25th IVR World Congress

LAW SCIENCE AND TECHNOLOGY

Frankfurt am Main

15–20 August 2011

Paper Series

No. 030 / 2012

Series D

History of Philosophy; Hart, Kelsen, Radbruch, Habermas, Rawls; Luhmann; General
Theory of Norms, Positivism

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Free Riders Play Fair

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Abstract: After the demise of the social contract theory, the argument from fair play, which employs the principle of fair play, has been widely acknowledged as one of the most promising ways of justifying political obligation. First, I articulate the most promising version of the principle of fair play. Then, I show that free riders play fair, that is, that their moral fault lies not in unfairness but in the violation of a rule by appealing to the example of three-in-a-boat. Finally, I conclude that even the most promising version is false because those who have accepted benefits from a social cooperative scheme do not owe an obligation of fair play.

Keywords: Political Obligation, Fair Play, Fairness, Free Riders

I. The principle of fair play

1. Hartian version

It is commonly accepted that obligations in general can arise in, at least, two ways: naturally and voluntarily. Natural duties are those duties that one owes despite his actions. For example, an individual has a natural duty to avoid cruelty even if he never promises to do so. In contrast, voluntary obligations are those that an individual incurs by consent. For example, if an individual promises to attend a party, he has an obligation to do so. The question then arises: Are there any other reasons upon which obligations may be grounded?

H. L. A. Hart answers this question by referring to the principle of "the mutuality of restrictions." This principle, he explains, consists of the following:

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 (Hart 1955:185).

It follows from the correlativity between right and duty that those who have benefited from a joint enterprise have a duty to obey its rules. Here, Hart mentions two conditions required to apply the principle: (1) a number of individuals conduct joint enterprise and (2) they benefit from it. The mutuality of restrictions is justified "because it is fair; and it is fair because only so will there be an equal distribution of restrictions and so of freedom among this group of men" (Hart 1955:191). The mutuality of restrictions, which is currently referred to as "the principle of fair play" or "the principle of fairness," derives from the equal distribution of

benefits and burdens. Hart also claims that political obligation is intelligible only by referring to this principle (Hart 1955:185). After the demise of the social contract theory, the argument from fair play, which employs the principle of fair play, has been widely acknowledged as one of the most promising ways of justifying political obligation.

The logical structure of the argument from fair play can be analyzed as follows:

(F1) If someone has received benefits from a joint enterprise under certain conditions, then he has an obligation to cooperate while engaging in it.

(F2) A citizen has received benefits from the state.

(F3) Therefore, a citizen has an obligation to cooperate in the state.

It is important to understand appropriately the term "under certain conditions" in (F1) to defend the argument from fair play. A major contribution was made by John Rawls.

2. Rawlsian version

In his article, "Legal Duty and The Duty of Fair Play," Rawls argues that the moral duty to obey the law is a case of the duty of fair play and ascribes to it a formula:

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 continued 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 cooperation (Rawls 1964:122).

Here, Rawls adds two conditions to the principle. First, for the principle to apply, it is insufficient that a scheme of social cooperation ("joint enterprise," in Hart's terminology) exists; instead, it is necessary that it is just. Conversely, the principle does not hold under an unjust scheme. Second, individuals are not bound by a duty merely by receiving benefits; rather, it is necessary that they "accept" the benefits. Rawls claims that the duty to obey the

law depends on "our own voluntary acts" (Rawls 1964:123).[1] The former, the justice condition, is criticized for two reasons. First, the principle of fair play holds even in an unjust cooperative scheme such as a mafia. A lazy, uncooperative mafia member may be identified as unfair by his associates.[2] Second, in an unjust cooperative scheme, those who are allocated a fair share of benefits have an obligation to cooperate, but those who are not lack the same obligation. It implies that the principle does not depend on justice; instead, it depends on the benefits acquired from the cooperative scheme (Simmons 1979:110–114).

