



BRILL



brill.com/jmp

Playing Fair and Following the Rules

Justin Tosi

Department of Philosophy, University of Michigan

jtosi@umich.edu

Abstract

In his paper “Fairness, Political Obligation, and the Justificatory Gap” (published in the *Journal of Moral Philosophy*), Jiafeng Zhu argues that the principle of fair play cannot require submission to the rules of a cooperative scheme, and that when such submission is required, the requirement is grounded in consent. I propose a better argument for the claim that fair play requires submission to the rules than the one Zhu considers. I also argue that Zhu’s attribution of consent to people commonly thought to be bound to follow the rules by a duty of fair play is implausible.

Keywords

consent – fairness – Klosko – political obligation – principle of fair play – Simmons – Hart

Jiafeng Zhu argues in his paper “Fairness, Political Obligation, and the Justificatory Gap” that fair play theorists have moved too quickly from a commitment to play fair to a requirement of submission to the rules.¹ Though Zhu admits that the principle of fair play may generate a duty for beneficiaries of a cooperative scheme to reciprocate to its participants in some way, he claims that it cannot bind beneficiaries to repay specifically by cooperating—i.e. following the scheme’s rules. The intuitive appeal of the principle of fair play is that it requires free-riders to restore “the just distribution of benefits and burdens.”² But as Zhu points out, it seems that a just distribution could be restored in any

I am grateful to Thomas Christiano for discussion of a previous draft, and to an anonymous referee for this journal for comments.

- 1 Jiafeng Zhu, “Fairness, Political Obligation, and the Justificatory Gap,” *Journal of Moral Philosophy* 12, no. 3 (2015): 290–312.
- 2 David Lyons, *Forms and Limits of Utilitarianism* (Oxford: Clarendon Press, 1965), 164.

number of ways, and it is not obvious why considerations of fair play should require cooperation as the method of repayment.

Zhu's argument could have important implications. If the principle of fair play cannot bridge the justificatory gap between reciprocity and cooperation, then its usefulness in addressing practical problems is significantly diminished. The principle has long been thought to provide the most promising grounds for political obligation—i.e. a general duty to obey the law. But if Zhu is right, then although we may have duties of fair play to reciprocate somehow for the benefits that states provide to us as subjects, we need not respond specifically by obeying the law. So unless the principle of fair play can bridge the justificatory gap, it is not well suited to ground an account of political obligation.

Fortunately, bridging the justificatory gap is not as difficult a challenge as Zhu claims. I respond below to what I take to be his two main arguments. First, I offer a stronger argument for the requirement of cooperation than the one Zhu considers on behalf of fair play. And second, I respond to Zhu's claim that consent is what grounds a requirement to follow the rules in cases that some take to be clear applications of the principle of fair play.

1 Why Follow the Rules?

Zhu's argument for the justificatory gap relies on an appeal to intuition: it seems that there are many forms of reciprocation that could provide a fair return for benefits produced by the cooperative efforts of others. So long as the return is fair, Zhu says, it does not matter what form it takes. The burden of the fair play theorist is to explain why some loose form of reciprocation is not a sufficiently fair return, and that cooperation—submission to the rules—is. Put in terms of rights, the issue is whether incurring a duty of fair play involves forfeiting a liberty right to choose how one repays one's debt of fairness.

The standard argument from fair play theorists is that giving up the liberty right to repay as one chooses is part of the cost paid by the scheme's other participants, and so those with outstanding debts of fairness must take on that cost, too. This alone cannot settle the issue, of course, because Zhu could simply reply that an alternative fair repayment would take into account—and provide compensation for—the extra benefit of choosing the form of repayment. So there will have to be some further reason to cooperate rather than reciprocate if the justificatory gap is to be avoided.

Zhu considers one possible reply on behalf of requiring cooperation: if everyone were free to choose the form of their reciprocation, then any cooperative

scheme would inevitably collapse. Freely chosen reciprocation would, then, fail to restore the just distribution of benefits and burdens. Thus, fair play requires cooperation, rather than freely chosen reciprocation.³ Call this the actual consequences argument.

