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Play Fair with Punishment

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In his influential essay "Are There Any Natural Rights?" H. L. A. Hart appealed to a "mutuality of restrictions" to account for the obligation to obey the law. As Hart put it, "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."[1] As developed by John Rawls and others, Hart's "mutuality of restrictions" acquired a new name—the principle of fairness (or fair play)—and soon played a leading part in discussions not only of legal obligation, but of legal punishment as well.[2] For if considerations of fairness or reciprocity account for the obligation to obey the law, as the principle's proponents argued, then they should presumably justify the punishment of those who fail to fulfill this obligation.

Now, nearly forty years after the publication of Hart's essay, the principle of fair play figures prominently in a lively debate on the question of whether there is or can be a general obligation to obey the law, with advocates and critics of the principle vigorously arguing their cases.[3] Punishment remains the center of an equally lively debate,

* Although he is an apostate in these matters, I am indebted to Jeffrie Murphy for a number of stimulating conversations on topics relating to obligation, fair play, and punishment. I am also grateful for the thoughtful comments of Alan Ryan, an anonymous reviewer, and two anonymous *Ethics* associate editors.

1. H. L. A. Hart, "Are There Any Natural Rights?" in *Human Rights*, ed. A. I. Melden (Belmont, Calif.: Wadsworth, 1970), p. 70. Hart's essay originally appeared in *Philosophical Review* 64 (1955): 175–91. For an earlier, but less influential, statement of this view, see C. D. Broad, "On the Function of False Hypotheses in Ethics," *International Journal of Ethics* 26 (1915–16): 377–97.

2. John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, ed. Sidney Hook (New York: New York University Press, 1964).

3. Important criticisms of the fair play theory of legal obligation include M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82 (1973): 950–76; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic, 1974), pp. 90–95; and A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979), chap. 5. For defenses, see, inter alia: Richard Arneson,

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but in this case the principle of fairness seems no longer to play a significant role. Indeed, critics have raised so many serious objections that they seem to have overwhelmed those who once regarded the principle of fair play as the best justification of punishment. These objections, however, are not as damaging as they appear. Or so I shall argue in this article, which attempts to restore the principle of fair play to a central place in discussions of the justification of punishment.

Before I examine the objections to the principle, it is first necessary to explain briefly how fair play provides a justification of punishment. This, in turn, requires a few words about what counts as a justification of punishment. Here I follow Stanley Benn's observation that any attempt to justify punishment must supply a justification at two different levels, for both the institution of punishment and its application in particular instances must be justified.[4] This distinction is important, as Benn noted, because what serves as a satisfactory justification at one level may be entirely unsatisfactory at the other. If we want to provide a justification for legal punishment, then, we must answer two distinct questions: (1) What justifies punishment *as a social practice*? and (2) What justifies *punishing particular persons*? The principle of fair play is an especially attractive theory of punishment, I shall argue, because it offers plausible and compelling answers to both these questions. I shall also suggest that there is a third question—How should we punish those who commit crimes?—that fair play cannot answer without help from other sources.

I

As it applies to punishment, the principle of fair play begins with a conception of society as a cooperative endeavor secured by coercion. To think of society in this way is to recognize that the individuals who compose a society enjoy a number of benefits available only because of the cooperation of their fellows. The social 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. This has two important implications. The first is that rules or conventions of some sort become necessary, for we need to know what the required acts of cooperation are. The second is that those who enjoy the benefits of society owe

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"The Principle of Fairness and Free-Rider Problems," *Ethics* 92 (1982): 616–33; Richard Dagger, "Rights, Boundaries, and the Bonds of Community: A Qualified Defense of Moral Parochialism," *American Political Science Review* 79 (1985): 436–47, esp. pp. 443–46; and George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, Md.: Rowman & Littlefield, 1992).

4. Stanley Benn, "An Approach to the Problems of Punishment," *Philosophy* 33 (1958): 325–41.

their own cooperation to the other members of society. Because the cooperation of others makes these benefits available to me, fairness demands that I help provide these benefits for them by cooperating in turn. When other things are equal, then, I owe it to the others to obey the rules; if I fail to do so, I take unfair advantage of them.

