

Consent Underlying Fair Play Theory

Fair play theory's appeal lies in its supposed ability to explain political obligation without the problems that arise when relying on consent to ground that obligation. However, I aim to show that the fair play account does not succeed in providing a distinct basis for political obligation, as people only have obligations to do their part in beneficial schemes when they have consented, either explicitly or tacitly, to participate. Consent, rather than a fair-play-generated duty to fellow participants, then becomes the underlying force that explains resulting obligations.

I will begin by outlining how fair play theory explains obligations, political or otherwise. The theory applies to joint enterprises regulated by fair or reasonably fair rules that mutually benefit those involved in the enterprise. Some restrict their liberty by sacrificing to comply with the rules, with others benefitting from this restriction. Fair play theorists conclude that those who do their part in the enterprise have a moral right to demand that other participants, who benefit from their restriction, also comply with the rules. Reciprocally, the others in the enterprise have a moral obligation to bear their fair share of burdens that produce mutual benefits. This theory is applied to political obligation by viewing citizens as participants in the joint enterprise of operating a functional society. A duty to follow the law, for example to pay taxes, then derives from an obligation to others who also pay taxes that fund mutual benefits such as public roads. Nozick, however, raises a counterexample to challenge this theory: he imagines a neighborhood where a group of residents begin playing entertaining broadcasts across a PA system. They assign each resident a day when he/she must take a turn creating the broadcast. Nozick posits that if you are a resident who did not agree to this broadcast system, you intuitively have no obligation to do your fair share (broadcast on your assigned day), despite having received benefits from others' burdens (hearing enjoyable broadcasts on others' days). This

counterexample illustrates his view that fair play theory incorrectly justifies others' ability to place obligations upon us simply by providing us benefits, whether or not we want them.¹ Fair play theorists have responded to Nozick's challenge by arguing that his counterexample is outside the scope of the theory and therefore irrelevant as a challenge. Richard Dagger explains that "there must be some sense in which one takes part in the enterprise or leads those who are participating to believe that he or she is taking part in it" for fair play theory to apply.² Nozick's counterexample fails to meet this condition because you (as the resident) never participated, nor did you lead others to believe you were participating, so fair play theory simply does not govern the situation.

I would like to address a question naturally arising from Dagger's response: what defines participation (or portrayal of participation to others) in a joint enterprise? I propose that one becomes a participant when he/she gives consent to take part (ie. abide by the rules) in that enterprise. Consent can be given explicitly: when someone expressly, such through a verbal or written contract, agrees to contribute to an enterprise according to the outlined rules, he/she becomes a participant. Alternatively, consent could be tacit: without explicitly signing a contract, someone can passively accept the rules of an enterprise, causing other participants to believe that he/she is also participating. To illustrate how consent is the underlying force behind participation, and therefore fair play theory, I will examine several variations of Nozick's scenario, demonstrating that each situation relies upon consent to generate obligation.

First, we begin with Nozick's original scenario. You are assigned to a day (I will refer to this scheme of assignment, in which each resident is tasked with a day to broadcast, as a

¹ Jonathan Quong, Lecture (8/24/20).

² Richard Dagger, *Civic Virtues*. (New York: Oxford University Press, Inc., 1997), 70.

“calendar”) by a group of other residents (I will refer to this group as a “committee”) that you were not part of. Despite having reaped benefits of hearing broadcasts, it is intuitive that you bear no obligation to the committee, nor other neighborhood residents, to play a broadcast on your assigned day. You have no obligation because you are not a participant, and you are not a participant because you have not consented to abide by the rules of the calendar. You did not explicitly consent, nor tacitly give the committee reason to believe you consented, nor did you consent to the legitimacy of their authority. This lack of consent explains our intuitive conclusion that you are a non-participant with no resulting obligation.

