

CHAPTER 7

*Paternalism and the principle of fairness*

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Robert Nozick provides this version of the Hart-Rawls principle of fairness:

[W]hen 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.<sup>1</sup>

The principle of fairness has encountered vigorous objections.<sup>2</sup> Some deny that the principle of fairness really justifies the moral obligations it proposes. Others deny that any obligations generated according to the terms of the principle are permissibly enforceable. One important recent objection maintains that forcing people to comply with the principle of fairness would be wrongfully paternalistic. Untangling this objection requires clarification as to what should count as a paternalistic restriction and what makes such restriction wrongful when it is that.

The moral appeal of the principle of fairness withstands these criticisms. Or so I shall argue. My procedure will be to consider objections one by one and either argue against the criticism or indicate how a minor reformulation of the principle accommodates the concern. The appeal throughout is to intuitive plausibility; I venture no deep explanation of what might justify the principle. To my mind its attraction is simple and lies on the surface. The core idea is roughly that it is morally wrong to free ride on the cooperative efforts of others, benefiting from their sacrifices without doing one's fair share to contribute, at least when one's failure to contribute would leave other contributors worse off. (I do not try to defend the principle of fairness against a deflationary act-consequentialist account of

<sup>1</sup> Nozick, *Anarchy, State, and Utopia*, 90.

<sup>2</sup> There is a large literature on the principle of fairness. For defense of it, see Arneson, "The Principle of Fairness and Free-Rider Problems"; also Klosko, *The Principle of Fairness and Political Obligation*.

the supposed obligations it generates. This essay aims to contribute towards the development of the most promising non-consequentialist moral theory.)

AN 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 or the loss of his possessions at the hands of the bandits is 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 non-cooperators, 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 obligated 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. 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, of which the implementation of one 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.”

NOZICK AND A REVISED PRINCIPLE OF FAIRNESS

In his 1974 discussion Nozick raised a central objection: 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. This holds true whether your action is deliberately chosen in order to benefit others or spreads benefits to them as a side-effect of actions you are doing for other reasons. The situation is not altered if it is not worthwhile for you to engage in these activities that spread benefits on others if you would not gain compensation from those who would get such side benefits.

Some have said that Nozick’s examples turn on the triviality of the goods provided.<sup>3</sup> 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.

This 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.

We should agree with Nozick that 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. Suppose I see

<sup>3</sup> George Klosko takes this line. See Klosko, *The Principle of Fairness and Political Obligation*, 39–48.

that your shoes are unshined and I shine them and then demand a ten dollar payment. Even if it is common knowledge between us that you have gained a benefit whose value to you is greater than the payment I am demanding, still, in this sort of case no entitlement to payment arises. Why not? I could have offered to shine your shoes and secured your agreement to pay a certain price for the service. If we failed to reach agreement, I could then simply decline to provide you the good or service in question. I should not have the moral freedom to bypass the negotiation and agreement and in their absence still insist on payment for services rendered.

Contrast the shoeshine example with the example of the farmers working together to provide collective safety against bandits. Here the willing cooperators cannot provide safety for themselves without providing it to others in the neighborhood, whether or not the others agree to contribute to the scheme, and knowledge of this feature of the situation on the part of those others who are being asked to agree to the scheme can provide a strategic motive for declining to agree. This feature is entirely lacking in the shoeshine example. When the service provided has some of the features of public goods, 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*, in common usage, 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 non-rival (one group member's consumption of some of 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 (2) and (3) do not hold, sheer non-excludability may pose the basic problem.

So here is a proposal: Restrict the scope of the Hart-Rawls principle of fairness to interactions in which cooperation produces a good that is both non-excludable 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 non-cooperating beneficiaries are obligated to contribute in valley defense but the person who received an unsolicited shoeshine is not obligated to pay for it. (Maybe what I am calling the “amended principle” is just the original Hart-Rawls principle correctly interpreted.)

