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A. John Simmons

Excerpt

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 THE PRINCIPLE OF FAIR PLAY

I

The traditional consent theory account of political obligation can be understood as advancing two basic claims. (1) All or most citizens, at least within reasonably just political communities, have political obligations (that is, moral obligations or duties to obey the law and support the political institutions of their countries of residence). (2) All political obligations are grounded in personal consent (express or tacit). Today most political philosophers (and non-philosophers, I suspect) are still prepared to accept (1). But (2) has been widely rejected largely because it entails, in conjunction with (1), that all or most of us have undertaken political obligations by *deliberate consensual acts*. And this seems not even approximately true. If it is not true, then (1) requires a defense employing a more complex account of special rights and obligations than the one offered by consent theory.

One popular way of defending (1) relies on what has been called “the principle of fair play” (or “the principle of fairness”).¹ Advocates of this principle argue that promises and deliberate consent are not the only possible grounds of special rights and obligations; the acceptance of benefits within certain sorts of cooperative schemes, they maintain, is by itself sufficient to generate such rights and obligations. It is these arguments

1 These are John Rawls’ two names for the principle, from “Legal Obligation and the Duty of Fair Play,” *Law and Philosophy*, ed. S. Hook (New York: New York University Press, 1964) and *A Theory of Justice* (Cambridge: Harvard University Press, 1971). The same principle was alluded to by C. D. Broad in “On the Function of False Hypotheses in Ethics,” *International Journal of Ethics* 26 (April 1916), and developed by H. L. A. Hart (see below).

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I want to examine. I begin with a brief discussion of the principle of fair play as it has appeared in recent philosophical literature. From there I proceed to a more general evaluation of the principle (in Sections II and IV) and of the theory of political obligation with uses it (in Sections III and V).

The first concise formulation of the principle of fair play was provided by H. L. A. Hart:

A third important source of special rights and obligations which we recognize in many spheres of life is what may be termed mutuality of restrictions, and I think political obligation is intelligible only if we see what precisely this is and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it.

Hart's explanation of the "special transaction" he has in mind runs as follows:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority to enforce obedience . . . but the moral obligation to obey the rules in such circumstances is due to the cooperating members of the society, and they have the correlative moral right to obedience.²

While Hart does not refer to this source of special rights and obligations in terms of fairness or fair play, he does note later that "in the case of mutual restrictions we are in fact saying that this claim to interfere with another's freedom is justified because it is fair."³ We can understand him, then, to be claiming that, in the situation described, a beneficiary has an obligation to "do his fair share" by submitting to the rules when they require it; others who have cooperated before have a right to this fair distribution of the burdens of submission.

Hart's brief account of the principle of fair play, of course, leaves many important questions unanswered. What, for instance, are we to count as an "enterprise?" Are only participants in the enterprise obligated to do their part, or do obligations fall on all who benefit from the enterprise? Why is a set of rules necessary? Clearly a fuller treatment of the principle is essential for our purposes, and John Rawls provides one in his 1964 essay, "Legal

² "Are There Any Natural Rights?" *Philosophical Review* 64 (April 1955): 185.

³ *Ibid.*, pp. 190–191.

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Obligation and the Duty of Fair Play.”⁴ There Rawls builds on Hart’s account to give both a more complete account of the principle of fair play and an extensive discussion of its application to constitutional democracies. His central presentation of the principle echoes Hart’s:

The principle of fair play may be defined as follows. Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating.⁵

The context within which obligations (or duties – Rawls is not very concerned here with the distinction between them) of fair play can arise, as described by Rawls, can be seen to exhibit three important features, parallel to those we can discern in Hart’s account.

