

## The Hart-Rawls Principle of Fairness-----Nozick's Chapter 5 Discussion Notes for Philosophy 167 Spring, 2008

"This principle holds that 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" (p. 90, *Anarchy, State, and Utopia*).

Example: Suppose the farmers in a valley 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 farmers in the valley participate in this scheme, each farmer's chances of avoiding premature death at the hands of the bandits and the loss of his possessions are significantly improved by the scheme. In this way all are significantly benefited by the scheme. Above some threshold level of participation, each farmer's net gains from the scheme increase as others participate.

I shall suppose that the conditions of the Hart-Rawls principle are satisfied in this example as described, so if one or a few valley residents benefit from the mutual protection scheme but balk at doing their part, the cooperating participants have a right against these noncooperators, that they should do their assigned part under the scheme. In supposing this is so, I am construing the principle in particular ways. First, I am supposing the persons who engage in the scheme need not be identical to the "all" who benefit and are obliged to cooperate under the rules of the scheme. Suppose some number of the farmers living in the valley, not necessarily all of them, work out a scheme and post the rules. If the scheme gets off the ground, if valley residents comply to a sufficient degree, then those who benefit from the first compliers' behavior are obliged to reciprocate and do their turn. Second, I shall suppose that the Hart-Rawls principle applies when and if such a cooperative scheme is successfully initiated and is up and running. The principle does not purport to tell us what we ought to do if a cooperative scheme is proposed but it is not yet clear whether enough people will go along with the proposal and comply with its rules for the scheme to deliver its anticipated benefits. The Hart-Rawls principle specifies how one ought to behave when one is a beneficiary of an ongoing successful cooperative scheme. Third, I shall interpret the phrase "restrain their liberty in ways necessary to yield advantages for all" loosely. In the example, suppose that there are many mutual protection schemes, differing in design details, any of which would have gained roughly the same benefits that the scheme actually established yields. If the actually established scheme is one of the set of possible schemes, the implementation of one of which was necessary to secure the basic scheme benefits, and if the actually established scheme is not significantly inferior to another that might have been established instead, I shall suppose that the cooperators are restraining "their liberty in ways necessary to gain advantages for all." (This condition so interpreted would not be satisfied if merely placing a scarecrow at each access point to the valley would be sufficient to deter bandits at much lower cost than the actually established scheme involving sentries sounding a general alarm.)

Nozick observes that if one supposes the right that the cooperating participants gain against benefiting noncooperators is an enforceable right, the Hart-Rawls principle then "seems to make unanimous consent to coercive government in a state of nature unnecessary!" (p. 90). A coercive government could arise legitimately without unanimous consent of the governed via the establishment of a cooperative scheme that satisfies the conditions of the Hart-Rawls principle of fairness.

### Nozick's objections:

"The principle of fairness, as we stated it following Hart and Rawls, is objectionable and unacceptable."

1. You might benefit from the operation of the cooperative scheme, but less overall than you would lose from compliance with the scheme's participation requirements.
2. Even if the operation of the scheme would benefit you more than compliance with its requirements would cost you, it still might be the case that the scheme barely benefits you overall, whereas others gain a lot. Requiring you to

cooperate with others to keep the scheme going may be unfair, because you gain so much less on the whole than others would gain.

3. The institution of the actually established and ongoing scheme might have foreclosed the possibility of adopting instead a cooperative scheme more to your liking. You might decline to participate in the ongoing scheme as a part of a strategy of trying to persuade people to replace it with your preferred scheme instead.

In any of cases 1-3, it would be unfair to demand that you contribute anything close to what other cooperators are paying to sustain the scheme.

**Nozick's objections to the claim that legitimately enforceable obligations arise according to the principle of fairness:**

1. In general, just by showering on people benefits they have not requested on specified terms, you do not thereby generate in these people obligations to reciprocate, to benefit you in turn. At least, nothing approaching an enforceable obligation arises in this way. (If I invite you over to dinner, you don't thereby incur an enforceable obligation to invite me to dinner.)

2. In general, acting to pursue projects of your own choosing (for example, projects that benefit you) in ways that as a by-product convey benefits on others, you do not thereby generate in others any sort of enforceable obligation to act in ways that benefit you.

3. The situation is not altered if it is not worthwhile for you to engage in these activities that spread benefits on others as a side effect if one does not gain compensation from those who get side effect benefits. Nozick, p. 95: "One cannot, whatever one's purposes, just act so as to give people benefits and then demand ( or seize) payment."

