

Punishment as Fair Play

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Abstract This article defends the fair-play theory of legal punishment against three objections. The first, the *irrelevance objection*, is the long-standing complaint that fair play fails to capture what it is about crimes that makes criminals deserving of punishment; the others are the recently raised *false-equivalence* and *lacks-integration* objections. In response, I sketch an account of fair-play theory that is grounded in a conception of the political order as a *meta-cooperative practice*—a conception that falls somewhere between contractual and communitarian conceptions—and draw on this account to show how the theory can overcome the objections.

Keywords Communitarianism · Contractualism · Cooperative practice · Fair play · Justification · Punishment

Introduction

In 1993 I published an essay, ‘Playing Fair with Punishment’, in which I defended the fair-play theory of punishment against various objections that had been lodged against it (Dagger 1993). My aim in that essay was to persuade punishment theorists that they were too hasty in their rejection—or in some cases abandonment—of the theory; failing that, I hoped at least ‘to restore the principle of fair play to a central place in discussions of the justification of punishment’. The essay did not go unnoticed, but it has not had the desired effect. It does seem to have inspired several philosophers to take a closer look at fair play as a justification for legal punishment, but that closer look has seldom won them over. But neither have their criticisms of

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my arguments convinced me that fair-play theory is, at best, an interesting and instructive failure. Nor do I think that this is sheer stubbornness on my part, for I am not the only one who remains committed to a fairness-based theory of punishment.¹ I conclude, then, that another attempt to vindicate fair play as the grounding of legal punishment is in order.

In ‘Playing Fair with Punishment’ I argued that every crime is in some sense a crime of unfairness, and I attempted to overcome six objections to the fair-play account of punishment. I shall not address all six objections again in this article, however, but only the one that seems most decisive to the critics. This is the complaint, as R. A. Duff states it, that fair play ‘offers a distorted picture of the punishment-deserving character of crime’ (Duff 2001, p. 22). In addition, I shall respond to two new objections that have been directed against the way in which I elaborated fair play as the justification for punishment. In order to overcome these three objections, I shall need to provide a richer and more clearly *political* explanation of how the principle of fair play applies to punishment under law than I did in my earlier essay. To set the stage properly, though, I shall have to begin by restating the connection I drew in 1993 between punishment and fair play.

The Idea of Fair Play

Although intimations may be found in earlier writers, the principle of fair play received its first clear formulations in the middle 1900s from two of the most influential legal and political philosophers of the twentieth century, H. L. A. Hart and John Rawls. According to Hart, ‘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 1970, p. 70). What Hart called ‘mutuality of restrictions’, Rawls a few years later designated the principle of fair play. ‘Suppose’, he said,

there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating (Rawls 1964, pp. 9–10).

¹ See, e.g., Sher (1997) in which he defends a ‘variant of the familiar view that punishment is deserved when, and because, it rectifies an unfair distribution of benefits and burdens’—a variant he had advanced in Sher (1987). See also Finnis (1999, esp. pp. 97–103).

In these early formulations, Hart and Rawls spoke of rights, duties, and justice, but not of punishment. Their primary concern was with the principle of fair play as a grounding for political obligation, understood as the general obligation to obey the law. By a somewhat different route, however, Herbert Morris drew a connection between the fair distribution of benefits and burdens, on the one hand, and the justification of legal punishment, on the other. As he argued in his influential essay, 'Persons and Punishment,' 'A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased.... [H]e owes something to others, for he has something that does not rightfully belong to him. Justice—that is, punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt' (Morris 1968, p. 478).

Underpinning all three of these statements—Hart's, Rawls's, and Morris's—is the idea that society, or the political or legal order, is a cooperative endeavor. That is, the principle of fair play only applies to those who are engaged in what Hart called a 'joint enterprise' and Rawls a 'scheme of cooperation.' Worries about fairness and unfairness may arise in other contexts, as they do when someone complains that it is not fair for some people to enjoy natural advantages, such as keen eyesight and a healthy constitution, while others are born with crippling disabilities. But fair *play* is a consideration that grows out of cooperative ventures, enterprises, or practices, in which the participants rely on one another and must make some sacrifice or bear some burden if the cooperation is to prove beneficial. In other words, cooperative enterprises produce public goods, and complaints of *unfair* play are likely to be heard when some people try to be free riders who enjoy the benefits of the cooperative efforts of others without bearing their share of the sacrifice or burden.