There are, however, two complications. One is that we are sometimes required to do things for the sake of cooperation that we find unpleasant or burdensome—paying taxes, driving within the speed limit, respecting the persons and property of others, and so on. In all but the smallest and most closely knit societies, moreover, it is often possible to receive the benefits without bearing the burdens of cooperation. This is due to the second complicating feature of the social order—that it provides public goods. One of these, perhaps the most important, is the rule of law. Like other public goods, the rule of law provides benefits for those who do not cooperate as well as for those who do. Under these circumstances the rational course of action for each individual is to withhold cooperation—to be a free rider—whenever cooperation is unpleasant.

This is where punishment enters the picture. Even if people want to cooperate by obeying the rules of the social order, they will find it unwise to do so when there is widespread disobedience. In some circumstances, where the sense of community is especially strong, the threat of coercion may not be necessary to ensure cooperation. But these circumstances are not likely to obtain in the legal systems of modern states. With the aid of the institution of punishment, however, we can provide a guarantee that "those who would voluntarily obey shall not be sacrificed to those who would not."[5]

This is to say that punishment as a practice is justified because it is necessary to the maintenance of the social order. As long as the social order is itself just, or reasonably so, and as long as we cannot trust everyone to obey its rules, we may use punishment to secure its survival. To justify the institution of punishment is not to justify its applications to particular cases, however. Hence Benn's second question must be asked: Whom may we punish?

The answer again follows from the conception of society as a cooperative venture secured by coercion. In this case, though, the relationship between the individuals who compose the society is more important than its security. This is because these individuals are under an obligation to one another to obey the laws of their society. According to the principle of fair play, anyone who takes part in a cooperative practice and accepts the benefits it provides is obligated to bear his or her share of the burdens of the practice. In the case of the legal order this means that everyone who profits from others' obedience to the

5. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 193.

law is under an obligation to reciprocate by obeying the law in turn. As Jeffrie Murphy once put it, "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."[6]

The problem is that people do not always act justly or fairly, especially when they can be free riders or gain in some other way from their unfair actions. As we have seen, one of the purposes of punishment is to discourage us from taking unfair advantage of those who, through their obedience to the law, enable us to enjoy the benefits of the social order. For some, the mere threat of punishment will not be a sufficient deterrent; and in these cases punishment itself is justified.

Punishment is justified, ceteris paribus, because the persons who disobey the law fail to meet their obligations to the other members of society. In this sense 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 at the heart of the notion of justice. Justice requires that this balance be restored, and this can only be achieved through punishment or pardon. As Herbert Morris has argued, "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."[7]

This, according to the advocates of fair play, is how we must justify punishing particular individuals. But we must be careful to note what this implies. If we hold that punishment is a means to the end of restoring equilibrium between benefits and burdens, then we must also hold that punishment is warranted only when this equilibrium has been disturbed. We are presuming, in other words, that benefits and burdens were in balance before the person we intend to punish

6. Jeffrie Murphy, "Three Mistakes about Retributivism," *Analysis* 31 (1971): 166–69, p. 166; also see his *Retribution, Justice, and Therapy* (Dordrecht: D. Reidel, 1979), p. 77. For Murphy's more recent doubts about the adequacy of this principle, see his "Retributivism, Moral Education, and the Liberal State," *Criminal Justice Ethics* 4 (1985): 3–11, esp. pp. 6–7, and his review of George Sher's *Desert* in *Philosophical Review* 99 (April 1990): 280–83.

7. Herbert Morris, "Persons and Punishment," *Monist* 52 (1968): 475–501, p. 478.

upset matters by breaking the law. And this means that punishment is justified only when there is a just balance of benefits and burdens to begin with—when the social order is just, or reasonably so.[8]

When the social order does come reasonably close to balancing the costs and rewards of cooperation, however, punishment is justified as an institution and society is justified in punishing those who break the law. At both the levels Benn distinguished, then, the principle of fair play provides a justification for punishment.

II

Nevertheless, the attempt to ground punishment in fair play has been the subject of serious criticism by a number of philosophers. Society may well have a right to punish those who break its laws, they say, but this right cannot follow from the principle of fair play. The philosophers who make this complaint typically acknowledge that fair play or reciprocity is an attractive and plausible foundation for punishment. Yet they proceed to argue that closer inspection reveals serious flaws in this foundation. Exactly what those flaws are is the subject of some disagreement—indeed, they sometimes criticize one another's criticisms—but among them the critics have uncovered six principal reasons for rejecting fair play.[9] None of the six provides a conclusive objection to the fair play account of punishment, however, as I shall now try to show. Indeed, these criticisms often rest on a misunderstanding of the nature of the benefits and burdens involved in fair play.