Nozick's conclusion, p. 95: Even if some modified version of the principle of fairness could be formulated that would not be vulnerable to objections, "any such principle, if possible, would be so complex and involuted that one could not combine it with a special principle legitimating enforcement within a state of nature of the obligations that have arisen under it."

Another worry: From another angle, the principle of fairness might seem to generate enforceable obligations too easily. One might think that not just anybody is entitled or authorized to establish cooperative schemes with morally legitimate powers of enforcement. For example, one might think an entity that satisfies a number of conditions that render the entity a just government might legitimately establish cooperative schemes according to the principle of fairness and enforce them, but that not just anybody qualifies as such an entity. In this vein, one might accept the authority of government to establish a scheme that provides communal defense and police protection, but deny that a group of one's neighbors can similarly establish such schemes and legitimately enforce their rules.

**Responses to Nozick's objections.**

Some have said that Nozick's examples turn on the triviality of the goods provided. If one alters his examples so that the cooperative scheme provides large and uncontroversial benefits, one restores the judgment that the beneficiaries of the cooperative scheme are obligated to reciprocate by doing their part.

response seems to me to be unmotivated. If one keeps in mind that the strength of an obligation to reciprocate cooperative benefits varies with the size of the benefits, one should be able to discern an obligation to reciprocate in cooperative schemes that provide very small benefits. Suppose that in a large city where strangers must negotiate narrow sidewalks and walkways, there is a cooperative practice of making way graciously for those one encounters moving on foot in the opposite direction. If the benefits, though small, are real, and benefits to all who receive them, the principle of fairness should generate an obligation to reciprocate the favor in these interactions among strangers. A decrease in the size of the benefit provided may increase the likelihood that for some people the "benefit" provided is an irritating cost or even harmful, but it is the latter factor not the former that blocks the obligation to reciprocate.

Just imposing an unsolicited benefit on a person does not by itself generate any sort of obligation on the part of the beneficiary to pay for the benefit or to reciprocate in kind. This is the true take home lesson of Nozick's critical

discussion of the principle of fairness. Suppose I see that your shoes are unshined and I shine them. Even if it is common knowledge between us that you have gained a benefit whose value to you is greater than the ten dollar payment I am demanding, still, in this sort of case no entitlement to payment arises. Why not? The answer has something to do with transaction costs, the costs of reaching an agreement. In this sort of case, I could easily have offered to shine your shoes and secured your agreement to pay a certain price for the service. I should not have the moral freedom to bypass the negotiation and agreement and still insist on payment for services rendered.

But when the service provided is a public good of a certain sort, the transaction cost issue is transformed, and insistence on prior agreement as a necessary condition for reciprocal obligation may be misplaced. A good is public, I shall say, with respect to a group of people, to the degree that three conditions hold: (1) Exclusion is impossible or unfeasible (if one person consumes any of the good, it is impossible or very difficult to prevent any other member of the group from consuming it), (2) consumption is nonrival (one group member's consumption of some the good leaves none less for others to consume), and (3) all must consume the same amount of the good. If (3) holds, one or a few members of a group may balk at a proposed agreement whereby all group members contribute to provide the good for all, because they foresee that if they withhold agreement and the rest of the group proceeds anyway, those who decline to join the scheme will enjoy its benefits in any case. Even if (3) does not hold, sheer nonexcludability may pose the same temptation and difficulty.

So here's a proposal: restrict the scope of the Hart-Rawls principle of fairness to interactions in which cooperation produces a good that is both nonexcludable and worth its costs to each member of the group that receives the good. One should add, mindful of Nozick's concern that the good might be variously beneficial to its recipients, so that insistence on a uniform contribution from each recipient would be unfair, that the burdens of cooperation are fairly divided. This proposal allows us to distinguish the valley defense case and the shoeshine case. The proposed amended Hart-Rawls principle yields the result that the noncooperating beneficiaries are obligated to contribute in valley defense but the person who received an unsolicited shoeshine is not obligated to pay for it.

### **Three objections to the Amended Hart-Rawls Principle**

The amended Hart-Rawls principle faces at least three objections. One concerns nonrivalry of consumption. If the free rider benefits from a cooperative scheme and if her failure to contribute to the burdens of maintaining the scheme harms no one, as may be the case if consumption of the cooperatively produced good is nonrival, it may be doubtful that the free rider's behavior involves any unfairness to anybody.

A second objection holds that the amended principle is unfair to beneficiaries, by virtue of failure to insist that obligations to contribute under the principle of fairness only legitimately arise if the beneficiary freely and voluntarily accepts the benefits. Mere receipt of benefits does not generate obligation to contribute, it is claimed. John Simmons pushes this line forcefully in his essay "The Principle of Fair Play" and elsewhere.