That is why the attempt to ground political obligation or punishment on the principle of fair play begins by conceiving of society—or the political or legal order—as a cooperative endeavor secured by coercion. When it approaches the ideal of a cooperative endeavor, the political order enables us to work together for common purposes and to pursue in peace our private interests; but we can do these things only when others, through their cooperation, help to maintain this order. We must therefore have rules or conventions of some sort, for we need to know what the required acts of cooperation are, and we must see to it that the participants generally do as the rules require—that is, that they do their cooperative part. Indeed, in any but the smallest and most closely knit societies, simply having known procedures for making, enforcing, and interpreting the rules will be perhaps the most valuable of all public goods. For it is the political order, understood to include the rule of law, that makes it possible for people to go about their lives with a measure of security, pursuing various other goods, private as well as public, within its cooperative framework. Everyone who profits from others' obedience to the law is thus under an obligation to reciprocate by obeying the law in turn. As Jeffrie Murphy once put the point, 'in order to enjoy the benefits that a legal system makes possible, each man must be prepared to make an important sacrifice—namely, the sacrifice of obeying the law even when he does not desire to do so. Each man calls on others to do this,

and it is only just or fair that he bear a comparable burden when his turn comes' (Murphy 1971, p. 166).²

If a society is truly fortunate, little effort will be required to ensure widespread compliance with its laws, for the members will act out of a desire to do their fair share of the cooperative work. Such good fortune is not to be relied upon, however. Fairness often demands that we do things for the sake of cooperation that we find unpleasant or burdensome, such as paying taxes, obeying traffic laws, and respecting the property of others. The temptation to be a free rider is often strong, and steps must therefore be taken to secure the cooperative order against this temptation. Enforcing the laws is one of these steps, and punishment of those who break the laws is another. In Hart's words, "'Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not.... [W]hat reason demands is *voluntary* cooperation in a *coercive* system" (Hart 1994, p. 198).

Punishment is justified, then, when the political order may be reasonably regarded as a cooperative enterprise. When it can, and when other things are equal, the persons who disobey the law fail to meet their obligations to the cooperating members of society. It is in this sense that every crime is a crime of unfairness, whatever else it may be. Criminals act unfairly when they take advantage of the opportunities the legal order affords them without contributing to the preservation of that order. In doing so, they upset the balance between benefits and burdens that a cooperative practice requires, and they make themselves liable to punishment.

Such, in brief, is the argument for punishment as a kind of fair play that I distilled from the writings of Hart, Rawls, Morris, Murphy, and others. I then went on to respond, as I have said, to six objections that had been brought against this justification of punishment. For present purposes, two points in these responses seem to be of primary importance. The first is my defense of the claim that every crime is a crime of unfairness, and the second is my appeal to what David Boonin has called 'the general compliance response' (Boonin 2008, §3.3.2.1).³

In defending the claim that every crime is a crime of unfairness, I recognized that critics of the fair-play theory took this claim to betray the fundamental defect of the theory. Almost everyone acknowledges an intuitive or initial plausibility to the idea that criminals take unfair advantage of the law-abiding members of society; and retributivists at least agree that this unfairness helps to justify the punishment of those who commit *mala prohibita*, such as driving on the wrong side of the road or failing to pay taxes. But many crimes do not fall into this category, as the critics have noted, including those we ordinarily take to be the most serious offenses. Rape, murder, and other forms of assault are criminally wrong in ways that have nothing to do with fairness. R. A. Duff put this objection forcefully when he wrote, in *Trials and Punishments*, 'Such talk of the criminal's unfair advantage implies that obedience to the law is a burden for us all: but is this true of [crimes that are] *mala*

² For Murphy's subsequent doubts about the adequacy of the fair-play argument, see Murphy (1985, pp. 6–7); and Murphy (2007).

³ At the time of this writing, Boonin's book was not yet in print. I am grateful to him for allowing me to cite from the "CUP version" of his book as it appeared on his website (<http://stripe.colorado.edu/~boonind>) in February 2008.

in se? Surely many of us do not find it a *burden* to obey the laws against murder and rape, or need to *restrain* ourselves from such crimes: how then does the murderer or rapist gain an unfair advantage over the rest of us, by evading a burden of self-restraint which we accept' (Duff 1986, p. 213)?

My response to this objection was, and continues to be, that unfairness is an aspect or feature of all crimes, including crimes that involve much more, and much worse, than taking unfair advantage of the law-abiding members of society. Rape, murder, and assault are not merely crimes of unfairness. If they were, they would be on a par with cheating on one's taxes or littering public property, and punishable to the same extent. Nevertheless, the murderer and the tax cheater are on a par in that both have committed crimes of unfairness, and that is what makes them subject to legal punishment—albeit not to the same punishment. This, however, is at most a partial response to the objection, for the critic may go on to say, with Duff, that there is no unfair advantage at all in most cases of murder, rape, and other *mala in se* crimes. For if most of us do not find laws against murder or rape burdensome restraints on our conduct, how is it that murderers and rapists take unfair advantage of us when they refuse to bear those burdens themselves?