II. Two conditions: benefit and acceptance

It is helpful to specify the conditions for the principle of fair play to review the objections levied against it. Robert Nozick harshly criticizes the principle using the example of "a public address system" (Nozick 1974:93). Suppose that several neighbors take turns running the public address entertainment system. Nozick claims that, even if one neighbor receives the benefit of listening to the system, she is not obliged to take a turn at operating it. He gives two reasons to support this argument. First, unless the received benefits exceed the costs that an individual pays to run the system, she has no obligation to run it. Here, it is necessary to insert "the benefits outweighing costs clause" into the principle of fair play (Nozick 1974:94). Second, and more important, no individual ever owes an obligation without consenting to it. Nozick maintains that "[o]ne cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment" (Nozick 1974:95). In brief, it is objectionable and unacceptable that those upon whom some benefits are "imposed" have an obligation to cooperate. To evade the problem of being "imposed," it is necessary, according to Nozick, to incorporate a cost-benefit analysis and the need for actual consent into the principle.

1. The acceptance condition

The actual consent condition seems to turn the principle of fair play into the principle of consent: those who give consent are obliged. To rescue the principle of fair play, it is essential to weaken the condition. John Simmons defends the principle of fair play by referring to the fact that the acceptance of benefits is significantly distinct from both the receipt of benefits and the actual consent (Simmons 1979: 118–136). On the one hand, if someone merely receives the benefits from a joint enterprise, he *might not* have an obligation to cooperate;

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[1] Rawls keeps his position on the two conditions in his *A Theory of Justice* (Rawls 1971:111).
[2] While an uncooperative member is unfair, he is not unjust; he is right in not participating in illegal activities. We might even say that he has a duty not to cooperate. It implies that we have a natural duty to be just. An obligation of fair play with the justice condition collapses into a natural duty to be just. I do not discuss it further in this paper.

even if he does *not* give an actual consent to the joint enterprise, he *might* have such an obligation. On the other hand, if an individual accepts the benefits from the joint enterprise, he s*hould* have such an obligation. Simmons agrees with Rawls on the acceptance condition.

It is yet unexamined when an individual is considered to have accepted benefits. As such, it is essential to distinguish between benefits received from excludable goods and those received from non-excludable goods. The former is, metaphorically, an ambulance and the latter is a patrol car. It is easy to confirm whether an individual has accepted benefits from *excludable* goods, such as ambulance service; it is sufficient if he attempted to get the benefits. However, it is difficult to determine whether an individual has accepted benefits from *non-excludable* goods, such as local security, because he cannot avoid receiving them even if he does not want to do so. As an individual cannot voluntarily accept unavoidable benefits, unavoidability (non-excludability) entails unacceptability. If we hold the acceptance condition, we must face difficulties in dealing with non-excludable goods.

Richard Arneson objects to the acceptance condition, claiming that the mere receipt of benefits generates the duty of fair play by appealing to the self-benefit principle, which claims that "moral rules should be so constructed that, if rules are obeyed, the acts of each person benefit or harm only himself, except as he himself chooses to confer or exchange the benefits of his acts" (Arneson 1982:626).[3] The principle implies that the benefits from a joint enterprise must be shared *only* among participants, and, therefore, that those who have received the benefits have an obligation to cooperate. They have an obligation of fair play because collective goods would not be supplied without their cooperation. However, the self-benefit principle depends on an unjustified assumption that any collective good, either beneficial to a particular individual or to everyone, should be supplied, and makes an unacceptable claim that the suppliers of non-excludable goods have the right to collect a fee from all.

2. The benefit condition

As a means of rejecting the acceptance condition, George Klosko focuses on the benefit condition. Klosko believes that "the principle of fairness grounds obligations on the receipt of benefits rather than voluntary actions by recipients" (Klosko 2004:148). Once the acceptance condition is relaxed, it might be possible to defend the principle of fair play by constricting the benefit condition. Klosko maintains that an obligation to cooperate can be generated by the supply of non-excludable goods, but only if a cooperative scheme meets three conditions:

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[3] Arneson borrows the principle from Alan Gibbard.