First Objection: Neither Prohibit nor Punish

The first complaint is that the principle of fair play can justify neither prohibiting nor punishing those who break the law. This is because the principle, as Morris elaborates it, requires that a just balance be maintained between the benefits and burdens of social cooperation. Lawbreakers upset this balance by taking benefits that do not belong to them and by shirking burdens that do. To restore the proper balance, society must remove the extra benefit from the offender while reimposing the burdens of social cooperation—that is, obeying the law. But this need not mean that the offender must be punished. As Herbert Fingarette insists, restoring the balance and punishing the offender are quite different from one another.

> On [Morris's] view, provided the books are ultimately balanced, I would seem to have two equally legitimate options—paying

8. On the connection between punishment and social justice, see Jeffrie Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2 (1973): 217–43; also see Murphy, *Retribution, Justice, and Therapy*, pp. 93–115.

9. For a criticism of criticisms, see Richard Burgh, "Do the Guilty Deserve Punishment?" *Journal of Philosophy* 79 (1982): 193–213.

> my debts earlier in cash, or paying later in punishment. But surely that's not the intent of the law *prohibiting* stealing. The intent is precisely to *deny* us a legitimate alternative to paying the storekeeper for what we take. And even if I restore the balance by returning the stolen goods, and by paying back any incidental losses incurred by the storekeeper, it still remains intelligible and important—not only in principle but in the practice of the law—to ask whether I should *also* be punished. So Morris' kind of view . . . fails to account for law as prohibition, and . . . to make intelligible the question of punishment as something over and above the equitable distribution of burdens and benefits.[10]

This criticism rests on a misconception of the relationship between reciprocity and punishment. There is, to be sure, a distinction between restoring the balance and punishing offenders. If a payroll clerk mistakenly pays an employee more than he or she is supposed to, the clerk may have to retrieve the money from the employee, or take it out of the employee's next pay check, in order to balance the books. This need not involve punishment, either of the clerk or the other employee. But balancing the books in this case does not require a balance of benefits and burdens, which makes it very different from the kind of case Morris has in mind. The clerk and the other employee do not stand in the same relation to one another as the law-abiding citizen (the storekeeper in Fingarette's example) and the lawbreaker (the thief). To restore the balance between the second set is to preserve or restore the balance between the benefits and burdens of cooperation under the rule of law. Indeed, when the thief steals from the storekeeper, he upsets the balance not only with regard to her, but to all law-abiding citizens.

The benefit that the thief gains, in other words, is not simply whatever he steals from the storekeeper. This can be repaid, as Fingarette says, without punishment. Instead, the benefit is to be understood as the double advantage of not obeying the law when it suits one's purposes while also enjoying the advantages of the rule of law provided by the law-abiding citizens. This benefit cannot be repaid simply by forcing the thief not to break the law again—that would leave the "books" unbalanced. So, to restore the balance, the lawbreaker must be punished. The whole point of the principle, then, is to secure a cooperative practice such as the rule of law by prohibiting actions that will undermine the practice and by punishing those who nevertheless do them. The first criticism simply fails to see this.[11]

10. Herbert Fingarette, "Punishment and Suffering," *Proceedings and Addresses of the American Philosophical Association* 50 (1977): 499–525, p. 502; emphasis in original.

11. See Burgh, "Do the Guilty Deserve Punishment?" p. 203, n. 18, for a related criticism of Fingarette's argument.

Second Objection: Sufficient, but Not Necessary

The second criticism holds that acting unfairly may be a sufficient warrant for legal punishment, but it cannot be necessary. There are many people who deserve to be punished, on this view, not because they have acted unfairly, but because they have done something far worse. Put in terms of the distinction between acts that are *mala prohibita* and those that are *mala in se*, the point of this criticism is that some misdeeds should be punished because they take unfair advantage of others, thus falling into the first category, while other and more serious crimes deserve punishment because they are intrinsically wrong. Rape, murder, and other forms of assault are wrong, and they ought to be proscribed; but we cannot explain their wrongness in terms of a violation of fair play or a lack of reciprocity. As R. A. Duff says, "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 such *mala 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?"[12] The problem with fair play, then, is that it justifies punishment in some cases, but not in all—and not in the cases in which punishment seems most obviously deserved.

