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Rescuing Fair-Play as a Justification for Punishment

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Abstract The debate over whether 'fair-play' can serve as a justification for legal punishment has recently resumed with an exchange between Richard Dagger and Antony Duff. According to the fair-play theorist, criminals deserve punishment for breaking the law because in so doing the criminal upsets a fair distribution of benefits and burdens, and punishment rectifies this unfairness. Critics frequently level two charges against this idea. The first is that it often gives the wrong explanation of what makes crime deserving of punishment, since the wrongfulness of murder is not primarily about unfairness. The second is that it implies that all crimes deserve the same degree of punishment, because all crimes create the same degree of unfairness. These objections are viewed as revealing fatal flaws in the theory. Although Dagger attempts to meet these objections by drawing on political theory, Duff responds that this still draws upon the wrong kind of resources for meeting these objections. This paper argues that these two objections rest on a crucial mistake that has been overlooked by both the defenders and critics of fair-play. This mistake results from failing to distinguish between what justifies punishment as a response to crime (which requires a common element to all crime) and what justifies attaching particular penalties to crimes (which requires making distinctions in the severity of crime). The arguments presented will give reasons to consider fair-play as a viable justification for legal punishment.

Keywords Crime · Fair-Play · Law · Punishment · Reciprocity · Retributivism

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Introduction

The debate over whether 'fair-play' can serve as a justification for legal punishment has recently resumed with an exchange between Richard Dagger and Antony Duff. The fair-play theorist claims that criminals deserve punishment for breaking the law because in breaking the law the criminal upsets a fair distribution of benefits and burdens, and punishment can rectify this unfairness. What appears most controversial about this justification of punishment is the idea that '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' (Dagger 2008, p. 263). Critics frequently level two charges against this idea. The first is that it often gives the wrong explanation of what makes crime deserving of punishment, since the wrongfulness of murder is not primarily about unfairness. The second is that it implies that all crimes deserve the same degree of punishment, because all crimes create the same degree of unfairness. Dagger refers to the former charge as the '*irrelevance objection*', and the latter as the '*false-equivalence objection*'. These objections to the fair-play based justification of punishment are thought to show the view to be fatally flawed.

Although Dagger attempts to meet these two objections by drawing on a political theory that straddles contractarian and communitarian ideals, Duff responds that this still draws upon the wrong kind of resources for meeting the *irrelevance objection* and that he's still vulnerable to the *false-equivalence objection*. This paper argues that these two objections can be met without needing to wade deeper into controversial political waters, for the objections rest on a crucial mistake that has been overlooked by both the defenders and critics of fair-play. This mistake results from failing to distinguish between what justifies punishment as a response to crime (which necessarily requires pointing out a common element to all crime) and what justifies attaching particular penalties to a specific crime (which necessarily requires making distinctions in the seriousness of various crimes).[1]

A Brief Overview of Fair-Play

According to fair-play theory, the law establishes a fair distribution of a certain kind of benefit and burden among citizens. The relationship between the benefit and burden is such that the benefit is made possible only by assuming a burden. A common example is a law that protects you from the interference of others (free speech, freedom of religion, etc.). The benefit of the law is noninterference, and this benefit is made possible by individuals exercising self-restraint, which is the burden the law requires. It's important to note that although the benefit is frequently one of non-interference, it doesn't have to be that limited. The more important aspect is that it is a benefit that can only be secured by cooperation. Given this connection

[1] Although Dagger (1993) and others may have noticed this distinction, it is the continued failure by critics of fair-play to keep these two issues distinct that appears to have gone unnoticed.

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between benefits and burdens, it is easy to see that with such a system comes the problem of free riders. A person could enjoy the benefits of non-interference from others, while at the same time not engaging in self-restraint. This is what happens when someone breaks the law. It is unfair for a person to continue to enjoy the benefits of the system while not assuming all of the expected burdens, and there needs to be a way to correct this injustice.

The aim of punishment then is to correct for the imbalance in the distribution of benefits and burdens that occurs when someone breaks the law. Punishment can restore the balance of benefits and burdens by giving the criminal a different burden than the burden of self-restraint. As a matter of fairness, the criminal needs to pay the debt he owes to society. From the point of view of fair-play, the criminal chooses the burden of punishment rather than the burden of self-restraint. It is important to note that the focus on burdens should not be thought of in terms of a felt psychological burden. For most of us obeying the law doesn't seem like much of a burden at all, but 'self-restraint is burdensome as compared to unrestricted liberty, irrespective of whether we perceive it so or not. If unrestricted liberty gives me all these options that I have in the situation of self-restraining behaviour plus some extra options, then it is an advantage irrespective of whether I really want to experiment with these extra options or not' (Sadurski 1985, pp. 53–54).