At this point my argument relied, and continues to rely, on what Boonin calls 'general compliance.' That is, my claim is that the principle of fair play requires us to attend to the benefits and burdens involved in a *system* of laws, not in the benefits and burdens of obedience to particular laws, such as those against robbery, murder, or rape. On the fair-play account, the benefits and burdens in question are those that follow from obedience to the laws of a cooperative *practice*—in this case, the rule of law in a reasonably just society. When these circumstances obtain, everyone in the practice is free to act, and to enjoy his or her rights, with a security that would be otherwise impossible. This is a benefit everyone in the practice shares; but everyone also shares the burden of self-restraint, which in this case includes obeying laws that he or she would rather disobey. Everyone thus receives the same benefits—freedom and security under law—and bears the same burden—obedience to the law when obedience requires self-restraint. Rights and obligations are thus in balance, for everyone in the practice has a right to the cooperation of the others and an obligation to cooperate in turn.

I did not, and do not, mean to say that it is always wrong to disobey the law. In some cases there may be good, and even public-spirited, reasons for disobedience. But there is a fair-play obligation to obey the law of a reasonably just society, even when that obligation may be overridden by other compelling considerations. It is a general obligation, moreover, for it is an obligation to obey the law as such, and the compliance it requires is general compliance. Every crime is *at least* a crime of unfairness, then, because every crime takes unfair advantage, in this general sense, of the cooperating members of society.

Three Objections

With this background established, let me now turn to the three objections, noted earlier, that have been brought against my arguments in 'Playing Fair with

Punishment.’ One of these is the old but still troubling objection that, despite my efforts (and others’), fair play fails to capture what it is about crimes that makes them deserving of punishment. We may call this *the irrelevance objection*. The second objection is that my general compliance response to the first objection is unsatisfactory because it treats all crimes as equivalent offenses. I shall refer to this as the *false-equivalence objection*. The third is that fair-play theory *lacks integration* because it “does not have the resources... to integrate an assurance-based explanation of ‘why the system of punishment?’ and a ‘benefit and burden’ based account of individual punishment” (Matravers 2000, p. 69, n. 41). Responding to these complaints will require me to develop the richer and more clearly *political* account of the fair-play theory that I promised in the introduction. I believe, though, that I can address the second objection on narrower grounds, and do so in a way that will lead into that political account of the argument from fair play.

According to David Boonin, the problem with the general compliance response is that it entails not only that ‘all offenders are free riders’; it ‘also entails that all offenders are *equally* free riders’ (Boonin 2008, p. 196). That being so, fair-play theory fails to justify ‘aiming more punishment at the murderer than at the tax evader’ (Boonin 2008, p. 198). To be sure, Boonin acknowledges my argument that the murderer is in effect guilty of two offenses—that is, the crime of unfairness and an offense against (at least) the person he has murdered—while the tax evader is guilty only of one. On this argument, the principle of fair play explains why the state is justified in punishing law breakers, but it leaves open the possibility that considerations other than fairness may be invoked when determining how and how severely to punish offenders—considerations that may appeal to the value of deterring would-be offenders or reforming those who have offended, for example. Boonin acknowledges this argument, as I have said, but he finds it unsatisfactory. Here it is worth quoting him at length.

Dagger suggests that the problem is only that the principle of fairness ‘must be supplemented by other considerations—for example, deterrence, reform, moral education, restitution—when it is time to decide how exactly to punish wrongdoers.’ But at the very same time, he insists that ‘none of these other considerations provides a satisfactory account of society’s right to punish. For that we must rely on the principle of fair play’ (Dagger 1993, p. 484).

But if the fact that punishing a murderer will deter others from committing murder does not suffice to justify punishing him in the first place, then the fact that punishing a murderer more than a tax evader will deter others from committing these offenses cannot justify punishing the murderer more than the tax evader. If the only thing that gives the state the right to punish is the state’s right to prevent offenders from enjoying an unfair benefit, after all, then the state can only have the right to punish a particular offender up to the point that that particular offender’s unfair benefit has been removed. If, as the general compliance response would have it, the unfair benefit that every offender enjoys is precisely the same, then the state

only has the right to punish every offender to the same degree (Boonin 2008, p. 198).⁴

This false-equivalence objection is potentially devastating to fair-play theories, or at least to those that appeal to general compliance, as I have done. But it rests, I think, on a *non sequitur*. One can hold, as I do, that the state's right to punish is grounded in fair play *without concluding* that the agents of the state can consider nothing but unfair benefits when deciding how or how much to punish offenders. Fair play is more than a matter of punishing fairly, and the state's job is not only to punish offenders, but also to preserve the cooperative practice. It has the authority, to return to Hart's words, to use *sanctions* in order to guarantee that 'those who would voluntarily obey shall not be sacrificed to those who would not.' In carrying out this responsibility, the agents of the state will find it necessary to provide more active protection to some people than to others, even though it treats them equally as members of the cooperative endeavor; and they will also find it necessary to take more vigorous measures against some offenders and would-be offenders than against others, even though its aim is to provide equal protection to all cooperating members of the society. By the same reasoning, the agents of the state will be justified, when assigning punishments, to take account not only of the fact that law breakers have taken unfair advantage of others, but also of the steps that ought to be taken to preserve the cooperative practice. If deterrence, reform, moral education, restitution or other considerations seem apposite in this regard, then the agents of the state are justified in taking them into account.