(1) the benefits must be worth their cost, as Nozick also proposes; (2) the benefits must be presumptively beneficial; and, (3) the overall distribution of benefits and burdens in the cooperative scheme must be acceptably fair (Klosko 2004:xx, cf. 39). "Presumptively beneficial" goods in the second condition fall along the lines of Rawls's "primary goods"; that is, "things that every rational man is presumed to want" (Rawls 1999:54). However, the former is much narrower than the latter in that it is confined to public goods and indispensible to acceptable lives (Klosko 2004:40). At the core of presumptively beneficial goods lies security: national defense, law and order, and environmental protection. Since security is confined to public goods and is indispensible to acceptable lives, it is presumptively beneficial. On the other hand, classical public goods such as streets and ports are not presumptively beneficial because they are not indispensible to acceptable lives (Klosko 2004:xv–xxiv). Provisions of social security, such as aid to dependent children and old-age pensions, are not justified by the principle of fairness because they are not presumptively beneficial to everyone. In simple terms, Klosko strengthens the benefit condition to discard the acceptance condition.

However, it is far from clear why the principle of fairness does not ground obligations in cases of less important goods. There is no reason to believe that those who receive trivially valuable goods have no duty to cooperate while those who receive very valuable goods have an obligation of fair play (McDermott 2004:224). The principle of fair play has nothing to do with the magnitude of benefits; rather, it requires not taking advantage of the cooperative sacrifices of others (Simmons 2001:34). Simmons observes that presumptively beneficial goods are more likely to be freely *accepted* than are trivial goods, and that, therefore, "it is free acceptance, not presumptive value, that does the moral work" in the argument from fair play (Simmons 2001:35). Klosko's argument does *not*, even if successful in its conclusion, rely on the principle of fair play.

Thus understood, the principle of fair play does not appeal to the *balance* between benefits and costs to each individual. It is different from the principle of beneficiary pays. Rather, it concentrates on the *relation* among participants in a social cooperative scheme. It entails that no one individual should take advantage of cooperators. This is why the principle of fair play rejects "free riders." Free riders do not pay a fair share to use public transportation and, therefore, play unfairly, mainly by evading their share of the burden and taking advantage of other passengers.

3. Fairness and equality

M. B. E. Smith indicates that the principle of fair play does not establish an obligation to obey the law (Smith 1973:81–83). The obligation of fair play regulates our actions "only when some benefit or harm turn whether he obeys." Conversely, when an individual's actions do not affect others, he does not owe any obligation. Obedience to the law often benefits no one and disobedience to the law harms no one. Richard Dagger objects to Smith by stating the following:

What Smith overlooks is the consideration that itself underlies the notion of fairness: the conviction that everyone involved in a practice is to be treated as an equal. This holds even when the interests of the parties involved are not affected, directly or indirectly, for one may be *wronged* (deceived, treated unfairly) without being *harmed*. (Dagger 1997:71, Takikawa's emphasis)

The point is that at the core of the principle of fairness lies the idea of equality. Cooperators are treated unfairly in a social scheme that allows free riders—not because they are beneficially disadvantaged, but because they are not recognized the same moral status as free riders. Equality, not benefit, is the moral essence of the principle of fair play. The argument from fair play, therefore, insists that we have a duty to obey the law not because the law supplies public utility, but because the law combines with the ideal of equality (Kramer 1999:280). When Dworkin maintains that the correct understanding of the principle of fair play is a necessary condition for political legitimacy, he finds the relation between fairness and equal treatment (Dworkin 1986:195).