- (1) There must be an active scheme of social cooperation. This does not really advance us much beyond Hart’s “enterprise,” but I think that both writers clearly intended that the principle cover a broad range of schemes, programs, and enterprises differing in size and in significance. Thus, both a tenant organization’s program to improve conditions in an apartment building and an entire political community’s cooperative efforts to preserve social order seem to qualify as “enterprises” or “schemes of social cooperation” of the appropriate sort. Rawls does set two explicit conditions, however, which help us limit the class of “schemes” he has in mind. First, they must be “mutually beneficial.” This condition is, I think, implicit in Hart’s account as well; indeed, the principle would be obviously objectionable in its absence. Second, the schemes must be just. This condition is nowhere alluded to by Hart, and I will consider it carefully in Section II.

⁴ See fn. 1 above. The versions of the principle which Rawls presents elsewhere do not differ substantially from this 1964 version; however, contrary to his claims in this version he does argue in *A Theory of Justice* that this principle cannot be used to account for political obligations.

⁵ “Legal Obligation and the Duty of Fair Play,” pp. 9–10.

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- (2) Cooperation under the scheme involves at least a restriction of one's liberty. Rawls does not mention here, as Hart does, that this restriction must be in accord with a system of rules which govern the scheme by determining the requirements of cooperation (although his later "institutional" language does follow Hart's requirement). Frankly, I can see no good reason to insist that the enterprise be governed by rules. Mightn't an enterprise be of the right sort which, say, assigned burdens fairly but not in accord with any preestablished rules? Cannot doing one's part be obligatory under considerations of fair play even if "one's part" is not specified by the rules?
- (3) The benefits yielded by the scheme may be received in at least some cases by someone who does not cooperate when his turn comes; here Rawls again makes explicit a condition which Hart clearly has in mind (since "free riding" is a problem only when this condition obtains). But Rawls adds to this the condition that the benefits in question can be obtained only if nearly all of the participants cooperate. I confess that I again do not see the necessity of this condition. Would it be any less unfair to take the benefits of the cooperative sacrifices of others if those benefits could still be obtained when one-third or one-half of the participants neglected their responsibilities towards the scheme? Would this make that neglect justifiable? Surely not. A scheme which requires uniform cooperation when only 50 percent cooperation is needed may perhaps be an inefficient scheme; but it is not clear that this would make considerations of fair play inapplicable. Consider a community scheme to preserve water pressure. This scheme prohibits watering lawns in the evening, when in fact if half of the members watered their lawns there would be no lowering of water pressure. Surely this is an inefficient plan, compared to alternatives. But once the plan was instituted, would a member be any more justified in watering his lawn in the evening than if only a few people's so doing would lower the water pressure? I think it is clear that he would not be. Certainly free riding is more dangerous to the scheme's successful provision of benefits when Rawls' requirement obtains; it may then be even more objectionable in those cases. But this additional objectionable element seems to have nothing to do with considerations of *fair play*.⁶

6 This argument also seems to me to provide an effective response to a recent attack on the principle of fair play made by M. B. E. Smith, in "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82 (1973). Smith argues that failing to cooperate in a scheme after receiving benefits is only unfair if by this failure we deny someone else benefits within the scheme. But my example is precisely a case in which the failure to cooperate may not

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Rawls' account seems to conform to either the letter or the spirit of Hart's account fairly consistently. One significant addition Rawls makes, however, is to move beyond Hart's simple requirement that an individual must benefit from the scheme in order to become bound. Rawls specifies that the obligation depends on "our having accepted and our intention to continue accepting the benefits of a just scheme of cooperation. . . ."⁷ We have, then, a move from mere benefaction in Hart's case, to a positive *acceptance* of benefits in Rawls' account. (The "intention to continue accepting benefits" seems quite beside the point here, and Rawls drops that clause in later versions; I shall ignore it.) While the distinction between benefiting and accepting benefits is usually not easy to draw in actual cases, that there is such a distinction, and that it is of great significance to moral questions, is undeniable. Suppose that I am kidnapped by a mad doctor and dragged to his laboratory, where he forces on me an injection of an experimental drug. When I discover that as a result of the injection my intelligence and strength have greatly increased, it is undeniable that I have benefited from the injection; but it would be a simple abuse of language to say that I had "accepted" the benefits which I received. It seems clear, then, that we can distinguish, at least in some cases, between mere receipt and positive acceptance of benefits. And it seems equally clear that this distinction may play a crucial role in determining whether or what obligations arise from my having benefited from another's actions.