Nozick’s examples include some in which a non-excludable good is provided to a group of people. He imagines a neighborhood public address system, with individuals taking turns entertaining their neighbors through loudspeakers that blare sound throughout the neighborhood day and night. It is hard to envisage the system as providing a public good rather than a public bad, and harder still in light of Nozick’s discussion to see the distribution of benefits and burdens under the scheme as fair. Supposing the case is redescribed so that it is clear that cooperation is supplying a non-excludable good and that the rules of the scheme provide for a fair distribution of benefits and burdens from its operation, I am happy to conclude that the scheme does generate obligations on the part of beneficiaries to cooperate with its rules.

How do we determine whether the distribution of benefits and burdens under the cooperative scheme is fair? This is a good question, but not germane to our topic as I see it. So long as we are agreed that there is such a thing as an objectively correct answer, at least in some clear cases, to the question, is the distribution of benefits and burdens fair, the issue of what are the appropriate standards of fairness in this connection may be set aside as a topic for another occasion.

#### THE AMENDED PRINCIPLE AND SOME FURTHER OBJECTIONS

The amended Hart-Rawls principle faces several apparently powerful objections. This section addresses three of these and the next section considers the separate and distinct worry that enforcing the principle would violate the personal sovereignty of one who is forced to contribute, hence would count as paternalistic or close to paternalistic.

#### *Why excludability?*

One objection is that it was a mistake in the first instance to focus on the non-excludability 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.<sup>4</sup>

In response: 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 non-excludable 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 non-excludable good identifiable. (Once again, 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

<sup>4</sup> Cullity, "Moral Free Riding."

fairness that is common to all the cooperative practices that fall under the scope of the principle, and the obligations so generated look to be reasonable, all is well for the proposed principle.

*No harm, no wrong*

A second objection concerns non-rivalry 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 non-rival, it may be doubtful that the free rider's behavior involves any unfairness 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 now 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.<sup>5</sup> We might consider the scheme itself, in virtue of its inefficiency, to be

<sup>5</sup> This point is made by Philip Pettit in "Free Riding and Foul Dealing."

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. (If contrary to the assertion just made you deny that Pareto efficiency is a component of fairness, you can simply ignore this one proposed reformulation and agree with everything else this essay claims in defense of the principle of fairness.)

*Voluntary acceptance of benefits*

An objection that squarely challenges the moral judgment underlying amended Hart-Rawls holds that this 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 classic essay, "The Principle of Fair Play", and elsewhere.<sup>6</sup> On this view, if the cooperative scheme makes benefits available but consumption is optional, and one does not seek and consume benefits, no obligations of reciprocity arise. 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 accept the benefit willingly and knowingly. This last claim denies what the principle of fairness as interpreted in this essay asserts.

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 having any intention to take advantage of the cooperators.<sup>7</sup>

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

<sup>6</sup> Simmons, "The Principle of Fair Play"; and "Fair Play and Political Obligation: Twenty Years Later." See also Wellman and Simmons, *Is There a Duty to Obey the Law?*. Simmons' work has spawned much critical commentary.

<sup>7</sup> Simmons, "The Principle of Fair Play." David Estlund agrees: "The idea of free riding does not seem to cover cases where the advantages are not actively sought or taken." See Estlund, *Democratic Authority*, 147.

consenting to their governments are nonetheless morally obligated to comply with reasonable coercive political requirements. Simmons holds that the conditions under which the principle of fairness really generates obligations of reciprocity are standardly not met in modern societies. 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. Supposed 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.

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 towards 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 or wishes one could avoid them 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.

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. Under the principle of fairness an obligation is owed to the cooperators who supply the benefit receipt of which triggers the obligation. If the intention to cooperate is lacking, generation of obligation never gets off the ground. 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 one another 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.

There is a further issue, what to say about situations in which the intentions necessary for full-blown cooperation are not present but otherwise the scheme distributes benefits and burdens in a way that is fair. Suppose that in a well-functioning state, with benefits and burdens of public goods provision fairly distributed, most people do their part just to avoid the penalties imposed on non-compliers. One possibility: If the scheme were explained to them, they would affirm it, and would acquire the intentions of cooperators. One might say in this case they are latent cooperators, and claim that obligations under amended Hart-Rawls are still generated as would be the case if they had been standard knowing and willing cooperators.