While there are other questions that can be raised about the talk of benefits and burdens, Dagger's current concern is with the objections that have lingered the longest and are thought to be the most devastating to the fair-play approach. These objections focus on the claim that every crime can be understood in some sense as a crime of unfairness. The *false-equivalence objection* states that if all crimes are crimes of unfairness, then it would seem to follow that all crimes have an equivalent degree of unfairness to them, and thus all crimes would basically deserve the same punishment. The *irrelevance objection* states that not all crimes can be understood in terms of fairness. While these two objections raise different problems with thinking of crime in terms of unfairness, it will be argued that they are based on a common mistake. Before turning to the objections, it should be noted that little time will be spent discussing Dagger's response to these two objections. Dagger treats these objections as making legitimate demands for further explanation on the part of the fair-play theorist, and he does his best to provide a more detailed explanation that draws on political theory. The perspective taken in this paper, however, is that these objections should be rejected as involving a conflation of two related but distinct issues in the justification of punishment.

The False-Equivalence Objection

An evaluation of the fair-play theory requires putting forth criteria for what a theory of punishment should be able to explain. There is a particular pair of demands for explanation that form the backbone for what appears to be the most serious objection to the fair-play approach to punishment. The first demand is to:

- *Explain what all crime has in common that makes it justifiably punishable*

Since a theory of punishment attempts to justify punishing law breakers, there must be something that all crime has in common that makes it deserving of punishment. According to the fair-play theorist, what all crime has in common is the inherent unfairness that is produced when the criminal renounces the burden of self-restraint. This unfairness deserves punishment because punishment can restore the fair balance of benefits and burdens by giving the criminal a different burden than the one he renounced.

The opponent of reciprocity could agree that this approach succeeds in identifying what all crimes have in common that make them punishable. However, the opponent is quick to point out that this answer leads to problems with the second demand of a theory of punishment, which is to:

- *Explain the degree to which specific types of crimes should be punished*

Richard Burgh, starting with a quote from Jeffrie Murphy who is defending fair-play, explains what problem the fair-play thesis runs into in stating that we punish criminals because they act unfairly:

> 'But unfairness is unfairness, murder being no more unfair than robbery' (85). What follows from this is important. Though a conception of maintaining an equitable balance between benefit and burden can *explain why the guilty deserve punishment*, it cannot *explain the degree of punishment deserved*. This is because the analysis cannot explain why murder is worse than robbery. Murphy concludes that, though the analysis cannot explain why murder is worse than robbery, it can demand a kind of proportionality between crime and punishment in terms of ranking both offenses and punishments on a scale of seriousness (Burgh 1982, p. 207 Emphasis Mine)

The apparent drawback of the fair-play approach is that its explanation of why those guilty of breaking the law deserve punishment has problematic implications for the degree of punishment the criminals deserve. Whatever the degree of punishment should be for various crimes, all seem to agree that the degree should be proportional to the seriousness of the crime. So according to this line of objection, a theory of punishment should be able to explain why some crimes are more serious than others, and thus deserve different punishments, but the fair-play thesis is unable to do so because it cannot make important distinctions in assessing the seriousness of different crimes. This turns into an oft repeated criticism of the fair-play approach:

- David Dolinko argues that if what was common to all crimes is that they violate the prohibition 'Do not break the law', which would be to refuse to bear the burden of self-restraint, then this 'criterion would tell us that all such offenses yield the same 'unfair advantage', and all deserve the same punishment—income tax evasion and big-time cocaine smuggling just as much as speeding or destroying birds' nests in a public cemetery' (Dolinko 1991, p. 547).

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- Jami Anderson claims that a justification of the institution of punishment should explain 'why murder is a more serious crime than tax evasion' (Anderson 1997, p. 17).
- According to David Boonin, the problem with all criminals being viewed as free riders is that 'all offenders are equally free riders' (Boonin 2008, p. 196), and so fair-play cannot justify 'aiming more punishment at the murderer than at the tax evader' (Boonin 2008, p. 198).

Reply to the False-Equivalence Objection

Opponents of fair-play demand that a theory of punishment explain (1) what all crimes have in common (such that punishment is an appropriate response) and (2) why different types of crimes should be punished differently. The claim is then made that while fair-play's focus on fairness can provide a satisfactory answer to #1, it cannot provide a satisfactory answer to #2. But why should we expect that an explanation of what crimes have in common will also be an adequate explanation of what differentiates types of crime? There doesn't seem to be any reason why the answer to one demand should necessarily provide a satisfactory answer to the other demand, given that one demand is for similarities and the other for dissimilarities. That all crimes have a common element of unfairness, even an equal degree of unfairness, does not imply that crimes are not dissimilar in other ways relevant to assigning penalties for crime.