To have accepted a benefit in the right sense, I must have wanted that benefit when I received it or must have made some effort to get the benefit or, at least, must not have actively attempted to avoid getting it. I will try to be more precise about this distinction later; here I want only to suggest that Rawls apparently does not see mere benefaction as sufficient to generate an obligation of fair play. He stresses instead the necessity that the benefits be voluntarily accepted by the beneficiary.

II

I want now to return to consider briefly another of Rawls' conditions for the generation of obligations of fair play. The condition states that only

deny anyone else benefits within the scheme. And still it seems clear that failure to cooperate is unfair, for the individual's failure to do his part *takes advantage* of the others, who act in good faith. Whether or not my cooperation is necessary for benefiting other members, it is not fair for me, as a participant in the scheme, to decide not to do my part when the others do theirs. For these reasons, Smith's argument is unpersuasive.

⁷ "Legal Obligation and the Duty of Fair Play," p. 10.

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when the scheme or institution in question is just can any obligations of fair play (relative to that scheme) arise. This claim is part of a more general thesis that we can never be bound to support or comply with unjust arrangements. Although Rawls never advances this general thesis in so many words, it follows from his (unacceptable) claim that *all* obligations are accounted for by the principle of fair play, conjoined with the absence of any natural duties which could account for such a bond.⁸

Rawls' requirement that the scheme of cooperation be just is put forward quite casually in the essay we have been considering; and although he calls it an "essential condition," as far as I can see he offers no defense of this claim. Even in the more recent statement of this requirement in *A Theory of Justice*, we are given little in the way of justification. While he suggests that the condition is necessary to guarantee the requisite "background conditions" for obligation, he elaborates on this point only by suggesting a (strained) analogy with the case of promise-making: "extorted promises are void ab initio."⁹ I have argued elsewhere that this observation is quite irrelevant.¹⁰ It is a failure in terms of voluntariness that renders extorted promises non-binding, and the injustice of an institution need not affect the voluntariness of either consent to its rules or acceptance of benefits from it. Rawls' only argument for his "justice condition," then, seems to be a non sequitur.

As Rawls supplies us with no real argument for the justice condition, let us try to construct some for him. Two sorts of arguments suggest themselves as defenses of this condition; the first concerns the purpose of the scheme or the ends it promotes, while the second more directly concerns distribution within the scheme. Our first argument would run as follows: we cannot have obligations to do the morally impermissible, or to support schemes whose purposes are immoral or which promote immoral ends. Since unjust schemes fall within this category, we cannot have an obligation to cooperate within unjust schemes. Now there are a number of difficulties with this as a defense of Rawls' justice condition. One obvious problem is this: why does Rawls only disqualify *unjust* schemes, rather than all schemes which promote or aim at *immoral* ends? Why does Rawls not include the more general prohibition?

The reason is, I think, that while these immoral ends of the scheme

⁸ *A Theory of Justice*, p. 112.

⁹ *Ibid.*, p. 343.

¹⁰ A. John Simmons, "Tacit Consent and Political Obligation," *Philosophy & Public Affairs* 5, no. 3 (Spring 1976): 277–278.

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provide us with a reason for working against it, the justice condition is meant to be tied to the principle in a more intimate fashion. But what is this fashion? Thus far, nothing we have said about fair play seems to have anything to do with the moral status of the scheme's purposes. The intuitive force of the principle of fair play seems to be preserved even for criminal conspiracies, for example. The special rights and obligations which arise under the principle are thought to do so because of the special relationships which exist between the cooperating participants; a fair share of the burdens is thought to be owed by a benefiting participant simply because others have sacrificed to allow him to benefit within a cooperative scheme. No reference is made here to the morally acceptable status of the scheme. Simple intuitions about fair play, then, do not seem to provide a reason for disqualifying unjust cooperative schemes. Rather, they suggest that obligations of fair play can, at least sometimes, arise within such schemes.