Next, imagine an alternate scenario: you are a member of the committee. At the committee meeting, the calendar is proposed, and you vote in favor of it. You and your fellow committee members then assign a day to each resident (including yourselves). Our intuitive reaction is that you are obligated to take your turn. Fair play theory says that this obligation results from your participation, but motivating your status of participation is once again consent. In this case, your consent was explicit: you voiced your agreement to the calendar via your affirmative vote during the committee meeting. Because you consented to have the calendar implemented, you become a participant in the enterprise. We can see how while fair play theory posits an obligation to not free ride off neighbors’ sacrifices, you only have that obligation because you are a participant. You are only a participant because you consented to follow the rules of the scheme, which require you to do your part (ie. broadcast on your assigned day). The moral impetus for your obligation to broadcast comes from the promise you made when you consented to the implementation of the calendar, rather than from the receipt of benefits created by others’ sacrifices.

Now, imagine another alternate scenario: you are not a member of the committee. However, the committee holds a town hall where they ask everyone to voice any problems they have with the calendar. We shall assume that the committee genuinely wants feedback on the scheme, with no negative social repercussions for voicing opposition. You attend the town hall but do not speak up. Intuitively, it seems that you now have an obligation to take your turn. Why is this? In this case, you portray to other participants (ie. the committee) that you are participating in the enterprise. We can again trace this back to consent. Though you have not expressed explicit consent in voicing outright approval for the calendar, you have given tacit consent. By failing to voice opposition when you had knowledge of the new system and a fair opportunity to oppose it, you signal to other participants that you are also taking part. Once again, consent provides the basis for your portrayal of participation, which fair play relies upon to generate obligations.

Admittedly, not every case may be this clear cut. Let us take a third alternate scenario: you are a member of the committee, but at the meeting, vote against the calendar. Are you still obligated to take your turn broadcasting? Fair play theory seems to say yes, as you have participated in the enterprise by being a member of the committee. Though it may be less obvious, I believe consent still provides the basis for this obligation. Let us remove ourselves from this particular scenario and first look at a candidate for tacit consent in the context of political society. Participation in the political process is considered a leading candidate for what could constitute tacit consent to abide by the government's laws: by voting, running for office or engaging in other activities that utilize the political process as outlined by the government, people tacitly consent to the legitimacy of that government's authority. We can apply this logic similarly in alternate scenario #3 and view the committee as a neighborhood government of

sorts. By engaging in the process of neighborhood decision-making (via being a member of the committee), you give tacit consent to the legitimacy of the neighborhood authority. In this case, you have not consented to the calendar scheme itself, but rather tacitly consented to the legitimacy of the institution that created the calendar (the committee). Your tacit consent makes you a participant in the larger enterprise of the neighborhood as a political society. Again, your duty to broadcast then derives from your tacit consent to be a participant in your neighborhood society and to respect the committee's authority. You have a consent-driven duty (that underlies any fair play concepts) to obey the laws of the neighborhood government, including to broadcast on your day.

I will now outline and then address a fair play theorist's potential objection to the necessity of consent. Some may believe a fair play obligation can be generated based off one's positive attitude toward the benefits generated in a joint enterprise, without need for consent. For example, in Nozick's neighborhood, you may have never consented to the calendar, but you also may thoroughly enjoy others' broadcasts. Had your neighbors not worked together to provide the broadcasts for free, you would have paid to purchase a daily broadcast service. It seems that though you never consented to implementing the calendar, your attitude of enjoyment toward the benefits your neighbors made sacrifices to provide makes it morally wrong (or at least disingenuous) for you to refuse to broadcast on your assigned day.³

To address this challenge, I first wish to establish that if this proposed line of reasoning is to succeed in upholding a fair play obligation (independent of consent), it must indicate that the obligation continues to depend upon participation. In other words, if the moral impetus for fair

³ Quong, Lecture (8/26/20).

play obligation is to derive from one's attitude toward certain benefits, one's attitude must also serve to make him/her a participant in whatever enterprise produces those benefits. To explain this requirement, I return to Dagger's response to Nozick. For obligation based on fair play theory to apply to a person, he/she must *participate* or *portray participation* in the relevant enterprise.⁴ Therefore, if fair play theory is to successfully explain obligation deriving from one's attitude, the fair play theorist must also be able to explain that positive attitude toward the benefits of an enterprise makes one a participant in that enterprise (in the proposed objection, that your positive attitude toward the broadcasts makes you a participant in the PA system enterprise). Otherwise, fair play would not apply, like it did not Nozick's original neighborhood.