It's important to note that the issue isn't over whether fair-play theory supplies or violates the principle of proportionality in punishment, since the proportionality principle is assumed in generating the objection. If the degree of punishment should match the severity of the crime (which is the proportionality claim), and all crimes have the same severity (which is the opponent's claim about fair-play), then all crimes deserve the same degree of punishment. The problem lies specifically with the claim that fair-play implies that all crimes have the same severity. It might seem according to fair-play theory that all crimes have the same severity given Murphy's claim that murder is no more unfair than robbery. Opponents assume that 'murder being no more unfair than robbery' implies that the two crimes are equally severe from the point of view of fair-play, but Murphy clearly doesn't mean to imply that since he goes onto claim that crimes can still be differentiated by seriousness, which would imply that factors other than fairness are taken into account when deciding on the seriousness of the crime.

Furthermore, it is not the case that Murphy was just mistaken when he thought he could consistently claim that murder was no more unfair than robbery while also claiming that crimes could still be ranked by seriousness. For all crimes have to have something in common to make it the case that punishment is a justifiable response to any type of crime, and it is that common punishable element that fair-play theory seeks to explain. Saying that all crimes involve some common element of wrongfulness does not necessarily imply that all crimes are equally wrong for the purposes of assigning penalties for committing the crimes. Fair-play theory does not

require that the common element of unfairness be the only consideration taken into account when deciding on a penalty for breaking a particular law.

Obviously, there can be many different considerations that are relevant to explaining why a type of behavior was made a criminal offense, since what makes murder problematic is different from what makes tax evasion problematic. Once a type of behavior has been deemed criminal, then all citizens are expected to restrain themselves from engaging in this kind of behavior. Fair-play theory justifies punishment as a response to those who break the law, because it rectifies the inherent unfairness in refusing to restrain oneself. Although fair-play theory justifies attaching penalties to criminal behavior on the basis of fairness, deciding on the types of penalties to attach to such criminal behavior will be based on the considerations that went into criminalizing the behavior in the first place. The reasons why a behavior is problematic enough to warrant making such behavior criminal need not be the same reasons that make the criminal behavior punishable. These are separate issues that the opponent of fair-play is running together. It should also start to be apparent now how the *irrelevance objection* is based on this same mistake.

The Irrelevance Objection

The *irrelevance objection* states that fair-play theory often provides the wrong explanation for what makes crime deserving of punishment, since the wrongfulness of many crimes isn't primarily about unfairness. Duff charges fair-play theory with failing to appreciate the distinction between the following two types of crime. *Mala in se* crimes, like murder, are inherently wrong and usually because of their effect on the victim. *Mala prohibita* crimes, like tax evasion, are only wrong because there is a legal prohibition against it and these are often victimless crimes. Duff points out that with *mala prohibita* crimes that:

> if asked what makes them wrongs, we cannot now say that the conduct in question was wrongful prior to the regulation that prohibits it. We might then appeal instead to ideas of unfairness in the way that Dagger does: once the regulation exists, it is unfair to break it, because that is to evade a burden that I should accept in return for the benefits I receive (Duff 2008a, p. 279).

So the difference between *mala in se* crimes and *mala prohibita* crimes can be seen along two dimensions. First, in the former crime wrongfulness precedes the prohibition, while in the latter crime the prohibition precedes the wrongfulness. Second, in the former crime the wrongfulness of these crimes does not consist in unfairness, while in the latter crime the wrongfulness is a matter of unfairness.

The charge then against fair-play theorists is that they treat *mala in se* crimes as if they were wrong for the same reasons as *mala prohibita* crimes. While fair-play theory may give an adequate explanation of the wrongness of *mala prohibita* crimes, it fails to address what's centrally wrong with *mala in se* crimes. This *irrelevance objection* is frequently mentioned by critics of fair-play theory:

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- Phillip Montague points out that in violent crimes, criminals 'wrong those whom they assault or murder, but not by treating them unfairly' (Montague 1995, p. 85).
- Jean Hampton critiques Morris's version of the fair-play view as failing 'to link our condemnation of a wrongdoer *to that which makes his conduct wrong*' (Hampton 1998, pp. 116–117).
- According to the Stanford Encyclopedia of Philosophy entry on Legal Punishment, the problem with the defenders of the fair-play thesis is 'they seem to misrepresent what it is about crime that makes it deserving of punishment: what makes murder, or rape, or theft, or assault a criminal wrong, deserving of punishment, is surely the wrongful harm that it does to the individual victim—not (as on this kind of account) the supposed unfair advantage that the criminal takes over all those who obey the law' (Duff 2008b).