But perhaps another sort of support can be given to Rawls' condition. This second argument concerns distribution within the scheme, and it certainly has the Rawlsian flavor. We suggest first that, in effect, the justice condition amends the principle to read that a person is bound to do his fair share in supporting a cooperative scheme only if he has been allocated a fair share of the benefits of the scheme. Previously, the principle of fair play required only that the individual have accepted benefits from the scheme in order to be bound, where now it requires that he have accepted benefits *and* have been allocated at least a fair share of benefits. The role of the justice condition now appears to be important, to be an intimate feature of our intuitions about fair play. For if a scheme is just, each participant will be allocated a fair share of the benefits of cooperation; thus, anyone who benefits at all from the scheme has the opportunity to benefit to the extent of a fair share (although he may *accept* less than this). We are guaranteed that the principle of fair play will only apply to individuals who have been fairly treated. Our feeling that a person ought not to have to share equally in supporting a scheme that treats him unfairly is given voice in this condition. The justice condition, then, on this argument, serves the purpose of assuring that a man is bound to do his fair share only if he is allocated a fair share of benefits (and accepts some of them).

I think that this is an important feature of our intuitions about fair play, and it also seems a natural way of reading Rawls. In fact, this may be the argument that Rawls is suggesting when, in elaborating on the principle, he notes that if the scheme is just, "each person receives a fair share when

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all (himself included) do their part.”¹¹ (Rawls’ observation is, strictly speaking, false; the justice of a scheme does not guarantee that each person either receives or accepts a fair share.) But if this *is* the argument Rawls intends for his justice condition, there are serious difficulties for it to overcome. The motivation for including the requirement is (on this reading) to guarantee that an individual not become bound to carry a fair share of the burdens of a cooperative scheme if he has been allocated less than a fair share of its benefits; it is unfair to demand full cooperation from one to whom full benefits are denied. But if *this* is our reason for including the justice condition, we have surely included too much. Why should we think that the whole scheme must be just for this sort of intuition to be given play? Rawls’ justice condition requires that *everyone* be allocated a fair share of benefits if *anyone* is to be bound by an obligation of fair play. But the reasons we have given for including this condition seem only to require that for a particular individual to be bound, *he* must be allocated a fair share. This says nothing about the allocation of benefits in general, or about what benefits *others* are allocated. If some individuals within an unjust scheme are allocated less than a fair share of benefits, then our reasons would support the view that *they* are not bound to carry a fair share of the burdens. But nothing said yet about feelings of fair play seems to exempt from obligation those individuals to whom a fair share of benefits is in fact allocated within an *unjust* scheme. So again the point of Rawls’ justice condition comes into doubt.

These arguments may prompt us to think more about the notion of a “fair share” of the burdens of cooperation. For if we understand by this phrase a share of the total burden proportionate to the share of the total benefits allocated to the individual, then we may have no problem in accepting that anyone who accepts *any* benefits from a cooperative scheme is bound to do his “fair share.” Our belief that only an individual who is allocated a fair share of the benefits is bound to cooperate may be false. For it seems eminently fair to hold that each is bound to cooperate to the extent that he is allowed to benefit from a cooperative scheme; thus, those who are allocated the largest shares of benefits owe the largest share of burdens. But even one who is allocated a very small share of the benefits is bound to carry a small share of the burdens (provided he accepts the benefits).

Now it is clear that these intuitions cannot be given full play in the case of schemes whose burdens cannot be unequally distributed. But there may seem to be other difficulties involved in the interpretation of the fair-play

¹¹ *A Theory of Justice*, p. 112.