This reply is enough, I think, to meet Boonin's objection to general-compliance versions of fair-play theory. Yet it obviously draws on a notion of the state as more than an umpire charged with determining what counts as fair and unfair play. It draws, that is, on a richer and more *political* account of the legal or political order as a cooperative venture than I supplied in 'Playing Fair with Punishment.' It is time, then, to turn directly to that account, and to employ it in response to false-equivalence and the two remaining objections.

Contracts and Communities

To develop this account, it may be helpful to begin by distinguishing it from two other ways of conceiving of the political and legal order. On the first conception, political societies are essentially voluntary in nature, and their members are related to one another as the parties joined together by a contract. That is, the parties form or enter into the society in order to advance their interests, and they acquire obligations to one another when they do so. The political society thus rests on the consent of its members as the classical social-contract theorists held, even if their consent must be understood to be given tacitly or hypothetically.⁵

⁴ See also Matravers (2000, p. 62): 'fair play theory risks reducing all criminal actions to the same act: the non-mediation of one's self-interest by the duty of fair play.'

⁵ For the purposes of this essay, I do not think it necessary to distinguish between so-called contractarian and contractualist versions of social-contract theory, as has been done in recent years.

The second conception of the political and legal order differs from the first in holding that political societies resemble families or traditional communities much more than they do voluntary associations. On this communitarian view, membership in and identification with the society is what counts, even when membership is not altogether voluntary. We do not choose the families into which we are born, the argument goes, yet we are members of families nevertheless, and that membership entails obligations to our families. In much the same way, we are born into communities or societies, and we have obligations to their members, whether we *choose* to undertake them or not. Nor is this to say that those obligations are forced or imposed on us in the way that unfortunate British (and other) subjects of earlier times were sometimes *impressed* into military service. As Michael Hardimon argues,

the metaphor of impressment is particularly ill-suited to the roles associated with the non-contractual role obligations we are inclined to take seriously. It would simply be wrong to say that we are impressed into the roles of sons or daughters, wrong to say that we are impressed into the roles of brothers and sisters, and wrong to say that we are impressed into the role of citizen. We do not, it is true, choose these roles, but we are not impressed into them either. They are roles into which we are born (Hardimon 1994, p. 347).

The fair-play theory rests on a conception of the political order that falls between the contractarian and the communitarian conceptions. This claim may come as a surprise to some, for critics sometimes take the fair-play theorists' appeal to the mutual benefits of a cooperative practice to indicate that practices of this kind are essentially contractual. Matt Matravers, for example, holds that 'fair play theory combines a contract-based understanding of social co-operation and a retributive account of punishment' (Matravers 2000, p. 55). In discussing Rawls's duty of fair play, Phillip Montague states that political obligations 'are requirements of fair play that arise when people *voluntarily enter into agreements* to establish mutually beneficial and just schemes of social cooperation' (Montague 1995, p. 85). He then goes on to raise the familiar *irrelevance* objection that the most serious wrongdoers do indeed 'wrong those whom they assault or murder, but not by treating them unfairly.' For 'even if some acts of violence could be shown to be immoral partly by virtue of being unfair in the relevant sense, such acts would be very rare, because people who perform acts of murder, assault, and so on typically are *not parties to agreements* in which they commit themselves to refrain from performing such acts. In the absence of such agreements, occasions for acting unfairly do not arise' (Montague 1995, p. 85).⁶

⁶ In a reference to 'Playing Fair with Punishment', Montague brings me into the complaint: 'Dagger provides no reason at all to believe that many (or any) murderers, rapists, and so on, act contrary to agreements when they commit their crimes.' He also says, 'Nor does [Dagger] argue that, even if some seriously harmful acts are also unfair to those who are harmed, such acts should be punished because they are unfair rather than because they are harmful' (Montague 1995, p. 166, n. 14). My point, however, was and is that the state has the right to punish law breakers because it is the state's responsibility to preserve the political or legal order as a cooperative enterprise. Other things equal, law breaking should be punished for its unfairness even when it is not obviously harmful.