Reply to the Irrelevance Objection

While Duff is correct about the differences between these two types of crime, in building his case he makes admissions that undermine the force of the *irrelevance objection*. In regards to *mala in se* crimes, although they are inherently wrong actions, not all inherently wrong actions are subject to legal punishment. Betraying a close friend is inherently wrong, but legal punishment is not justified for the 'crime' of betrayal itself. As Duff points out, 'In relation to such wrongs as these, we do need 'rules or conventions' to identify those of them that are to count as 'public', i.e. criminal wrongs, and to create the institutions and procedures through which they will be dealt with, but not to constitute them as wrongs in the first place' (Duff 2008a, p. 279). So murder and betrayal are both inherently wrong, but only the former is counted as a public or criminal wrong. In regards to *mala prohibita* crimes, 'we do need rules or conventions to determine what conduct should be prohibited or required for the sake of the cooperative endeavour' and when it comes to breaches of these rules 'we might see good reason to criminalize at least some breaches, as constituting wrongs that should be publicly marked as such' (Duff 2008a, p. 279) Tax evasion is wrong only because of conventions requiring paying taxes, and so the wrongness of it is a matter of unfairness. No matter the source of the wrongness for either type of crime, only some wrongs are ruled to be public wrongs, which will be regarded as criminal and subject to legal punishment.

While both murder and tax evasion (but not betraying a friend) are thought to deserve legal punishment, they are clearly wrong for different reasons. But if there's no common element to these two crimes, then perhaps we're mistaken to think that they both deserve punishment. As pointed out in the *false-equivalence objection*, for punishment to be an appropriate response to any crime, all crimes must have something in common that makes them deserving of punishment. There is, however, a common element, since Duff points out that not every act that is inherently wrong is also against the law. We need rules to identify which wrongs will count as public or criminal wrongs, otherwise it's unclear why murder deserves legal punishment but betraying a friend does not. So even Duff has to admit here that part of what

makes murder and tax evasion deserving of punishment, but not betrayal, is that there are rules that stipulate what sorts of wrongful behavior are going to count as public wrongs. Breaking these rules involves an element of unfairness, even when the rules concern inherently wrongful behavior such as murder. This is the core claim of fair-play that every crime is at least a crime of unfairness, and that claim does not imply that what is fundamentally wrong with murder is merely unfairness.

Duff, in his discussion of *mala in se* and *mala prohibita* crimes, is conflating the question about why certain behaviors are criminalized with the very different question of why all criminal behavior deserves punishment:

> If we suppose that criminal wrongfulness must be unitary, i.e. criminalization must always be justified by appeal to just one kind of wrongfulness, this more pluralist picture that appeals to different kinds of wrong will seem inadequate: but why on earth should we suppose that? Why should we not, more plausibly, be pluralists about criminal wrongfulness, and recognise that there are irreducibly different kinds of wrong that merit criminalization? (Duff 2008a, pp. 279–280)

Fair-play theorists are supplying a unitary account of what makes crime deserving of punishment, and this account does not imply that our reasons for criminalizing behavior in the first place only refer to one kind of wrongness. The goal is to give a unitary account of why crime deserves punishment despite the 'irreducibly different kinds of wrong that merit criminalization'. After all, that is what a theory of punishment has to do—provide a unitary explanation of what makes all crime, as opposed to other wrongful but not illegal behavior, deserving of punishment. The *irrelevance objection*, like the *false-equivalence objection*, involves the failure to keep distinct the question regarding what all crime has in common from the questions regarding what differentiates types of crime. The former question can be answered by reference to unfairness without necessarily implying that unfairness has to be the only answer to the latter question. Even with *mala in sen* crimes where we can agree that they are inherently wrong acts, we do not have a complete story about their status as crimes (for which legal punishment is justified) without mentioning the rules marking them as public wrongs. These rules, like the rules marking tax evasion as a public wrong, are rules which everyone is expected to follow, and for which it would be unfair for someone to break them.

Conclusion

It is consistent for fair-play theorists to provide a unitary answer to the question of what makes crime deserving of punishment, while being pluralists in response to the question of what makes certain behavior deserving of criminalization. The reasons why behavior is criminalized will vary, and those reasons are already in place before the attempt is made to determine a suitable punishment for any particular crime. There's no reason why the fair-play theorist cannot take those reasons for criminalization into account in determining punishment, once we've clearly distinguished the issue of determining specific punishments from the issue of what

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justifies punishment as a response to crime. The failure to appreciate that is what generates the *false-equivalence* and *irrelevance objections*. Although the arguments in this paper by no means address all of the questions raised about the fair-play view, they should provide reasons to once again consider fair-play as a viable justification of punishment.

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