As I read Zhu, he offers two replies to this argument. First is that the actual consequences argument cannot ground a requirement of cooperation, because cooperative schemes generally do not depend on support from those bound only by a duty of fair play. I will address this claim in the second section, as it is part of an independently interesting point. Zhu's second reply is to charge the actual consequences argument with begging the question. The consequences of freely reciprocating rather than cooperating are no fault of those bound by the principle of fair play unless fair play requires cooperation. But that is precisely what this argument is supposed to show.⁴

Fortunately, there is a better alternative in the neighborhood of the actual consequences argument. Free-riding is morally problematic not because of the actual costs it might impose on cooperators, but because it is disrespectful. So call this the argument from disrespect. Beneficiaries of rule-based cooperative schemes enjoy the same benefits as cooperators. Those who free-ride on such schemes treat cooperators disrespectfully, as they enjoy the benefits that come from others following the rules while refusing to submit to those rules themselves. Free-riders thus claim for themselves a status that is greater than equal to cooperators. Put in Kantian terms, the maxim of a free-rider is to enjoy benefits without following the rules that make possible the provision of those benefits.⁵ That, of course, is a contradiction in conception, as universalizing the maxim makes it a non-viable means to the end of enjoying the scheme's benefits.⁶ The same is true of the maxim of free reciprocators. If everyone reciprocated as it pleased them rather than submitting to the rules, the scheme would collapse. The failure of both the free-rider's and free reciprocator's maxims to pass the contradiction in conception test reveals that accepting the scheme's benefits without submitting to its rules violates a perfect duty, owed to the cooperating members of the scheme. This seems to me a much stronger

3 Zhu, "Fairness, Political Obligation, and the Justificatory Gap," 306–309.

4 *Ibid.*, 309.

5 The point is clearest when free-riders go out of their way to accept benefits, but I think the point holds even for non-voluntarist versions of fair play. Unfortunately, going into the details here would take us too far afield for too long.

6 Here I make use of the practical contradiction interpretation of the contradiction in conception test. See Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), 92–93.

argument for the conclusion that non-cooperators wrongfully claim for themselves an extra liberty right.⁷

Another attractive feature of the argument from disrespect is that it avoids the following novel argument from Zhu against the actual consequences argument. If the point of the principle of fair play is to allocate to schemes the rights necessary to prevent their collapse, then schemes should have only a liberty right to coerce beneficiaries into providing the form of support the scheme needs, since that is the only right necessary to ensure the functioning of the scheme. The claim right to similar submission is dispensable.⁸ But the argument from disrespect does not call for the allocation of rights with an eye to the consequences of different possible allocations. Rather, the argument shows through non-consequentialist means that free-riding and free reciprocation both violate the claim rights of the other cooperators.

The argument from disrespect is importantly different from the argument from actual consequences, as it holds that people must cooperate out of considerations of fair play whether the scheme actually depends on fair play cooperators or not. And the argument is not question-begging, as it represents the fundamental moral concern underlying the principle of fair play just as much as it does an explanation of the wrongness of claiming a liberty right to reciprocate freely. Thus, one cannot grant that fair play requires some form of reciprocity—as Zhu does—without also admitting that the form of that reciprocity must be submission to the rules.

Fair play theorists have better resources for requiring cooperation than Zhu recognizes. But that may be of little import, as Zhu also charges that cases commonly thought to raise issues of fair play fall instead under the purview of consent. I turn now to that issue.