There is something to this charge. Rape and murder and other acts of violence are wrong for reasons that have nothing to do with fairness. But this is not to say that considerations of reciprocity play no part in our condemnation and punishment of those who are guilty of such crimes. All crimes, I have said, are in some sense crimes of unfairness. They may be *more than* crimes of unfairness, as rape, robbery, and murder surely are, but they must be *at least* crimes of this sort.

This is true whenever the rule of law is in effect. Murders and rapes and other vicious acts may take place when it is not, of course, but then the character of the offense is different. In such circumstances the offense may be taken to be a private matter involving only the offender and the victim; or it may be regarded as an offense against family honor, or perhaps against the gods or the proper order of things. But it cannot be an offense against the public, or society, unless there is some sense that the members of society are bound together under the rule of laws that it is wrong, ceteris paribus, to violate. Nor can the offender suffer legal punishment unless the rule of law obtains. He may suffer revenge, or the punishment of the gods, but not punishment under the law.

12. R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), p. 213; emphasis in original. See also Richard Wasserstrom, *Philosophy and Social Issues* (Notre Dame, Ind.: University of Notre Dame Press, 1980), pp. 143–46.

The contrast between these two attitudes toward offenses and offenders is one of the themes of Aeschylus's *Oresteia*. So, too, is the advantage of living under the rule of law. In place of the blood feuds and ceaseless quarrels of the lawless life, the rule of law at least promises us the chance to live under rules made and enforced by impartial authorities. To achieve the security and freedom thus promised, we must be willing to forgo the private "punishment" of those who have, we believe, injured us. When we do this, we recognize that an injury to one person is not only an injury to her and her kin, but an offense against the law itself—and therefore a wrong done to all those who make the rule of law possible.

It is in this sense, then, that all crimes (under the rule of law) are crimes of unfairness. The robber, the rapist, and the murderer do terrible things to the specific victims of their crimes, and the charge of unfairness does not capture this. But what gives society, rather than the victim or his or her kin, the right to punish is the criminals' violation of fairness and reciprocity. The criminals want the security and freedom afforded by the rule of law, but they are not willing to grant this same security and freedom to their victims. They enjoy the benefits of cooperation without bearing a full share of its burdens. When they commit their crimes, therefore, they wrong all the law-abiding members of society. For this crime of unfairness they may properly be punished, as well as for the additional wrong they have done to their particular victims. All crimes (under the rule of law) are crimes of unfairness, in short, even if some are much more than that.

Third Objection: What Benefit? What Burden?

In rejecting the foregoing criticisms I have relied in part on the claim that the critics misunderstand the nature of the benefits and burdens involved in a cooperative practice governed by fair play. But what exactly are these benefits and burdens? Is there really a balance to be struck between them? Can we really justify the practice and infliction of punishment by appeal to such notions? Not according to the third criticism, which holds that the principle of fair play offers no coherent and plausible account of benefits and burdens.

The problem stems, again, from the difficulty of seeing how some crimes are to be analyzed in terms of an unfair distribution of benefits and burdens. To return to Duff's example, it is easy enough to see how the would-be rapist or murderer will find compliance with the laws against rape or murder burdensome; but those who are never tempted to commit one of these crimes will not feel the restrictions of these laws at all. Insofar as rape is defined as unlawful carnal knowledge of a female by a male, moreover, it seems that a man cannot benefit from its proscription, at least not in the same way a woman can. For that matter, the man who wants to commit rape, or the person who wants to be cruel to animals, may derive no benefit at all from

laws against these acts.[13] There are, it seems, laws that provide no benefit to some people and laws that impose no burden on some people. That being so, it must be impossible to balance benefits and burdens in these cases. Does this mean that these laws should be eliminated? No, because these laws are among those most of us consider most important. It means, instead, that the principle of fair play cannot provide the ground for a justification of criminal punishment.

This criticism is effective only if we take the benefits and burdens in question to be the benefits provided and burdens imposed by obedience to particular laws. But this is not what the principle of fair play requires. 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.[14] When these circumstances obtain, everyone engaged in the practice is free to act, to enjoy his or her rights, with a security that would otherwise be impossible. This is a benefit everyone shares. But everyone also shares the burden of self-restraint. The freedom one gains as a result of the cooperation of others, in other words, must be balanced by a restriction on one's freedom, on one's right to act, in order to make freedom under law possible. Everyone thus receives the same benefit—freedom under law—and bears the same burden—obedience to the law. Rights and obligations are in balance, furthermore, for every person in the practice has a right to the cooperation of the others and an obligation to cooperate in turn.