#### ENFORCEABILITY

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 non-compliance are suitable. In this connection J. S. Mill once remarked, "We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it."<sup>8</sup> One might dispute Mill's claim about the ordinary concept of being *morally wrong*. Perhaps in moral contexts the designations "right" and "wrong" just point to where the balance of moral reasons lies; what is right (required) is what one has most moral reason to do and morally ought to do. Perhaps it is not necessarily so that wrong acts are apt for punishment. However if an act is wrong and also a violation of a social obligation, a breach of a duty owed to another person or persons, then there is a presumption in favor of enforcement, which normally takes the form of a standing threat of sanctions. 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, if other things are equal then I should be penalized in some way for the breach of obligation. But penalties should at most be mild if the obligation that is violated is no big deal. To be coercive, a threat must invoke sanctions that suffice to deter, but coercion can be mild, need not always involve the rack and thumbscrew and gallows or 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.

These comments 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

<sup>8</sup> Mill, *Utilitarianism*, chap. 5, para. 14.

cooperative scheme is in place, further schemes that compete with and interfere with the government's rightful authority would likely be counter-productive, hence generate no genuine further obligations.

AN ANTI-PATERNALIST OBJECTION TO THE PRINCIPLE  
OF FAIRNESS

The Hart-Rawls principle of fairness has attracted still another objection. This claims the principle is objectionably paternalist. If this objection sticks, it will stick also to the amended principle I have been defending. So the objection threatens my enterprise.

The paternalism objection directly attacks the principle of fairness, and *a fortiori* attacks any attempt to deploy the principle of fairness to show how people come to be obligated to contribute to the support of the state in which they reside and to obey the laws of a tolerably decent state. Or at least, the objection undercuts any attempt to show that the principle of fairness can justify coercion to enforce the obligations the principle claims to generate. No coercively enforceable obligations flow from the principle of fairness: So the objector claims.

Christopher Wellman puts the point succinctly: “[E]ven 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.”<sup>9</sup> His point is not necessarily that it is wrong to heap a benefit on someone without that person’s consent, but that one cannot justify coercing a person by appeal to the consideration that the coercion will contribute to sustaining a scheme that benefits her. He states, “I object to the paternalism implicit in any account that justifies non-consensual coercion in terms of potential benefits to the coerced.”<sup>10</sup>

The paternalism objection invites two responses, either of which would suffice to defeat the complaint. The two responses are “Oh yeah?” (the argument under review is not rightly characterized as paternalistic at all) and “So what?” (even if the argument did need to rely on a paternalistic premise, this would not be problematic, because paternalism of this sort would not be objectionable). Both responses are correct, in my view, but

<sup>9</sup> Wellman, “Samaritanism and the Duty to Obey the Law,” 5, in Wellman and Simmons, *Is There a Duty to Obey the Law?*.

<sup>10</sup> *Ibid.*, 18.

the first one is more decisive, because not everyone will agree that paternalism is ever defensible as I suppose it to be.

We first need to clarify the notion of paternalism that figures in the arguments that trouble Wellman. Let us say that coercive restriction of a person's liberty is paternalistic just in case the person's liberty is restricted, against her will, for her own good.<sup>11</sup> But of course it will not be useful to draw a line in the sand and defend a particular definition. The issue that Wellman is raising is whether the features of the enforcement of the principle of fairness that provoke him to call it paternalistic are objectionable features, whether or not we choose to say they qualify as paternalism.

The "against her will" condition is meant to exclude cases in which a person suffers a restriction of freedom for her own good, but she welcomes the restriction, it does not go against her will.<sup>12</sup> For example, if I am weak-willed and cannot stick to my diet, I may welcome and accept your helping me to accomplish what I want, by threatening to punch me in the stomach each time I go on a chocolate milkshake binge or the equivalent. Given that I welcome and accept this restriction, imposing it on me is not paternalistic. One might also say the restriction does not aim to override my own judgment as to where my own good lies and how to reach it, but just to give effect to my judgments on these points. The "for her own good" condition invokes a motivational condition: Whether a restriction of my freedom is paternalistic or not depends on what the restrictor is trying to achieve. If the restrictor aims to harm me, what she does, even if morally wrong, is not paternalistic, even if by some fluke I end up being benefited by the restriction.