This criticism, however, misses its target. Fair-play theorists do not rely on a conception of the political order as a voluntary agreement, nor do they believe that ‘occasions for acting unfairly’ only arise when a person has agreed or consented to enter into a mutually beneficial scheme of social cooperation. On the contrary, such obligations are more likely to arise when people simply find themselves participating in a cooperative practice, never having thought of whether they should or should not enter into it. In this respect, the fair-play view is closer to the membership or communitarian account in holding that the obligations of membership are neither fully voluntary, as in a contract, nor wholly involuntary, as in the case of the impressed sailor. But neither are they exactly like the obligations that flow from membership in a family or traditional community. To conceive of the political order as a cooperative practice is, as I have said, to take a stand between the contractarian and communitarian views. Ronald Dworkin indicates as much in his own defense of the communitarian position. According to Dworkin,

the best defense of political legitimacy—the right of a political community to treat its members as having obligations in virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice *or obligations of fair play that might hold among strangers...* but in the more fertile ground of fraternity, community, and their attendant obligations (Dworkin 1986, p. 206).

In short, the fair-play conception of the political order as a cooperative practice stands between the contractarian and communitarian positions because it does not rest on strictly voluntary agreement, on the one hand, and because it requires more than mere membership, on the other. It will no doubt be easier to secure obedience to the law and other forms of cooperation when the people engaged in a joint enterprise perceive themselves as members of an extended family or community, and fair-play theorists may well want to foster such a sense of membership or identity. But it is not necessary to their theory that they do so. What is necessary is that the people engaged in social cooperation under law—or at least a good many of them—understand that the benefits that they and others derive from this cooperation require them, as a matter of fairness, to do their part, even when it is unpleasant to do so, and even when those to whom they owe their obligations of fair play are for the most part strangers.

To be sure, communitarians may not be willing to concede that the fair-play conception of the political order is as different from their conception as I have claimed. To them it may appear that the appeal to fair play will have force or ‘bite’ only when it rests on some pre-existing sense of community; for without that sense, how are we to see others as *fellow* participants in a cooperative practice?⁷ Fair play presupposes community, in other words, but once we recognize this point, we must also recognize that it is community or fellow feeling that does the real work of justifying obedience to the law and punishment of those who do not obey. To see another as a fellow participant in a cooperative practice is *already* to see her as someone whom I should not murder, rape, or otherwise attack or improperly exploit.

⁷ I owe this point to Antony Duff.

The appeal to fair play is simply a way of expressing this underlying reliance on community.

We may concede the strengthening force of community, however, without conceding that the fair-play conception of the political order simply reduces to a form of communitarianism. I say this for two reasons. First, there is something distinctive about fair play that the appeal to community does not capture. This distinctive element becomes evident when we consider that appeals to fair play will be otiose in an ideal community—that is, one in which a truly powerful sense of fellowship or solidarity permeates all relationships among its members—for in an ideal community everyone will cheerfully try to promote the common good. That such an ideal is seldom if ever attained is no doubt owing to the tug of self-interest. Even strong communities have to worry about cheaters and free riders, and the force of the appeal to fair play owes as much to that worry as it does to the sense of fellowship or community.

The second reason for distinguishing the fair-play account from the communitarian is that fair play continues to hold even as the sense of community weakens. Again, it is important to note that the sense of community may help people to perceive that they are involved in a cooperative practice of some sort, and that perception will almost certainly reinforce their commitment to the practice. But that is not to reduce fair play to the sense of community—not unless we simply define ‘community’ as involvement in a cooperative practice. If we take community to entail direct or many-sided relationships among people, however, so that you and I are not members of the same community unless, say, we live in the same town, know some of the same people, and are subject to the same laws, then it becomes clear that we can have duties of fair play to those who do not share membership in a community with us. That is why I say that fair play continues to hold even as the sense of community weakens, as it surely has weakened in the modern state. The millions or hundreds of millions of culturally diverse people living hundreds or thousands of miles apart in such a state may feel little sense of community with one another, but they may nevertheless owe a duty of fair play to one another to obey the law.

This is to say that the conception of the political order as a cooperative practice differs from the communitarian conception in its emphasis on the rule of law. Families and traditional communities have their customs, rules, and norms, of course, but they typically do not regard themselves as rule-governed enterprises. What counts most for them are the ties of affection and solidarity. Cooperative practices, however, are by their nature rule-governed—joint enterprises according to rules, in Hart’s terms. When the practices involve a small number of people, the rules are likely to be simple and unspoken—perhaps nothing more than the rule that ‘you do your part, I’ll do mine, and no shirking’. As cooperative enterprises expand, however, the rules will need to be more explicit and elaborate, so that we know what counts as your part of the cooperative effort and what counts as mine. When the cooperative practice is a political order, moreover, it will be necessary to have ways not only of stating and enforcing the rules, but also of making and unmaking them to adapt to the needs of the practice. The rules will now be laws, in other words, and this rule-governed enterprise will be a political order under the rule of law.