This balance is upset when someone breaks the law. In some cases the lawbreaker may have good, even public-spirited reasons for disobedience. In most cases, however, the lawbreaker seeks a double benefit for himself. He seeks to enjoy the benefits of freedom under law, that is, while enjoying freedom from the burden of obedience as well. If he succeeds, the law-breaker achieves an excess of freedom over the law-abiding members of society.[15] He enjoys the benefit of cooperation, then, without bearing its burden. It is in this sense that the balance of benefits and burdens is upset.

The offender achieves this, furthermore, by doing what he cannot want everyone else to do. This is the Kantian aspect of reciprocity that Murphy has emphasized.[16] The lawbreaker is typically someone who wants the advantages of the rule of law, but who is unwilling to

13. As Burgh says in "Do the Guilty Deserve Punishment?" p. 205.

14. Burgh, ibid., recognizes this, but argues that this "retreat to a second-order set of benefits, viz., those received from obedience to law in general" must fail because it entails "that all offenders are, regardless of the offense they committed, deserving of the same punishment" (p. 206). I respond to this below, under "Fourth Objection."

15. Here I follow George Sher, *Desert* (Princeton, N.J.: Princeton University Press, 1987), pp. 78–80.

16. See esp. Jeffrie G. Murphy, "Kant's Theory of Criminal Punishment," in Murphy, *Retribution, Justice, and Therapy*, pp. 82–92.

make the sacrifice of self-restraint. By taking advantage of the obedience of others to enjoy benefits for himself, he treats the law-abiding citizens as means to his own ends.

Fourth Objection: How to Punish?

The fourth criticism is that fair play cannot provide a satisfactory basis for punishment because it cannot tell us how, or to what extent, we are to punish offenders. If all crimes are (at least) crimes of unfairness, then does it follow that all criminals are to suffer the same punishment? If so, we shall have no way to account for the different degrees of seriousness we attach to different crimes.

One possible escape from this difficulty is to look for some sense of proportionality in the principle of fair play. Beginning with the notion that the principle requires us to restore the balance of benefits and burdens under the rule of law, one might say that those who commit the most serious offenses throw the distribution of benefits and burdens further out of balance than those who commit petty crimes. To restore the balance, then, the murderer must be punished more severely than the robber, who must be punished more severely than the thief, and so on.

The trouble with this defense of fair play, as Richard Burgh argues, is that it requires us to look not only to the gravity of the crime in question, but to the benefits and burdens involved. If the benefit the criminal receives is relief from the burden of self-restraint, with the extra freedom this brings, we must then find some way of understanding what the force of the burden of obeying the law is. "Now," Burgh says, "one way of understanding this burden is to see it in terms of the strength of the inclination to commit the crime. The stronger the inclination, the greater the burden one undertakes in obeying the law. Hence, if the strength of the inclination to commit one crime is stronger than another, a greater advantage will be derived from committing that crime. If the basis of desert is the removing of the advantage, then the person who commits the crime will be deserving of more punishment."[17] The consequences of such a policy, Burgh continues, are surely unacceptable. The crimes we ordinarily consider the most serious are the ones that most people are least inclined to commit, while the ones most people are most inclined to commit are usually regarded as the least serious. But this will change if we base punishment on the strength of the inclination to break the law. As Burgh puts it, "insofar as we think of the burden of self-restraint in terms of the strength of inclination to violate the law, it probably follows that a greater burden is renounced with regard to tax fraud than with respect to murder." Accepting the principle of fair play thus seems to entail

17. Burgh, "Do the Guilty Deserve Punishment?" p. 209.

the surrender of "the rather central intuition that punishment must be proportional to the gravity of the crime. In fact, if this analysis yields the result that the tax evader deserves a greater punishment than the murderer, then I think most would be inclined to reject the analysis."[18]

As Burgh says, "one way of understanding" the burden of obedience is in terms of the strength of the inclination to commit a particular crime. This is not the only way to understand this burden, however, nor is it the right way. Here, as with my response to the second criticism, the key is to distinguish between the burden of obeying a particular law and the burden of obeying the law in general. Reciprocity does not mean that everyone must benefit from and feel the burden of each and every law. On the contrary, it is the system of laws—law as a cooperative practice—from which each must benefit, and to which each must contribute by bearing the burden of cooperation. Cooperation will not always be burdensome; if it were, the practice would probably collapse. But there are times for almost all of us when we would like to have the best of both worlds—that is, the freedom we enjoy under the rule of law plus freedom from the burden of obeying laws. Because the rule of law is a public good, it is sometimes possible to do this—up to the point, at least, where disobedience is widespread enough to threaten the breakdown of law. Punishment is the device we use to prevent this from happening.