A third worry is that it was a mistake in the first instance to focus on the nonexcludability issue. The claim here is that the principle of fairness can generate obligations to contribute that fall on the recipients of excludable goods produced by a fair cooperative scheme. Garrett Cullity suggests 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.

In response to the third objection, I would say that 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. Given that the good exists and is available for some group members, it is available for all. The amended principle of fairness applies to this second good, I submit.

Further objection: suppose we amend the case. Imagine a person who sneaks into a movie theatre without paying the admission price. This case exhibits the same sort of unfairness as the subway train fare evasion, but here there is no nonexcludable good identifiable. (Garrett Cullity presses this objection.)

Further response: If there is nothing in the example that can be identified as a cooperative practice, there will be nothing for the principle of fairness to grip. If we interpret the case so it can fall under the scope of the principle of fairness, then we are imagining the regular customers who pay the admission price honestly, without looking for opportunities to cheat, as a number of persons engaging in a just, mutually advantageous cooperative venture according to rules and thus limiting their liberty in ways necessary to yield advantages for all. The advantage here is a muted version of the benefit in the subway train case. When customers are disposed to be honest and deal fairly with a merchant, monitoring and administrative costs are lowered, and the good can be supplied at lower cost to consumers. The sneak free rides on this cooperative practice. Of course, so described, the cooperative practice of honest dealing is pervasive in a successful market economy. So such an economy will be thickly marbled by obligations stemming from the principle of fairness. Usually these will accompany and reinforce duties generated from other sources, such as the obligation not to steal property that belongs to another. But it is no objection to a construal of the principle of fairness that according to that construal, fairness obligations are pervasive. So long as the obligations the proposed principle generates capture an element of fairness that is common to all the c

The first objection is that if free riding harms no one, makes no one worse off, it is dubious to claim that free riding is unfair to anybody. Consider an example. Residents of a community are voluntarily complying with a cooperative scheme of water rationing during a drought. Provided that there is compliance with the rationing rules at a threshold level, no harm to anyone will ensue: the town's water supply will be pure and adequate. In fact, compliance is above this threshold level, so the town's reservoir is well above the level that would begin to taint the water supply. The extra water in the reservoir we may imagine will just evaporate if unused. I could cheat on the water rationing rules by watering the potentially glorious flowers in my back yard. In the circumstances, I am free riding, but no harm is done to anyone, no costs imposed on anyone. A more efficient scheme would provide some procedure for allocating this excess water, but no such procedure is in place, and no move to establish such a procedure will make headway. My choice is either to comply with the rules or violate them and water my flowers.

The water-rationing example contrasts with another type of case, exemplified by train fare evasion. In the latter case, if I do not pay my fare, others must pay a bit more. The more contributors to the scheme who abide by the rules, the less the burden of contribution to supply the good that anyone must bear. (At least this is so if contributions can be supplied in continuously varying size; if this is not so, there will be levels of contribution that a tiny bit of free riding will not affect at all.)

One might hold that a person's behavior with respect to a cooperative scheme might be unfair even if the behavior harms no one, imposes no costs of any size whatsoever on anybody. But I think it is more intuitively plausible to concede that in the types of case we are considering, free riding on cooperative schemes that imposes no costs on anybody is not unfair. We might consider the scheme itself, in virtue of its inefficiency, to be unfair, and the free riding behavior (when permissible) to be a reasonable adjustment to this situation that renders the scheme more rather than less fair in its distribution of benefits and burdens. A scheme that is Pareto inefficient is unfair. The amended Hart-Rawls principle of fairness should be further amended to reflect this position.

The second objection claims that mere receipt of benefits is insufficient to generate an obligation to do one's part in a cooperative scheme. One must freely and voluntarily accept the benefits of the scheme to trigger obligation. A variation of this position holds that if the cooperative scheme makes a good available to people but leaves to each member of the group the choice whether or not to consume, one must voluntarily accept the benefit of the scheme by voluntarily choosing the consumption option. If the cooperative scheme provides a good that simply befalls each group member and must be consumed by each group member, then the fallback requirement in this case is that one must take the benefit willingly and knowingly.

The argument for this voluntary acceptance requirement is that one is a free rider in the pejorative sense only if one acts from motives that render it the case that one is unfairly taking advantage of the cooperators who provide the public good. The free rider is an exploiter. But merely being the passive recipient of benefits that one could not choose to avoid does not amount to an intention to take advantage of the cooperators. A. John Simmons vigorously asserts this objection in his essay "The Principle of Fair Play."