Another way to make this point is to say that the political order is a kind of *super- or meta-cooperative* practice. That is, as I stated earlier, the political order provides a collective good—cooperation under the rule of law—that makes it possible for people to pursue with some degree of peace and security other goods, including other, narrower public or collective goods. The cooperative practice of parents who find themselves taking turns helping at the local school, for example, would be much more difficult, if not impossible, to sustain in the absence of a political order operating according to the rule of law. Furthermore, because the political order is a meta-practice, reliance on the rule of law becomes absolutely essential. Not only do the terms of fair cooperation need to be promulgated and cooperation itself encouraged, but these terms will themselves become matters of debate. ‘What laws do we need?’ thus becomes a vital question, as do the related questions of who should make these laws, who should enforce them, and who should apply and interpret them. There is also, finally, the question of how to hold those who make, enforce, and apply the laws accountable to the people—that is, to those who have a right to equal respect and treatment as cooperating participants in the political order.

This is, of course, the merest sketch of what the rule of law entails and how that rule is central to the fair-play conception of the political order as a cooperative practice. Yet it will be enough, I hope, to indicate how this conception of the political order makes it possible to respond to the objections raised against the fair-play theory of punishment. Let me now turn directly to that task.

Remaining Objections

Of the two objections that remain to be discussed, I shall begin with the older, more common, and more fundamental one. This is *the irrelevance objection*, or the complaint, in Duff’s words, that fair-play theory simply fails to capture ‘the punishment-deserving character of crime’ (Duff 2001, p. 22).⁸ What I said in ‘Playing Fair with Punishment’ obviously was not enough to overcome or even deflect this objection, so let us see if I can do better now with the aid of the richer and more political conception of the cooperative practice set out above.

Let me begin with the reminder that the worry here concerns the relevance of fair play to *mala in se* crimes, not to those that are *mala prohibita*. As one of my more sympathetic commentators says, ‘the fair play conception of crime can be successfully defended... as an adequate account of the wrongfulness inherent in *malum prohibitum* offenses, which covers a wide range of white collar and other regulatory offenses that typically govern the conduct of activities that are not inherently immoral, perhaps the paradigmatic example being tax evasion’ (Morison 2005, p. 90, n. 160). But tax evasion, as we have seen, is very different from murder, rape, and assault, and those who are willing to concede that tax evasion is a crime of unfairness may well deny that unfairness plays any part in the wrongfulness of these acts of violence. In cases such as these, fair play is simply irrelevant.

⁸ As we have seen, Boonin and Montague raise much the same objection, as does Matravers (2000, p. 64).

I have two arguments in response to this charge, one of which appeals directly and the other indirectly to considerations of fair play. The direct argument takes this form. To conceive of the political order as a cooperative practice is to endorse the claim that those who participate in that practice should enjoy an equal standing under the rule of law. All should enjoy the benefits the rule of law affords, and all should bear their share of the burdens that rule places on them. On the fair-play account, those who disobey the law take unfair advantage, *ceteris paribus*, of the law-abiding participants. Their unfair advantage disturbs ‘the equilibrium of benefits and burdens,’ as Morris says, and matters ‘are not even’ until that advantage is ‘erased,’ as punishing the lawbreakers aims to do. By using terms such as ‘even’ and ‘equilibrium,’ Morris suggests that criminal disobedience violates the equal standing of the members of the political order—an equal standing respected by those who play fair. That is why all crimes are crimes of unfairness. But considerations of unfairness can also justify the conclusion that some offenses are more serious violations of equal standing and fair play than others. The tax evader takes unfair advantage of many people—millions of them in many cases—but her offense typically does not make it difficult for them to continue doing their part in the cooperative practice. With the rapist, the murderer, and the batterer, however, the offender has done something that makes it difficult or even impossible for his victim to contribute further to the ongoing cooperation. He has offended against the interests and integrity of his victim, to be sure, but he has also offended against the requirements of a society based on fair play, and his offense is thus a more serious crime of unfairness than the tax evader’s.

If this direct response seems to be unpersuasive or merely ad hoc, it may help to consider simple cases of unfairness in a sport. In baseball, for example, there are many ways in which a player may ‘bend’ the rules in order to gain an unfair advantage, as when a pitcher applies a substance to the baseball that makes it more difficult for the batter to hit his pitches. But there are other violations of fair play in the game that directly threaten the health and well-being of other players, as when the pitcher throws the ball at the batter with the intention of intimidating or even injuring him. In both of these cases the pitcher violates fair play, but one violation is considerably more serious—and warrants a more severe punishment—than the other. The same is true of *mala in se* crimes, I contend, in the political order.⁹

It is one thing, though, to demonstrate that some instances of unfairness are more serious than others, and quite another to conclude that this demonstration is enough to dispose of the irrelevance objection. For the critic may still insist that some crimes are simply not crimes of unfairness—especially not those we typically regard as the most serious. To return to the baseball example, the critic may point out that a pitcher who throws a live grenade at the batter is doing something more heinous than one who throws a baseball at him—something that is simply not captured by

⁹ In this way the direct response provides an answer to Matravers’ complaint that ‘in focusing [as fair-play theory does] on the restoration of some state of affairs the important retributive connection between the act of the offender and that offender’s punishment is threatened’ (Matravers 2000, pp. 60–61). As I see it, restoring the proper state of affairs—a state of fair play—requires that the offender’s act be connected to his or her punishment, at least in the sense that some offenses are more serious violations of fair play than others.

reference to degrees of unfairness.¹⁰ My direct response to the irrelevance objection is therefore unsatisfactory.