This way of understanding the burden of obedience saves fair play from Burgh's criticism. Still, it does not address the more general point, namely, Does fair play tell us how, or to what extent various offenders are to be punished? The answer is that it does not. Fair play tells us *that* those who take unfair advantage of the cooperating members of a cooperative practice should be punished—allowing, of course, for the possibility of overriding considerations. But it does not tell us *how* they should be punished. Nor should it.

The principle of fair play enables us to see how certain actions constitute offenses against society because those who engage in these actions take advantage of the law-abiding citizens who make the rule of law possible. From this point of view, as I have said, all crimes are crimes of unfairness. From this point of view, furthermore, that is all that they are. The murderer and the tax cheater are on a par in this respect. Both are guilty of taking unfair advantage of those who obey the law, and both should be punished accordingly. Exactly how they should be punished is something fair play cannot tell us. That will depend upon the circumstances of the society in question, and perhaps even on the circumstances of the individuals in question, since what

18. Ibid., pp. 209–10. For a related criticism, see David Dolinko, "Some Thoughts about Retributivism," *Ethics* 101 (1991): 537–59, esp. pp. 546–49.

counts as an efficacious punishment at one place and time may not count at another. But the murderer and tax cheater should be punished to the same extent for their crimes of unfairness.

This is not to say that the murderer and the tax cheater should receive the same punishment *tout court*. For the murderer has committed two crimes, in a sense, but the tax cheater only one. The murderer has simultaneously committed a crime of unfairness (a *malum prohibitum*) *and* a crime against her particular victim (a *malum in se*). For these two offenses, as it were, she must suffer two punishments. The first serves to discharge her debt to society by restoring the balance of benefits and burdens under the rule of law. The second punishment must be justified and established on other grounds.[19]

It is true, then, that the principle of fair play does not tell us everything we need to know about punishment. But this does not mean that it is unsatisfactory as a grounding principle. On the contrary, it simply means that reciprocity 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 it is important to notice 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.

Fifth Objection: Restitution or Compensation, Not Punishment

A different kind of objection tries to sever the connection between fair play and punishment. In this case the complaint is that fair play or reciprocity may provide a sound foundation for a system of criminal justice, but such a system will not include punishment. If the point of criminal justice is to maintain the balance of benefits and burdens on the part of those who live under the rule of law, the argument goes, then it is by no means clear that punishment is necessary to secure or restore this balance. "For it remains to be seen," as Richard Wasserstrom argues, "how it is that *punishing* the wrongdoer constitutes a taking of the wrongfully appropriated benefit away from him or her.... [C]ompensation or restitution to the victim by the wrongdoer, not his or her punishment, appears to be the natural and direct way to restore

19. This should help to alleviate at least part of Murphy's concern about the phrase *debt to society*. "The idiom of owing and paying a debt is misleading," he says, "in that it tends to obscure the fact that (i) criminal 'debts' differ from ordinary debts in that we have an antecedent moral obligation not to incur them and (ii) undergoing punishment for (say) murder, unlike paying the final installment on a loan, can hardly be said to make things all right again, to make the world morally as it was before" (*Retribution, Justice, and Therapy*, p. 78). On my analysis, the criminal's punishment for the crime of unfairness repays the debt to society. This does not "make the world morally as it was before"—perhaps nothing can do that—but that is asking for more than a debt to society can entail.

the balance in respect to wrongful appropriation of something that belonged to the victim."[20] All crimes may be (at least) crimes of unfairness, in other words, and society may have a right to respond to these crimes, but there is no reason to believe that punishment is the proper response.

Although I do not want to insist that punishment should be the sole response to crime, I do want to resist the conclusion that it is not *a* proper response. There are two primary reasons for taking this position.