7 Incidentally, although Zhu attributes the actual consequences argument to George Klosko, I think Klosko has something more like my argument in mind. See *The Principle of Fairness and Political Obligation*, Rev. ed. (Lanham, Md.: Rowman & Littlefield, 2004), 42. Hart also clearly rejects the appeal to actual consequences as the basis of a duty to play fair. Immediately after stating the principle of fair play, he writes: “In social situations of this sort... the obligation to obey the rules is something distinct from whatever other moral reasons there may be for obedience in terms of good consequences (e.g., the prevention of suffering); the obligation is due to the cooperating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering.” “Are There Any Natural Rights?,” *Philosophical Review* 64, no. 2 (1955): 185. Other common-sense defenses of fairness also explicitly reject the need for additional bad consequences to render unfair rule-breaking morally problematic. See Gerald F. Gaus, *Social Philosophy* (London: M. E. Sharpe, 1999), 184–85.

8 Zhu, “Fairness, Political Obligation, and the Justificatory Gap,” 307–308.

2 Consent and Fair Play

Both consent and fair play are transactional principles. They account for the transfer or creation of rights relationships between persons by appeal to some interaction between them. As a result, the two principles have a similar structure with similar parts. On consent theory, one commits to an agreement by the offering of a “sign of consent”—an act that, “because of the context in which the act was performed, including the appropriate conventions (linguistic or otherwise)...counts as an expression of the actor’s intention to consent.”⁹ Acceptance of benefits fills this role on the principle of fair play.¹⁰ In cases where consent is offered, the contract or terms of agreement specify the rights transferred between and created for the consenting parties. For fair play theorists, the rules of the cooperative scheme specify the relevant rights and duties. In other words, the rules stipulate what form fair reciprocation must take.

One major appeal of the claim that fairness requires submission to the rules is that it offers an attractive explanation of our intuition that in some cases we are morally required to submit to a set of rules even when we clearly have not consented to those rules. In accepting benefits willingly and knowingly from a cooperative scheme, one is at the same time accepting that one is morally bound to submit to the rules of that scheme.¹¹ Garrett Cullity describes one such case:

Public transport in my town is efficiently run on an “honor” system, which places the onus on passengers to buy a ticket before traveling and to cancel it in a machine on any vehicle they use. I ride without paying.¹²

Fair play theorists often cite cases like this as classic instances of free-riding, in which a duty of fair play is being violated. Zhu concedes that there is a non-fungible duty to pay the fare in cases like this, but he denies that fair play is the best explanation of that duty. His alternative explanation is that the riders

9 A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979), 88.

10 I will restrict my remarks in this section to the voluntarist version of fair play, since it is the main target of Zhu’s argument about consent.

11 For discussion of the willing and knowing conditions, see Simmons, *Moral Principles and Political Obligations*, 129; Edward Song, “Acceptance, Fairness, and Political Obligation,” *Legal Theory* 18, no. 2 (2012): 212–15.

12 Garrett Cullity, “Moral Free Riding,” *Philosophy and Public Affairs* 24, no. 1 (1995): 6.

tacitly consent to pay the fare by—as the case specifies—riding without paying. Zhu writes that just as one tacitly consents to pay for a meal in a restaurant by ordering, Cullity’s free-rider tacitly consents to pay the transit fare by boarding.¹³ If there were a ticket seller blocking the entrance to the vehicle, riders would expressly consent by paying; under the honor system, riders tacitly consent to pay by boarding the vehicle. Zhu writes that using the honor system instead of a ticket seller “does not change the nature of the public transport scheme; it only makes the system more open, and changes the way people pay their fares.”¹⁴ Thus, Zhu concludes, the best explanation is that the free-rider violates a tacit agreement by failing to pay.