 A liberal interpretation of equality, specifically, an understanding that treating everyone as an equal implies treating everyone as an autonomous individual, requires providing everyone with a veto over participating in a joint enterprise. Thus, it is necessary to add the acceptance condition to the principle of fair play. The benefit condition is insufficient to protect an autonomous individual because it ignores each individual's estimate and allows for a paternalistic evaluation of the benefits provided by a cooperative scheme. As such, it seems necessary to revise the principle of fair play (F1) to the following:

 (F1') If someone has accepted benefits from a joint enterprise, then he has an obligation to cooperate in it.

III. Three in a Boat

1. The state of nature

To evaluate the validity of (F1'), it is necessary to examine the state of nature. A classical answer to the question of political obligation is the social contract theory: people settled a social contract to avoid inconveniences in the state of nature. One common approach is to depict the state of nature as the prisoner's dilemma, which is, as Hobbes described it, the "war of every man against every man (*bellum omnium contra omnes*)" (Hobbes 1642: XIII, p. 90). Recently, however, several authors have held that a better approach is to depict the dilemma as the stag hunt, similar to what Rousseau once illustrated (Skyrms 2004, Pettit 2008:113).[4] Hume also has the stag hunt when saying that "two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other" (Hume 1639–1640:3.2.2, 315). To examine the principle of fair play, it is necessary to change Hume's boat, a two-person stag hunt, into a three-person stag hunt. This revised game is referred to as "three-in-a-boat" (Skyrms 2004:117). The boat runs when two rowers row. All of them (x, y, and z) prefer that the boat runs, but they all prefer a leisurely ride to actually rowing. Three-in-a-boat has the following payoff structure[5]:

Three-in-a-boat

when z Cooperates (rows)

$x \diagdown y$	Cooperate	Defect
Cooperate	3,3,3	2,6,2
Defect	6,2,2	1,0,0

when z Defects (does not row)

$x \diagdown y$	Cooperate	Defect
Cooperate	2,2,6	0,1,1
Defect	1,0,0	1,1,1

This game has four Nash equilibria: (D,C,C), (C,D,C), (C,C,D), and (D,D,D). The last one indicates that no one rows, and then the boat does not run. It is important to address the former three in which two out of three rows and one of them does not row, and then the boat advances. Any of them is an equilibrium because (1) if one of the two rowers stop rowing while holding the others' strategies fixed, the boats does not run, and then her utility drops from 2 to 1; (2) if a non-cooperator rows while holding the others' strategies fixed, the boat still runs, but her utility drops from 6 to 3. Moreover, all of them are Pareto efficient, i.e., no

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[4] In his *Discours sur l'Origine et les Fondements de l'Inégalité parmi les Hommes*, Rousseau wrote, "if it was a matter of hunting a deer, everyone well realized that he must remain faithful to his post; but if a hare happened to pass within reach of one of them, we cannot doubt that he would have gone off in pursuit of it without scruple." (Rousseau 1755:96–97)

[5] I make such a slight change in 'Battle of the Rowers Game' (Almendares and Landa 2007:516) that the three equilibria which are Pareto efficient are also Kardor-Hicks efficient.

one is better off without making someone else worse off; they are also Kaldor-Hicks efficient, i.e., everyone is better off if a better-off person would compensate worse-off persons. Finally, universal cooperation, i.e., (C, C, C), is neither a Nash equilibrium nor efficient in both the Pareto and Kaldor-Hicks criteria. There is no reason to require the slacker to cooperate in rowing.

2. Free riders play fair

Three-in-a-boat demonstrates that it is possible to reach an efficient equilibrium even while some individuals are "free riders." Free riders do not threaten an efficient order.[6] Universal cooperation is unnecessary; large scale cooperation is sufficient.

It is important to note that when noncooperation is distributed through some fair procedure, free riders must be considered fair. Conscription serves as an example of this (Rawls 1971:380). A universal draft, which requires everyone to have an equal burden of national defense, might be considered the fairest. However, a partial draft, which selects some individuals through fair procedures such as rotation or a lottery, is as fair as a universal draft. In addition, when volunteers give informed consent, a voluntary service system is also fair. Those who do not join the armed forces can be viewed as *fair free riders*. It might, perhaps, seem that free riders play unfairly, but they are made fair through a fair procedure; thus, they never contradict the idea of equality.