Simmons then ends up siding with Nozick on the core issue: the principle of fairness cannot justify the claim that citizens of modern, not excessively unjust societies who do not really have the option of freely consenting to their governments are nonetheless morally obligated to comply with reasonable coercive political requirements. Simmons holds that the Hart-Rawls principle of fairness generates obligations only when those who benefit freely and voluntarily--or at least willingly and knowingly--accept the cooperative benefits. This condition is standardly not met in modern societies. Citizens obeying the laws that the government enforces do not see themselves as cooperating together to supply important public goods to all, so no cooperative scheme is in place, and no obligations are generated. Those who benefit from widespread obedience to law either do not voluntarily seek to consume those benefits or (if the benefits are such that no question whether or not to choose to consume them cannot arise) do not accept the benefits willingly and knowingly. In either case, no obligations arise via the principle of fairness rightly understood. Free riders on coercive governmental schemes to supply public goods do not then have the wrongful intentions to take advantage of their cooperating fellow citizens.

In reply: Whether or not one is a free rider in violation of the principle of fairness depends on how it would be reasonable to view one's relations with the persons from whose cooperation one benefits, not on how one actually subjectively regards these relations. Unreasonable false beliefs on this score, even if nonculpable, do not bring it about that one is not obligated, though they may affect the different issue, whether and to what degree one is blameworthy for failing to fulfill one's obligations under the principle of fairness.

Voluntary seeking to get the benefits the principle of fairness regulates is neither necessary nor sufficient to bring it about that one becomes obligated to contribute to the cooperative scheme in question. Not sufficient, because other conditions for obligation may fail to hold. For example, a flawed cooperative scheme may be in operation, whose benefits are not worth their costs. Such a scheme deserves to die. While it is ongoing, one may voluntarily seek to gain the meager benefits the scheme makes available if one is not thereby taking any benefits away from the cooperators. One may simply be trying to make the best of a bad situation and reducing the welfare loss from the failed scheme. In such a case trying to get benefits and voluntarily accepting benefits do not generate obligations to contribute.

Voluntary seeking of benefits or acceptance of benefits is not necessary for obligation to arise under the operation of the principle of fairness. Consider the valley defense scheme described toward the beginning of these notes. In this case, there is no choice to consume or decline to consume the benefit of safety from bandits. If the scheme is successful, the valley residents simply are safe. If the terms of the amended principle of fairness are met, and if failure to contribute to the scheme would increase the costs other cooperators must bear, one is obligated to cooperate by doing one's assigned part in the scheme. Mere receipt of benefits, given the satisfaction of the other conditions set by the principle, suffices to generate obligations. Whether one "willingly" accepts the benefits, whatever that might mean, is neither here nor there. Unwilling acceptance of benefits will do.

Simmons objects that the passive recipient of benefits who does not recognize that he is the beneficiary of the cooperative efforts of others lacks the intention to exploit or take advantage of others. Merely passively benefiting need not imply that one has any such intention. But Simmons is looking for a faulty intention or state of mind in the obligated person in the wrong place. Once the true situation is explained to the passive beneficiary, the question is, what will she do then. If she insists on continuing not to do her part and contribute her fair share to the cooperative venture, she then exhibits a wrongful intention to take advantage of the cooperating fellow citizens. Or if she persists in not recognizing that she is benefiting from the cooperation of others, she may be culpable for this continued failure to understand. Even if she is not culpable, she is mistaken, and the actual relations in which she stands to the

cooperative behavior of her fellow citizens generate a reciprocal obligation under the amended principle of fairness. She is either unfairly taking advantage of her cooperating fellow citizens or would be doing so if she saw her situation in its true light and persisted in her failure to contribute.

Simmons raises another point, that in actual modern societies hardly anyone exhibits the intention to cooperate with others to provide important public goods that would establish the cooperative venture, to which the obligation on the part of beneficiaries to reciprocate (if it existed) would attach. Simmons is right to stress that there must be this sort of intention to cooperate with others for mutual advantage. Merely acting in ways that as a matter of fact end up creating benefits for people does not suffice to establish the existence of a cooperative scheme. So far, I am entirely in agreement with Simmons. I part company with him on the factual issue, to what extent it is or is not the case in modern societies that fellow citizens recognize themselves as cooperating with others to provide important public goods such as national defense, the rule of law, a criminal justice system, security and trust in private property arrangements, and so on. To me it seems farfetched to claim that most citizens in most modern democratic societies regard their governments as simply coercive Mafia type operations rather than as the (imperfect) administrators of decent cooperative schemes in which their fellow citizens are for the most part willing and dedicated participants. This is a complex issue that merits further analysis and scrutiny.