Zhu’s explanation is implausible. One offers tacit consent by remaining silent or inactive in cases where doing so is a sign in the given context that one consents.¹⁵ For the behavior of the passenger in Cullity’s public transport case to qualify as tacit consent, there would have to be a convention according to which it is a reliable sign that one consents to pay (and follow any other relevant rules) by walking past the ticket purchasing station and boarding a vehicle without paying. But, of course, there could be no more reliable sign that one does not consent to pay. If Cullity’s passenger tacitly consents, one wonders what a person would need to do to avoid signaling consent.¹⁶

The principle of fair play, on the other hand, explains cases like this easily. Cullity’s free-rider accepts the benefits of the public transit system without submitting to the rule that he must pay the fare. He becomes a member of the cooperative scheme of riders by accepting the benefits. Yet he refuses to submit to the rules of the scheme, and so claims a greater liberty for himself than that enjoyed by the other members. Submitting to the rules by paying to ride is the only way he can play fair with his fellow passengers. Unless he pays, he violates a duty of fair play to them. It seems, then, that Zhu has mistaken what John Simmons calls a “consent-implying act” with a genuine sign of consent, for boarding without paying does not signal that the free-rider intends to consent.¹⁷

13 Zhu, “Fairness, Political Obligation, and the Justificatory Gap,” 299–302. See n13 and the accompanying main body text.

14 Ibid., 301.

15 For this reason, ordering in a restaurant is an example of express consent, not tacit consent. For a helpful discussion of the conditions for tacit consent, see Simmons, *Moral Principles and Political Obligations*, 80–83.

16 If signs of consent were this easy to come by, one would think that the problem of political obligation could be disposed of rather quickly.

17 One of Simmons’ examples of a consent-implying act is apropos: “An act may be such that it binds the actor morally to the same performance to which he would be bound if

There are, of course, cases in which one *does* conventionally signal consent by accepting benefits. In these cases, consent is a fine explanation of the duties that arise.¹⁸ But the existence of such cases is of no help to Zhu, for two reasons. First, acceptance is not always a sign of consent, and when it is not there are still sometimes clear duties to follow the rules. For Zhu to avoid this problem, he would have to show that acceptance always signifies consent in the relevant cases, or that there are some other grounds for the duty in these cases besides fair play. But the public transport case is one clear example in which acceptance is not a sign of consent, benefits are accepted, and fair play is a strong candidate explanation for the relevant duty.¹⁹

Second, even if consent can explain our intuition that a person is under a duty in some case, that duty could have multiple grounds. One could be bound to fulfill the duty both because one agreed to do so, and as a matter of fair play. To see how this is possible, take a case involving another kind of special duty. Suppose that my mother is sick. I have an associative duty to her to provide for her care. But suppose further that I once promised my father that I would take care of my mother should the need arise. There is no good reason of simplicity to declare one of these grounds invalid. In fact, in this case the multiple grounds illuminate the fact that I owe the relevant action to different people for different reasons. The same could be true of some private variant of the public transit case. I may offer my consent to follow the rules of the bus (pay my fare, no eating or smoking, etc.) to the bus company and also owe the same thing to my fellow passengers as a matter of fair play.

Fair play sometimes offers a better explanation than does consent for a duty to follow the rules. The public transit case is a representative example. Thus, the theoretical utility of fair play cannot be so easily replaced. And even if it could, fair play might still be an additional grounds for a particular duty to cooperate.

he had in fact consented. I may do something which is not itself an act of consent, but which nonetheless binds me as if I had consented." Simmons, *Moral Principles and Political Obligations*, 89.

18 The serving conventions at some restaurants are one example, as Zhu points out. Zhu, "Fairness, Political Obligation, and the Justificatory Gap," 300.

19 Zhu could insist that I have misunderstood the conventions of the honor system in the public transit case, but again, that would not help him. For even if he has in mind a strange scenario in which skirting payment is a sign of consent to pay, there are obviously cases in which acceptance of benefits and signaling consent come apart. Suppose, for example, that Jones free-rides in a differently configured public transit system by hopping the turnstiles. He accepts the benefits of the system while offering a clear sign that he does not consent to pay.

3 Conclusion

Zhu poses a novel objection to the principle of fair play by pushing a point that has gone largely unremarked upon. Although the justificatory gap could make trouble for some fair play theorists, I think that a well-developed principle of fair play can successfully defend against Zhu's arguments.