Wellman interprets a no-paternalism norm 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. Recall, we had said a good is public with respect to a group of people to the degree that (1) consumption is non-rival among group members, (2) exclusion of anyone from consuming some of the good is unfeasible if anyone consumes any, and (3) all must consume the same amount of the good. Earlier, I had suggested that condition two, No Exclusion, is the

<sup>11</sup> On the characterization of paternalism, see de Marneffe, "Avoiding Paternalism"; see esp. 69–76; also Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation." So far as I can see, the authors' concerns about the most fruitful way to formulate the idea of paternalism do not affect my disagreement with Wellman.

<sup>12</sup> "Against her will" also covers cases in which the person has freely committed her will in the past, so that blocking her from doing what she wants to do now is acceptable.

crucial idea. Wellman is implicitly referring to another feature a good may possess that may well merit calling it “public.” The feature is that consumption is unavoidable: If anyone consumes any of the good, everyone in the group must consume some of it. They need not consume the same, so this condition, call it No Choice, is different from condition three. (A related condition that might or might not hold is non-optional: With respect to a good and a group of people, the good is non-optional just in case if any of the good is consumed by anyone, no individual has any choice concerning the amount of the good that she consumes.)<sup>13</sup> So let’s consider the principle of fairness applied to a scheme for providing a good that is public in the sense that it satisfies the conditions of No Exclusion and No Choice. I take Wellman to be saying such a scheme must be objectionably paternalistic. Is this so?

I think not. The scheme need not be paternalistic at all. Suppose a thousand people are cooperating to provide a good that will be of benefit to them, and unavoidably to some others as well. The good satisfies No Exclusion and No Choice for the members of this extended group including the cooperators and the others. Since the good, if provided at all, will unavoidably be provided to the initial non-cooperators whether or not they contribute, they may well not have a rational self-interested basis for contributing. So suppose they decline voluntarily to contribute. Nonetheless they benefit from provision of the good just as much as the initial cooperators do, and we can add it is plain to all observers that this is so. The cooperators aim to benefit themselves. They don’t mind that by doing so they also bring about benefits for the others, the non-cooperators; they are glad this is so. But the cooperators balk at allowing the initial cooperators to benefit without paying their fair share and hence to be free riders on the beneficial scheme. To prevent free riding, they coercively require the would-be non-cooperators to contribute their fair share of the cost of providing the good in question. (How do we determine the price they propose to charge for their service is fair? This is the question I am setting aside in this essay. Let’s just assume there is an objectively fair cost-sharing arrangement and they are implementing it [or that there is a range of acceptably fair schemes, the one they are actually enforcing being one that falls within this range]).

<sup>13</sup> No Choice just says that everyone in a group must consume some of the good if anyone consumes any of it. This allows that beyond a small amount of consumption, how much one consumes is optional; one can choose whether to consume more or less. The non-optional consumption condition says that whatever amount of the good one consumes, one has no choice in the matter.

In this case, I say, the cooperators are not behaving paternalistically. Their aim is to prevent free riding, not to restrict some people's liberty for their own good. Moreover, their conduct as described is not morally objectionable on some other ground. They are bringing about a provision of a public good that is worth its costs to all concerned parties and they do so by implementing a division of benefits and costs that is overall fair and reasonable. Even if we held – wrongly, in my view – that paternalism is always morally wrong, this norm would give us no grounds for rejecting the principle of fairness justification for coercion in this sort of case, because no paternalism is being perpetrated.

One might suspect there is a catch here. If the cooperators are seeking the good of the non-cooperators, then the cooperators are acting paternalistically, and if they are not seeking the good of the non-cooperators, their intentions fail to qualify them as generating obligations under the principle of fairness. So one might argue.

