothing is wrong with hard paternalism per se. This is the line I would myself defend.

Conclusion: This essay assembles arguments in favor of the principle of fairness. The provisional conclusion is that the principle of fairness is fair. Some resist this conclusion on the ground that enforcement of the principle of fairness would be wrongfully paternalistic or anyway sufficiently like paternalism to qualify as morally wrong. This essay replies that (a) the principle of fairness is not any close relative of paternalism and (b) even if it were, that would not be a decisive consideration militating against enforcement of the principle of fairness.