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principle sketched above. First, it seems to entail that the better-off are bound to support unjust schemes which favor them, and the more discriminatory the scheme, the more strongly they must support it. And second, it seems to entail that those who are allocated tiny, unfair shares of the benefits are still bound to cooperate with the unjust scheme which mistreats them. These may again seem to be good reasons to limit the principle's application to just schemes. I think this appearance is misleading. For, first, the principle under discussion does not entail that the better-off must support unjust schemes which favor them. While it does specify that they are obligated to repay by cooperation the sacrifices made in their behalf by the other members, the injustice of the scheme is a strong reason for opposing it, which gains in strength with the degree of injustice. Thus, there are moral considerations which may override the obligations of fair play (depending, of course, on the degree of the injustice of the scheme, among other things). And if we think of the burdens as sacrifices to be made, it seems only fair that the unjustly favored should be heavily burdened. As for the apparent result that the unjustly treated are still bound to support the scheme (even if to a lesser degree) which discriminates against them, this result can also be seen to be mistaken. For if we remember that benefits must be *accepted* in order for an individual to be bound under the principle, the unfairly treated have the option of refusing to accept benefits, hence sparing themselves the obligation to support a scheme which treats them unfairly (and they have, as well, the duty to oppose such unjust schemes, regardless of what obligations they are under). The idea, then, is that only if they willingly accept the benefits of the scheme are participants bound to bear the burdens of cooperation, and only then in proportion to the benefits allocated to them.

I am not sure just how much of the Hart-Rawls conception of the principle of fair play this analysis captures. But the considerations raised above seem to me to be good reasons for rejecting Rawls' "justice condition." While we can, of course, agree with Rawls that intolerably unjust schemes ought not to be furthered (and, in fact, ought to be opposed), there is no logical difficulty, at least, in holding that we may sometimes have obligations of fair play to cooperate within unjust schemes. And the arguments suggest that there may be no nonlogical difficulties either.

III

I want to pause here to comment briefly on the theory of political obligation which uses the principle of fair play, and specifically on the changes

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which this account introduces into our conception of political obligation. There are, of course, important continuities between this “fair-play account” and the traditional consent theory account mentioned earlier. While one approach locates the ground of obligation in the acceptance of benefits and the other in consensual acts, both are “obligation-centered” accounts and, as such, both stress the essential voluntariness of the generation of the obligation.¹² But defenders of the fair-play account of political obligation wish to stress as well its significant departures from consent theory; the fair-play account requires a cooperative scheme as the context within which obligations arise, and obviates the need for *deliberate undertakings* of obligation. How these changes might be thought to constitute improvements over the consent theory account seems fairly clear.

First, the fair-play account involves viewing political communities in a different way than consent theory; specifically, they are viewed as “communities” in a fairly strict sense. We are to understand political communities as being fundamentally, or at least in part, cooperative enterprises on a very large scale. Citizens thus are thought to stand in a cooperative relationship to their fellows, rather than in an adversary relationship with the government. And this former view may seem to some more realistic than the latter.

But clearly the major advantage which the fair-play account of political obligation is thought by its advocates to have is that of providing a *general* account of our political bonds. No deliberate undertaking is necessary to become obligated under the principle of fair play. One can become bound without trying to and without knowing that one is performing an act which generates an obligation. Since mere acceptance of benefits within the right context generates the obligation, one who accepts benefits within the right context can become bound unknowingly. This is an important difference from consent theory’s account, which stressed the necessity of a deliberate undertaking. Thus, while one can neither consent nor accept benefits (in the right sense) unintentionally, one can accept benefits without being aware of the moral consequences of so doing (while being unaware of the moral consequences of consenting defeats the claim that consent was given). The significance of this difference, of course, lies in the possibility of giving a *general* account of political obligation in the two cases. For

12 By “obligation-centered” I mean simply that according to the account most or all of the people who are bound by political bonds are bound by *obligations* (that is, moral requirements originating in some voluntary performance). “Obligation-centered” accounts are to be opposed, of course, to “duty-centered” accounts.