### **Enforceable Obligations**

The discussion to this point has left to the side the important question, whether the obligations that might be thought to arise under the principle of fairness are legitimately enforceable. If not, then in the end Nozick's skepticism about basing political obligation on the principle of fairness would be vindicated.

Approaching this issue, we should first of all distinguish the question, whether failure to conform to a genuine moral obligation always merits sanctions or penalties, and the question, whether there are any moral obligations so stringent that it is morally acceptable or even morally required to enforce the obligations and secure compliance come what may, regardless of the costs and benefits of enforcement. I would hold that the answer to the first question is Yes and the answer to the second is No.

The idea of moral obligation is tied to the idea that sanctions for noncompliance are suitable. If I am morally obligated all things considered to do X, and I fail to do X, then unless I am excused for some reason, I should be penalized in some way for the breach of obligation. But penalties can be mild if the obligation that is violated is no big deal. Suppose a kindly volunteer who shepherds schoolchildren across the busy street in front of the school adjacent to my house smiles and waves cheerfully at passers-by, and elicits reciprocal smile and waves from them. A small-scale cooperative venture is established, providing good cheer to those who pass by. If I walk by failing to reciprocate and casting surly glances at the nice volunteer, I violate a very small obligation under the principle of fairness, so a very small penalty (perhaps glowering scowls from the school children who see what is happening) is appropriate. If the children threaten this penalty and to avoid it I comply, I am coerced, just a bit. Coercion need not always involve the rack and thumbscrew and gallows or the threat of such.

To my mind, there is no special problem about the enforcement of obligations that arise under the principle of fairness and no specially delimited class of enforceable obligations. Any such obligation is properly enforceable to an extent. But the penalties deployed in enforcement should not be disproportionate to the magnitude of the obligation that is being breached and the overall magnitude of what is at stake, what is lost and gained depending on whether or not compliance is brought about.

### **Fairness**

What then is the basic fairness norm on which the principle of fairness, with its amendments and qualifications, rests? A. John Simmons (not in our course reading) states the core idea as follows: "In its most general possible form, the principle of fair play (his name for the principle of fairness) asserts that those who benefit from the good faith sacrifices of others, made in support of a mutually beneficial cooperative venture, have a moral obligation to do their parts as well (that is, to make reciprocal sacrifices) within the venture."

### **Further Unresolved Issues**

These notes have not responded to the worry that perhaps one should impose some further conditions on the sort of entity that is morally entitled to initiate a cooperative scheme that generates principles of fairness obligations when successful. My suspicion is that one should not impose any such further conditions. Anybody is authorized to initiate such a cooperative scheme. However, obligations will not multiply excessively, because the obligations themselves likely get more onerous as they multiply, so that at some point the condition that the scheme must be worth its costs will not be met, for proposed new schemes. Also, once a governmental cooperative scheme is in place, further schemes that compete with and interfere with the government's rightful authority would likely be counterproductive, hence generate no genuine further obligations.

Following the lead of the Hart-Rawls formulation, the amended principle of fairness proposed here specifies that the distribution of benefits and burdens under the scheme must be "fair" if genuine obligations are to be generated under the scheme. In a further development of the principle of fairness, it would be desirable to spell out the principles that determine what distributions of benefits and burdens would qualify as fair.

### **Afterthought.**

It is worth noting that if you endorse the principle of fairness when public goods are being distributed, you should probably also endorse the idea that one can acquire a duty of reciprocity without an voluntary act on one's part of engaging in a cooperative scheme, agreeing to cooperate, or voluntarily receiving benefits. The idea behind amended Hart-Rawls is that when voluntary contracting is unfeasible, cooperating in the absence of voluntary contract can generate duties to reciprocate on the part of those who benefit from cooperation. This or something close to it can occur in the absence of public goods provision. Example: Smith is drowning and has just gone unconscious. Jones, passing by in his boat, at considerable cost or risk to herself, fishes Smith out of the water. This rescue creates a new predicament. Smith's extra weight in Jones's boat causes it to spring a leak. Unless both Smith and Jones bail water, the boat will sink, and Jones will drown. Smith, now recovered from his near-drowning, can easily swim to shore if the boat sinks and would not mind the exercise. The suggestion then is that by virtue of having been rescued by Jones, Smith owes him a debt of gratitude, and is morally required to bail water to keep Jones's boat afloat. Notice that Smith has made no voluntary agreement binding him to help Jones so is under no enforceable obligation to aid and has a moral right to do nothing to avert Jones's death according to Nozick.