A careful characterization of what the cooperators are doing shows that the dilemma just described in the previous paragraph does not bind. The cooperators are seeking the good of the non-cooperators, but only on the condition that the latter contribute fairly to the public-good-provision scheme. The cooperators intend to coerce the cooperators not for their own good but in order to extract this fair return for services rendered.

One might hold that restriction of a person's liberty is paternalistic only when the person doing the restricting is overriding the restricted person's own judgment as to what constitutes her good and how best to obtain it.<sup>14</sup> Notice that no such overriding of the other's judgment about her own good need be involved in the cooperators' case for coercive enforcement of the obligation to contribute to public good provision. Three cases can usefully be distinguished. In Case 1, the non-cooperators decline to contribute to the cost of provision of the public good because they calculate they will get the good whether they contribute or not so it is in their self-interest to decline to contribute. Here it is transparent that the cooperators are not basing the case for coercion on a judgment that they know better than the non-cooperators themselves where their own good lies and how to

<sup>14</sup> In passing I note that the suggestion in the text strikes me as incorrect. Suppose I am pursuing a sensible goal by sensible means, but you correctly judge my execution of my plan will be flawed: I will act in a clumsy way and probably drop my expensive vase. You restrict my freedom for my own good, against my will, to prevent my carelessness from working to my disadvantage. This act looks to be a clear instance of paternalism but involves no overriding of the judgment of the person who is being treated in a paternalistic way. (I know I am likely to drop the vase but I still resent and oppose your intrusion.)

reach it. In Case 2, the non-cooperators incorrectly judge that the public good provided them is not worth the cost they are being charged for its provision (or that the cost being charged is not fair). But they would not contribute even if they changed their mind about these issues, because they are motivated by self-interest as in Case 1. Since here the non-cooperators' faulty judgment is an idle wheel in the proceeding, here again what the cooperators are doing to them is not fairly labeled "paternalistic." In Case 3, the non-cooperators incorrectly judge that the public good being provided is not worth the price they are being charged for its provision (or that the price being charged is not fair). They may hold that the "good" being provided is not a benefit to them at all.<sup>15</sup> Were they to revise these judgments, they would contribute in a spirit of fair play. This strikes me as a borderline case that veers closer to paternalism. However, even here, I would say that if one coerces a person in order to prevent that person from unfairly benefiting from your good will by being an inadvertent free rider, you are not coercing the person for her own good and hence not behaving paternalistically. Nor are you behaving wrongly, any more than it is wrong to force people to obey sensible traffic laws even if they incorrectly judge the going traffic laws are wrong-headed.

In some instances of Case 3, we may suppose that the individuals who wish to opt out of the public goods provision scheme if they could are not reasoning in a culpably sloppy way or basing their judgment on factual beliefs they form in a culpably bad manner. They are just making a good faith effort to size up the situation and simply arriving at a mistaken judgment. They are unwilling, conscientious free riders.

Nonetheless, they are free riders. In declining to contribute their fair share of the cost of the cooperative scheme, they are doing what is wrong, in my view. And forcing them to pay their fair share of this cost need not be paternalistic, I would continue to insist. The motivation of the cooperators who require payment from all who benefit should be to bring it about that a fair cost-sharing arrangement is upheld, not to restrict people's liberty for their own good. However, here in the other Case 3 scenarios, the cooperators are overriding the judgment of the conscientious free riders as to how much they are benefiting from the scheme and how much if anything they owe to those supplying the No Choice benefit. I do not find it plausible to suppose that it is never right to force people to act against their conscience when their conscience is erroneous, so I incline to hold that depending on further circumstances, forcing conscientious free

<sup>15</sup> I thank Jeffrie Murphy for calling my attention to Case 3 scenarios and the issues they raise.

riders to cease their free riding can be the morally right course of action for the cooperators. I acknowledge that the conscientiousness of this type of free rider might in some circumstances generate reasons that militate against the presumption in favor of enforcement.