It is worth noting that "prior occupation," in addition to rotation, lottery, and informed consent, sometimes makes the actions of free riders fair. To explain this, it is helpful to slightly modify the three-in-a-boat example so that it has a free rider seat. Anyone taking the seat is exempted from an obligation to row and may enjoy a free ride. Suppose that *x* occupies the seat first. There is no element of unfairness in doing so. Those who are prior in time have a stronger right (*qui prior tempore potior iure*). Then, the other two, i.e., *y* and *z*, arrive. They willingly row because they prefer that the boat moves. As shown in this example, a free rider can be understood as an individual who occupies a special position that is free of the obligation to cooperate. When someone occupies such a position prior to everyone else, he does not cooperate, but may benefit from the cooperative scheme, whereas everyone else has obligations to cooperate. It is true that not all cases of occupation can be justified, but occupation under certain conditions, such as the Lockean provisos, can be defended.[7]

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[6] Note that when the imitation probability is high and the discount rate is low, it is an evolutionarily stable strategy for all to defect (D, D, D) (Skyrms 2004:120–122).

[7] Kant writes that "the only condition under which appropriation (*apprehensio*) as the beginning of holding a corporeal thing in space (*possessionis physicae*) conforms with the law of everyone's external freedom (hence *a prori*) is that of priority of time, only in so far as it is the *first* appropriation (*prior apprehensio*), which is an act

The circumstances of law are similar to the structure of three-in-a-boat. A legal system is often regarded as a seamless web, but it is not a strained web; it has a "slack." It works well even where a number of crimes are committed. Universal obedience is unnecessary; large scale obedience is sufficient. This does not mean that those who disobey the law rightly occupy a special position that is free of the obligation to obey the law. Rather, they are to be blamed not because they are free riders against the principle of fair play, but because they cannot justify their disobedience by appealing to any justifiable procedures such as rotation, lottery, or prior occupation. The conclusion is that free riders are not unfair, but instead violate a law with no excuses justified by procedural rules. Their moral fault lies not in unfairness but in the violation of a rule.

My argument should contrast with Rawls's objection against the principle of fair play. In *A Theory of Justice*, Rawls rejects the argument from fair play and writes that "there is, I believe, no political obligation, strictly speaking, for citizens generally" (Rawls 1971:114). He rather develops a natural duty of justice as an argument for political obligation (Rawls 1971:115). Rawls suggests two reasons for this change in his position (Rawls 1971:336–337). First, since individuals are born into a political system, they do not have, in an appropriate sense, voluntarily accepted its benefits. Second, and more important, the principle of fair play tends to deteriorate the instability of a political system. It would complicate the assurance problem because it merely justifies a conditional obligation—you should obey the law *only when* almost everyone else follows it. Three-in-a-boat is accurately a three-person hybrid of the prisoner's dilemma, the chicken, and the stag hunt, often called the "assurance game" (Skyrms 2004:120). Rawls focuses on a stag hunt aspect of the game and demonstrates that it may reach a social dilemma: a Pareto inefficient equilibrium, (D, D, D). He concludes that the principle of fair play does not solve the dilemma. My argument concentrates on a chicken aspect and indicates that it may reach an efficient equilibrium, (C, C, D), (C, D, C), or (D, C, C). It shows that a social dilemma never exists even where some ride free and, in doing so, contravene the principle of fair play. The most promising version of the principle of fair play (F1') is therefore false; individuals do not owe an obligation of fair play even when they have accepted benefits from a social cooperative scheme.

of voluntary power. . . . Such a unilateral action as appropriation can be justified only when it is contained in the *a priori* united absolutely commanding will of all" (Kant 1797:VI.263). That is, prior occupation is justified when it is in accord with a general will.

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