First, there is no entirely suitable substitute for punishment. Restitution and compensation to victims both have their place, as I have argued elsewhere, but they work best when they are regarded as forms of or supplements to punishment.[21] Pure (as opposed to punitive) restitution promises to restore the balance of benefits and burdens between the criminal and his or her direct victims, or the victims' beneficiaries; it offers little, however, to the indirect or secondary victims who must endure the anxiety, frustration, and insurance costs that accompany crime.[22] Nor can pure restitution deal adequately with those offenses, such as tax evasion or violation of antipollution statutes, in which there are no specific victims to be identified for purposes of restitution. Requiring some form of community service may be the appropriate response to crimes of this sort, but community service is usually taken to be a form of punitive restitution.

As for compensation to the victims of crime, another set of problems arises. Compensation may help to restore the victims to their previous condition in some sense, but it falls far short of restoring the balance of benefits and burdens under the rule of law. For if compensation is made from public funds, then it is principally the law-abiding who are responsible for compensating the victims for their losses and suffering. This simply imposes an additional burden on those who are already bearing the indirect costs of crime, thereby throwing the benefits and burdens of the rule of law farther out of balance.[23] Another tactic

20. Wasserstrom, p. 145; emphasis in original.

21. I make a case for restitution as an especially valuable form of punishment in "Restitution, Punishment, and Debts to Society," in *Victims, Offenders, and Alternative Sanctions*, ed. J. Hudson and B. Galaway (Lexington, Mass.: Lexington Books, 1980), pp. 11–18, and in "Restitution: Pure or Punitive?" *Criminal Justice Ethics* 10 (1991): 29–39.

22. In addition to the articles cited in the previous note, see Franklin Miller, "Restitution and Punishment: A Reply to Barnett," *Ethics* 88 (1978): 358–60; and Margaret Holmgren, "Punishment as Restitution: The Rights of the Community," *Criminal Justice Ethics* 2 (1983): 36–49, for this and other criticisms of pure restitution.

23. For a scheme in which all crime victims are to receive compensation from those criminals who are apprehended and convicted, see Mane Hajdin, "Criminals as Gamblers: A Modified Theory of Pure Restitution," *Dialogue* 26 (1987): 77–86. I criticize Hajdin's proposal in "Restitution: Pure or Punitive?" esp. pp. 33–35.

might be to pay a reward of some sort to people who obey the law. This might serve to secure the benefits of the rule of law without resorting to punishment. In this case, however, everyone would be taxed to provide these rewards to people who either would obey the laws anyhow or who obey only to gain the reward. But in this case those who would willingly obey the law would find themselves paying what amounts to extortion to those who would otherwise break it—and that hardly counts as restoring the balance.

These problems lead me to believe that there are no entirely suitable substitutes for punishment. Punishment provides something that these other approaches necessarily lack—which brings me to my second reason for believing that it is a proper response to criminal wrongdoing. Punishment rests on the notion that certain actions are wrong, either as *mala in se* or *mala prohibita*. That is why we must draw a distinction, to return to Fingarette's argument, between restoring the balance and punishing offenders. We may restore the balance, as I suggested earlier, without implying that anyone is guilty of criminal intent or misconduct. If a payroll clerk mistakenly pays an employee too much, then steps should be taken to correct the mistake and prevent its happening again. If the clerk and the other employee are working together to steal from their employer, however, simply restoring the balance in the sense of regaining the money is not a sufficient response. These criminals have wronged both their employer and, I have argued, the law-abiding people who make it possible for them to enjoy the benefits of the rule of law. Steps must be taken to make the offenders and others aware of the wrong they have done. These actions are necessary to restore the balance of benefits and burdens under the rule of law. Making restitution to the employer is not enough to restore the balance between the offenders and the law-abiding members of society. To do that, some form of punishment—some form that affirms the belief that it is wrong to take advantage of those whose cooperation makes the rule of law possible—seems necessary.

Punishing offenders is a way of restoring the balance in these cases because it responds to a disruption of the equality that everyone is supposed to enjoy in the eyes of the law. Insofar as people are members of a society governed by the rule of law, that is, they all should have the same rights and obligations. All should be equal and alike as subjects of the law, no matter how different and unequal they are in other respects. The criminal, however, sets himself apart. By taking advantage of the cooperation of others to advance his own interests, he says in effect that others are less important than he. He wants them to bear the burdens of cooperation while he receives only benefits. In Kantian language, he treats others as mere means to his ends; he fails to show respect for their dignity as persons. Such an attitude threatens the rule of law. It must be condemned in order to

maintain equality in the eyes of the law. The balance to be restored, then, is the balance between people qua equal subjects of the law. Punishing those who upset this equality is the closest we can come to restoring the balance in this sense.