If the Wellman objection is not exactly an objection against paternalism, but against something close to that, the question arises, how to characterize this. Perhaps this is the rough idea: Enforcement of the principle of fairness is morally wrong when doing so would violate this principle: 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 the advantages and disadvantages that would accrue to her from the choices she might make and (2) the claim that those who would restrict liberty are providing benefits to the one whose liberty is being restricted. Call this the diluted paternalism objection.

As to (1), notice that many uncontroversial restrictions of liberty involve such overriding of judgment. Enforcing the moral norm against murder against me may involve overriding my own evaluation of the cost that refraining from killing imposes on me as compared to the cost that my killing would impose on the contemplated victim. As to (2), many uncontroversial restrictions of liberty are justified by properly balancing gains and losses to the individual whose liberty is restricted and to others who are affected. What draws the line between what we strictly owe to others and what would be nice but is not strictly owed depends on a correct estimation of the costs and benefits to all affected parties including the agent herself, not on the person's own subjective estimation however unreasonable that may be. In the absence of some explanation of how (1) and (2) might interact to establish a moral requirement even though neither by itself is compelling, I submit that the diluted paternalism objection fails.

So far I have supposed we are dealing with cases in which the cooperative scheme has both the features of No Exclusion and No Choice. What if one of these conditions obtains but not the other? Of course, if No Choice holds, then No Exclusion also holds. If everyone must consume some if anyone consumes some of the good, then no one can be excluded from consumption. But it could still be that when No Choice obtains, beyond a tiny amount of consumption that all must share, exclusion is still feasible. Suppose the tiny amount all must get would not be enough benefit to generate serious obligations of reciprocity. If exclusion beyond this tiny amount is feasible, then the possibility exists of running the cooperative scheme and preventing free riding by bringing it about that only cooperators share significantly in the benefits of the scheme.

The arguments I have pressed would not support coercive imposition of the scheme on those who would prefer not to cooperate with it. The legitimate choices the cooperators have in this scenario are to limit the scope of the scheme and exclude the non-cooperators from the benefits or to include the non-cooperators in the scheme and tolerate their free riding.

Suppose instead that exclusion is impossible or unfeasible but No Choice fails to hold. For simplicity, just take the case in which the public-good-provision scheme provides all in the group the opportunity to consume a good but each beneficiary may choose either to consume the good or decline consumption. For example, suppose the public good scheme provides an unguardable well for a village, which gives each village member the opportunity to get water from the well if she chooses. Now suppose there are some in the village who do not value the good provided and do not avail themselves of it. Intuitively, it seems these non-cooperators are not gaining benefits from the scheme, are not free riders, and hence may not legitimately be coerced into paying their share of the costs of the scheme. Suppose the non-cooperators are making a mistake here: They are foregoing water consumption, but they would be advantaged if they did take advantage of the scheme and did drink the water. Here at last we have a case in which anyone opposed to paternalistic restriction of liberty will see strong moral reasons not to block the mistaken non-cooperators from acting on their own judgment about their own good and to force them to contribute to a scheme they reject. But this is a deviant case, not the standard case where both No Choice and No Exclusion obtain. Rejecting coercion to force unwilling beneficiaries to benefit and pay when No Exclusion obtains but No Choice does not and consumption is optional for each individual potential consumer is not rejecting the amended principle of fairness, just forcing a small clarification of it, which I provide in a footnote.<sup>16</sup>

In considering such cases, we need to be careful in describing the goods provided. Providing the opportunity for someone to have water if

<sup>16</sup> The final amended version of the Hart-Rawls principle: 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 generate non-excludable and non-optional benefits 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, at least when failure to acquiesce in this way will impose costs on the cooperators. If the goods provided are non-excludable but optional, those who do not exercise the option of taking the goods provided do not acquire obligations under this principle. (On paternalist grounds it might be urged that in some cases in which people by mistake would choose not to take the optional provided goods, they should nonetheless be forced to take and pay for their own good. This further argument would not appeal to the principle of fairness.)

she wants it is itself a good, which may be valuable to a person who never has occasion to take the water. In the cases described above, someone who does not actually take water from the public well provided by a cooperative scheme may still benefit from having the back-up option to use the well if her other sources of water should dry up. In the previous paragraph, we are supposing the non-cooperators do not avail themselves of the opportunity to take water and also are not, or do not judge themselves to be, better off by having the No Choice opportunity provided.