I am willing to admit that the direct response, with its reference to degrees of unfairness, does not capture everything we want to know about the nature of crime and the kinds of punishment that ought to be assigned to different crimes. Nevertheless, I believe that it tells us something of value about these matters. Consider, for example, the case of the American figure skaters, Nancy Kerrigan and Tonya Harding, who were competing for a place on the U.S. Olympic team in 1994. Harding entered into a conspiracy to remove Kerrigan from the competition by attacking her and injuring one of her legs. In so far as competitive figure skating may be considered a cooperative enterprise conducted according to rules, it seems to me that Harding was guilty of a violation of fair play, and a much more serious violation than, say, shining a light in her rival's eyes while skating. As such, she deserved a more serious punishment, such as the life-long ban from competition subsequently imposed on Harding. The critic of the fair-play theory may agree, but will quickly point out that the life-long ban is not the same as the punishment imposed on Harding and her associates for their criminal assault on Kerrigan. They will be right to do so, of course. But my point is that there is an analogy between fair play in a sport and fair play in the political or legal order. Just as everyone is entitled to equal consideration as a participant in sporting competition, so every member of a political or legal order is entitled to equal consideration—to have equal *standing* under the law. Every criminal offense is a crime of unfairness, or an affront to this standing, but some are more serious—and some much more serious—than others. Those offenses that would render someone less capable or incapable of being a fully cooperating member of a cooperative political order are *in that respect* a more serious affront to the sense of fair play than are lighter, less serious offenses. That may not be enough to give us a complete explanation of why some crimes are more *heinous* than others, but it provides a significant part of the explanation.

There is, in any case, a second response to the irrelevance objection, one that appeals *indirectly* to the idea of fair play. In this case, the key idea is that the members of the political order want to be treated fairly under the rule of law, and the rule of law requires not only law obeying, but also law making, law enforcing, and law interpreting. That is, the members want a legal system that will preserve and sustain their cooperative practice and respect their equal standing as participants. Such a legal system will include the punishment of offenders as one of its features. But neither the law makers nor the people to whom they are accountable will be required to hold that all offenses are crimes of unfairness and nothing more. To the contrary, we should expect that the law makers and the people alike will insist that offenses must be graded according to the public's view of their seriousness. If all offenses are treated in the same way—with a 100 Euro fine for the murderer and the traffic offender alike, for example, or a death sentence for both of them—then the

¹⁰ Readers more familiar with cricket than with baseball will appreciate Antony Duff's way of stating the example: 'if I bowl a live grenade rather than a ball at an opposing batsman, my wrongdoing is more heinous than that of someone who bowls a beamer, or who cheats—but I don't think that that's a matter of unfairness.' I have borrowed this example to respond to an objection that Duff raised to the draft of this paper presented at the Stirling conference.

existence of the rule of law will be threatened as people see little or no reason to continue playing fair by obeying the law. Indirectly, then, the desire to maintain a cooperative practice grounded in fair play requires that some crimes be taken much more seriously than others, even if their offensiveness is not entirely or even mainly a matter of their unfairness.

For both of these reasons, I believe that the fair-play theorist is entitled to hold that his or her theory does not fail to capture ‘the punishment-deserving character of crime.’ Fair play does capture this character, either directly by showing how some offenses are more serious violations of fair play than others, or indirectly by allowing that the members of a cooperative political order will believe that grading offenses and punishments will enable them both to secure their order and to communicate their sense of the wrongfulness of various offenses.

Note that this response to the irrelevance objection also bears on Boonin’s criticism of my ‘general compliance’ argument. Because all crimes of unfairness are *equally* crimes of unfairness, he says, the fair-play theory provides no way to justify punishing some offenders more or less harshly than others. There is, to be sure, a sense in which all crimes of unfairness are equal, but I believe I have shown above that the fair-play theory does have the resources to justify different punishments for, say, the murderer and the tax evader. All crimes are crimes of unfairness, but some are more than that, and some are worse *qua* crimes of unfairness than others.