It seems this reasoning will be difficult to uphold. Let us imagine a different scenario: say you support the work of an influential interest group, run by volunteer members, that lobbies lawmakers to enact pro-choice policies. You have a positive attitude toward the benefits they generate, as you support pro-choice policies. You benefit from the group's work: they have successfully lobbied to change your state's laws, allowing you to have an abortion if you so choose. These policies are so important to you that if the interest group had not brought about pro-choice policies where you live, you would be willing to spend money if it would ensure those policies. Before I continue, we should verify that this scenario meets the conditions necessary for fair play theory to apply. It is a joint enterprise for mutual benefit: members of the interest group work together under the organization's guidelines to lobby lawmakers, producing pro-choice policies that benefit all participants of the group. The enterprise must be regulated by fair rules: we shall assume that each member is required to volunteer a roughly equal, reasonable number of hours each week (the hours are limited enough to allow members to also hold paid

⁴ Dagger, 70.

jobs and perform other necessary duties). Some must restrict their liberty to the benefit of others: members sacrifice leisure time to volunteer, leading to mutually beneficial pro-choice policies. Participation is the only remaining condition we must meet to apply fair play theory here.

Now, does your positive attitude toward the benefits (pro-choice policies) make you a participant in the joint enterprise (interest group)? For if fair play theory is to successfully generate an obligation here on the basis of your attitude, your positive attitude must make you a participant in the enterprise, otherwise the theory will be irrelevant. However, this conclusion seems intuitively objectionable: it seems unreasonable to conclude that you are a *participant* in the interest group based only on your attitude toward the pro-choice benefits they produce. It seems wrong to think that every person who holds a positive opinion of pro-choice policies, but does not volunteer for the group, is in fact a participant who is immorally shirking his/her duty. Further, people have attitudes on a plethora of issues. To take just politics, someone who has an attitude on abortion policy may also hold attitudes about environmental, tax, healthcare, and educational policies (just to name a few), and there are other similarly-operating interest groups for all these issues and more. If attitude were enough to make someone a participant, people would be participants of every single interest group that advocates for some cause they have a positive attitude about. Everyone having moral obligations to volunteer for hundreds of groups seems to be a wildly strenuous and altogether unreasonable expectation, causing positive attitude toward benefits to seem an implausible basis for fair play obligations.

Instead, consent is once again a much better candidate to explain obligation (or rather lack of obligation) in this example. Intuitively, we feel that you are under no obligation to volunteer for all interest groups, despite your positive attitude toward their work. Because you never consented to be a member of those groups, you are not a participant of their enterprise and

are therefore not shirking responsibility. You did not explicitly consent, never having signed a contract or otherwise agreeing to be a part of the group, nor did your internal beliefs amount to tacit consent that would have portrayed participation to group members. We can also explain why the actual members of our pro-choice group have an obligation to volunteer: in choosing to become members, they consented to meet the volunteering requirement, giving them a duty to uphold that promise.

From these examples, we can see how fair play theory relies upon consent: because fair play theory only applies to participants of an enterprise, and only those who have consented are in fact participants, consent underlies every instance in which fair play applies. Those participants already had separate, consent-driven contractual obligations to uphold the responsibilities they agreed to. Therefore, fair play fails to provide an account of obligation (including political obligation) that provides a useful alternative to consent. Attitude does not provide a viable alternative basis for fair play, as the obligations it would imply are wildly unreasonable. As a result, consent remains the driving force behind “fair play” obligations.