To this point I have challenged Wellman's claim that forcing people to contribute to public goods provision schemes they do not voluntarily embrace would necessarily be paternalistic. (The forcing would be paternalistic only in the special case just discussed, and there is a natural interpretation of the amended principle of fairness that disallows the forcing in this special case.) Wellman is focusing on the particular case of the imposition by a state of a coercive scheme requiring all within its jurisdiction to obey the laws and contribute to the cooperation needed to sustain the rule of law; I simply assert that my arguments about the general case apply to this particular example.

#### NO HARD PATERNALISM?

So far my claim has been that enforcing the principle of fairness is not paternalistic, so cannot be objectionably paternalistic. Just suppose that claim is false, and that enforcement of the principle of fairness in some standard cases would be either paternalistic or close to paternalistic. What would follow? Let us consider cases in which enforcement would qualify as hard paternalism, restriction of a competent adult person's voluntary choices against her will for her own good. Would such paternalism be morally unacceptable? The topic that opens up here is too broad for this essay. I limit myself to three remarks.

If enforcement of the principle of fairness does not squarely fall into the category of paternalism but only lies somewhere near it, we should note that the moral reasons against paternalism, whatever they may be, may fade away or become diluted as we move from core instances to more marginal cases. On this ground alone we might judge the anti-paternalism case against the principle of fairness to be weak.

A second comment is that even if we uphold a strong moral presumption against paternalism, when paternalism is necessary to provide a person a decent minimum of real freedom in her life, the presumption

may be overridden. If what is at issue is the claimed obligation of the individual to support a state that provides the essential public goods of law and order and basic physical security, the goods being provided are very large. Anarchy along with a general breakdown of people's willingness to respect one another's moral rights is a disastrous condition. Anyone's effective or real freedom to decide on any of a broad array of worthy courses of action and carry out the chosen course of action with a reasonable prospect of success will be very low under anarchy. If there is a moral obligation to bring it about that so far as is feasible, everyone has at least a minimal "good enough" level of real freedom, this obligation arguably will override whatever moral presumption stands against paternalism.

A third comment is that at the level of fundamental moral principle, there may be no presumption at all against paternalistic restriction, at least when paternalism enhances the prospect that the restricted individual will live autonomously and well. Morality may include a strong beneficence requirement, and the requirement to promote the good may encompass a duty to promote people's real freedom especially when their real freedom would sink to disastrous levels absent our aid. The sensible version of anti-paternalism is perhaps not in play at the level of fundamental moral requirements but only shows up at the level of practical policy guidance, the lore needed to fulfill fundamental principles as best we can.<sup>17</sup>

#### IS PATERNALISM MORALLY OBJECTIONABLE?

The discussion so far does not lay to rest the suspicion that there is something deeply wrong with paternalism *per se*, such that if an action or policy is correctly classified as paternalistic, that automatically renders it the case that the action or policy is morally impermissible unless there are overwhelming countervailing considerations in play. Is this so? Here is an argument to that conclusion:

Each person has the moral right to do whatever she chooses with whatever she legitimately owns (provided she does not thereby wrongfully cause harm to others). Having such a right entails that one is at liberty to act and others have a moral duty not to interfere. Now add the premise that each person is the full rightful owner of herself. So, each

<sup>17</sup> This is how J. S. Mill argues in *On Liberty*. For criticism of Mill's anti-paternalism from a prioritarian perspective, see Arneson, "Paternalism, Utility, and Fairness."

person has the moral right to destroy herself, to inflict any lesser harm on herself, and to act in ways that court or risk bringing about harm to herself. From these premises it follows that paternalism (restricting someone's liberty, against her will, for her own good) is morally impermissible. If the right in question is absolute, exceptionless, then paternalism is never permissible.