This response is also helpful in dealing with the final objection—that the fair-play theory *lacks integration*. In this case, the complaint is that my version of fair-play theory creates an unfortunate fissure by separating the justification of punishment as an institution from the justification of punishing particular offenders. Here is how Matt Matravers states this objection:

Dagger’s suggestion is that the maintenance of the social order explains the general justifying aim of punishment, but the question, ‘Whom to Punish?’ is correctly addressed by the fair play theory....[T]he maintenance of the social order explains why we punish; the argument from fair play explains what makes it morally permissible for us to do so (Morris, also, seems to have a similar division in mind). However, this leaves far too many questions unanswered, not least those concerning how the two parts of the theory are to be integrated.... Fair play theory, as it stands, does not have the resources to deliver priority rules [i.e., justifying differential punishment; the same objection Boonin raises] or to integrate an assurance-based explanation of ‘why the system of punishment?’ and a ‘benefit and burden’ based account of individual punishment (Matravers 2000, p. 69, n. 41).

Once again there seem to be two lines of response to the objection. One is to deny that an integrated theory of punishment is either necessary or desirable, and the other is to deny that the fair-play approach truly lacks integration. I shall set aside the first response, however, even though some philosophers have argued in favor of mixed or blended theories of punishment—theories that usually appeal to forward-looking considerations, such as deterrence, to justify punishment as an institution and to backward-looking or retributive considerations to justify punishing particular offenders. I shall forswear this response, furthermore, even though it is reasonable to

count my position, as set out in 'Playing Fair with Punishment,' as one of those mixed theories. In short, I concede Matravers' point about the desirability of a univocal or integrated theory both for the sake of argument and in recognition of the superior elegance of an unmixed justification of punishment.

What I do not concede is that fair-play theory lacks the necessary integration. This is a difficult point to establish, though, for it is not clear how much integration is necessary or even desirable in a theory of punishment. We certainly do not want a theory fractured by its reliance on contradictory considerations; but does that mean that we must insist on a theory that takes one and only one consideration into account? Assuming that the answer is no, let us say that a theory must rest on one primary consideration if it is to be coherent, with others taking a secondary or subsidiary role. If such a theory will achieve the necessary integration, then I believe that I have made a case for the coherence of the fair-play theory of punishment. It is true, as Matravers notes, that my earlier account makes 'maintenance of the social order' the justification for punishment as an institution. But the richer and more political account of the political order that I have sketched in this article should make it clear that it is not just any social order that is to be maintained. It is, instead, the political or legal order understood as a cooperative enterprise—the kind of enterprise in which considerations of fair play are most at home. That is enough, I think, to warrant the claim that fair play is the primary and integrating feature of this theory, bearing as it does the major burden in explaining both why the institution of legal punishment is necessary and why particular offenders ought to be punished.

This is not to say, however, that other considerations have no place in a fair-play account of punishment. If those who bear the responsibility for making the laws of a cooperative political order have reason to believe that one way of writing a law is more likely to prevent crime than others, then they should take that reason into account when writing the law, even if it is not dispositive. If they have reason to think that changing the ways in which criminals are punished will lead to the offenders' repentance and reform, and perhaps even to reparation of cooperative relationships, then they probably have sufficient reason to make those changes. As these abstract examples indicate, considerations such as deterrence and reparation are not necessarily hostile to a theory based on fair play. In so far as they strengthen cooperative relationships and help to guarantee that 'those who would voluntarily obey shall not be sacrificed to those who would not,' we may even say that they are considerations internal to the fair-play theory of punishment. That is enough, I believe, to overcome the lacks-integration objection.

Conclusions

I conclude, then, as I did some 15 years ago, that punishment theorists have been too hasty in their rejection or abandonment of the principle of fair play as the justification of legal punishment. But I also have two points to add by way of qualifying the arguments advanced in this article.

The first point is that I have tied the justification of punishment more closely to the central concerns of political philosophy than punishment theorists usually do. I make no apology for doing so. Indeed, I think it is a mistake to treat punishment as if it were somehow a discrete concern, with little or no connection to political philosophy. Some of my critics agree with me on this point, I take it, most notably Professors Duff and Matravers. In drawing this connection between punishment and the proper understanding of the political order, however, I venture into deep waters, and it is obvious that I have done little more than skim their surface in this article. Wading into these waters is likely to reveal a substantial amount of agreement with some critics, but even further disagreement with others.

The second point is that the richer and more political account of the political order as a cooperative practice that I have sketched in this essay is not meant to be an accurate representation of the actual operations of the political and legal orders with which we are familiar. A glance at the daily newspaper is often enough to raise doubts about the degree of fairness that marks even the best of existing political societies. What I have presented is a sketch of an ideal. It is an ideal, however, that animates much of the activity in any society that can make even the pretense of a claim to following the rule of law. That is why one can say that even the agents of the Nazi regime were justified in punishing ordinary traffic offenders, robbers, and rapists. But it is an ideal in another sense, too, for it should inspire us to greater efforts to live up to it. I hope that my efforts here will at least lend credence to the claim that the fair-play account captures the rule of law as an ideal in both the animating and the inspiring senses of the word.

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