Sixth Objection: Does the Law Play Fair?

This leads us to the final objection. In this case the complaint is that the notion of fair play simply fails to capture important features of law and punishment. The belief that we should obey the law because we owe obedience to the cooperating members of society may make sense in some circumstances, according to the objection, but not in all. Laws that prohibit certain forms of sexual relations seem to have nothing to do with fairness, for instance. Should two consenting adults who find themselves behind closed doors really refrain from engaging in proscribed sexual activity on the grounds that disobeying the law would be taking unfair advantage of others? Do considerations of fairness even play a part in this and similar cases? If they do not, as it appears, then fairness cannot provide the foundation for the rule of law and the practice of punishment.[24]

This in a way is the other side of the second objection, which holds that fair play cannot account for rape, robbery, murder, and other acts that are *mala in se*. In this case the complaint is that fairness or reciprocity requires people to obey, on utterly inappropriate grounds, laws that probably ought not to be laws in the first place. This is a forceful objection. Yet we may admit its force without abandoning the principle of fair play. In fact, it is possible to respond to this objection in a way that strengthens the case for fair play. This response involves three steps.

First, we should note once again that all crimes must be, on the fair play theory, crimes of unfairness. But this does not mean, as we have seen, that actions are or should be criminal only if they are ordinarily understood to be unfair. Some actions should be outlawed because they are unfair, others because they are wrong in some other way. The principle of fair play, however, is concerned with the overall balance of benefits and burdens in society, especially the benefits and burdens involved in the rule of law. If we live in a society that may be reasonably regarded as a cooperative venture under the rule of law, then fairness requires us to obey the law, even if the particular law in question seems to have nothing to do with fairness.

The second step in the response is to recall that this general obligation to obey the law is defeasible. It holds only when one's society is reasonably just, and even then it may be overridden by more pressing moral considerations. No society will be perfectly just, so it is always

24. Jeffrie Murphy raises this objection in his review of Sher's *Desert*.

possible that an unjust law will be on the books of a reasonably just society. That may be the case now with laws prohibiting certain kinds of sexual conduct, for instance. If so, a person may well conclude that he or she may, or even should, disobey the laws in question. Or there may be other laws that are not in themselves unjust, but seem to require pointless obedience—such as stopping at a red light in the early morning hours when it is clear that there is no one else on the road. Here again there is an obligation to obey, but it is a relatively weak obligation, and it may therefore be overridden more easily than, say, the obligation to pay one's taxes.[25]

But how are we to distinguish just laws from unjust, or weak obligations from strong? The answer, at least in part, is to look to considerations of fairness and reciprocity. This forms the third step in the response to the final objection. Those laws that have the strongest force are those that are most essential to the maintenance of a cooperative venture under the rule of law. Laws that place unfair burdens on some or give unfair benefits to others serve to undermine cooperation and the rule of law, so they cannot be just. In the case of private, consensual sexual conduct, for example, laws proscribing certain activities seem to place an unfair burden on some people—namely, the burden of repressing their sexual inclinations and activities while others are legally free to pursue theirs. Other things being equal, such laws are neither just nor in harmony with the principle of fair play. Until they are abolished, those who are affected by these laws have reason to believe that their obligation to obey them is of little force.

III

It seems, in sum, that the principle of fair play does a better job of accounting for crime and punishment than its critics suspect. Indeed, if the arguments I have presented are correct, the principle's ability to meet the six objections considered in this article strongly suggests that it provides the basis for the practice of punishment. The principle does not tell us everything we need to know about punishment—it does not tell us exactly how to punish every offender, as I have noted, or what the fitting punishment is for every crime—but it does provide the foundation from which we can go on to address these matters.

The principle of fair play, then, provides plausible answers to Benn's two questions about the justification of punishment—What justifies punishment as a practice? What justifies punishing particular individuals?—and it provides a partial answer to a third. If this is not reason enough to recognize fair play as the true or the best philosophical account of punishment, it is surely reason to restore it to a central place in the debate over punishment's justification.

25. In this and the succeeding paragraph I draw on George Klosko, "The Moral Force of Political Obligations," *American Political Science Review* 84 (1990): 1235–50.