The flaws in this argument against paternalism reveal considerations that weigh in favor of paternalism.<sup>18</sup> The crucial flaw is that the claim that each person is the full rightful owner of herself, at least as interpreted here, is implausible. This idea of self-ownership is that each person has full sovereignty and control over herself (unless she has ceded some sovereignty and control by her voluntary consent), and is permitted to act at will in any way that affects her body or future life, and also has the moral power to transfer this extensive bundle of rights over herself, in whole or in part, to another person. One sign that this conception of self-ownership rights is inflated is that common sense denies that one has the moral power to sell oneself into slavery or to make oneself the slave of another person.

There is no conceptual oddity in attributing property rights in oneself to each person, but it makes more sense to hold that such rights are limited. Any duties one has to help others can be construed as limited property rights that other people in need have in one's body. These limit self-ownership. But my moral liberty to act as I choose is also limited by duties to myself. Just as one who holds property in land is not best regarded as having the moral right to destroy it at will but instead as having stewardship duties to preserve the land as well as various rights to use and consume it, so too one has, so to speak, stewardship duties along with rights of self-ownership.

One source of such duty is one's rational agency capacity; being a (partly) rational agent, one has duties to seek out the reasons that bear on one's choices of action and to act for reasons. Another source of duty is that each person has the opportunity to live a life, and barring tragic circumstances, this is a tremendous opportunity to do good for self and others, which one is not morally at liberty to squander. Each person is under a vague, loose, but significant duty to make something worthwhile of the opportunity he or she has to live a life and is bound not to waste or squander this opportunity. Although an act-consequentialist principle interprets this duty strictly, on most accounts of morality the duty to

<sup>18</sup> For further argument, see Arneson, "Joel Feinberg and the Justification of Hard Paternalism."

make something useful of one's life goes with great discretion to do this in any of a great variety of ways. A duty to do something worthwhile with one's life is not equivalent to a maximizing duty to do the most good one can with the opportunities one has. This is a duty owed to oneself, but not a duty one can waive on one's own behalf, and though limited in its demands, when severely neglected it opens the doors to enforcement. If I am wasting my life, I am violating social norms and this triggers informal penalties as appropriate. Using certain mind-deadening drugs that tend to degrade one's rational faculties while offering too little enjoyment and other benefits in return can render me appropriately subject to criminal law penalties. Suicide on a whim, for no good reason, is banned in morality as well as in law.

Duties to make something worthwhile of one's life interact with duties of beneficence that we owe to one another (and so are owed by others towards oneself) to draw boundary lines setting limits to one's autonomy and allowing, and in extreme cases mandating, paternalistic interference. If I am making bad decisions and ruining my life, at some threshold of badness I am violating the duty to make something worthwhile of my life. From the side of other persons who are in a position to act to make my life go better, one should note that they have a duty to respect my autonomy, my authority to decide for myself how to conduct my own life, which includes the right to make mistakes and learn from them (or not), up to some point. But again there is some threshold of badness, some point beyond which one's life is becoming a mess of spoiled fruit, and others become morally permitted, and then at some further point perhaps mandated, to prevent further rot if there are available ways to do that that are morally cost-effective. (How these thresholds interact and where they might be located are topics for another occasion.)

In these brief remarks I intend to do no more than indicate a plausible and promising pathway along which one might proceed, to mount a convincing defense of the commonsense ideas that paternalism is sometimes morally permissible and sometimes morally required. I make no attempt to show how a plausible moral principle regulating permissible paternalism would treat the issue of the moral permissibility of enforcement of the principle of fairness, because I deny that such enforcement would trigger the application of such antipaternalism norms as there are. But if you believe that enforcing the principle of fairness would be paternalistic or exhibit features that are very like paternalism, this belief should be no bar to holding that enforcing the principle of fairness can be entirely morally appropriate.

CONCLUSION

This essay has defended the Hart-Rawls principles of fairness as justifying the duty to obey the law, in a broad range of cases. The defense has proceeded mainly by clarifying what the principle affirms and by introducing minor amendments to enable the principle to avoid objections that do not go to the heart of the matter. Even if successful, this essay does not advance a knockdown argument for the principle; it simply knocks down some bad influential objections.

PROOF