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# When Fair Is Not Just and Just Is Not Fair

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**T**he dramatis personae animating this article are two ideas that exert an immense influence on human affairs but whose names are too often taken in vain. They are justice and fairness. Both, especially the latter, are employed freely to convey a wide variety of meanings and to characterize heterogeneous events or states of the world—a latitude that impairs their quality and usefulness as concepts and renders them apt for abuse. Between the lines that follow, I use the case of trade to explicate these ideas with the principal object of helping to distinguish between clear and unclear usage of each as well as to distinguish between the two (for they are sometimes treated as synonymous).

I limit the use of the words *just* and *justice* to such relations between human acts or the states they bring about, on the one hand, and rules (having certain defined properties as to origin and content) and distributive agreements free of force or fraud, where the acts or states do not breach the rules or agreements, on the other.<sup>1</sup> This manner of proceeding to an *explicatum* should commend itself to those who wish justice (or, of course, injustice) to be relatively easy to identify by virtue of the factual, ascertainable nature of rules and agreements, without recourse to some theory of justice.

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1. For force to vitiate agreement, it must be wrongful; it must itself breach the rules. Twisting your arm to breaking point till you sign the agreement is, of course, force that vitiates the agreement. Signing the agreement to take an ill-paid and ignoble job because the unpalatable alternative is having no job at all is “forced” only in the language of those who affirm that the system of voluntary exchanges is a sham if the alternative to taking what is on offer is much worse. In inegalitarian societies, such is usually the case, which entails forced rather than voluntary agreement.

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Contrary to the idea of just and justice, the idea of fair and fairness can probably be explicated, if at all, only in terms of subjective sentiments that may be shared by many people, but rarely by all. The term *fair* is employed for the most part, though far from exclusively, to express approval of the relation between a consequence and the cause to which it is imputed. A reward is fair for any impartial observer if he finds that it properly relates to the act it is meant to recompense. The relation must satisfy some intuition; it must be a pleasing one. The word *fair*, of course, may signify aesthetic as well as moral pleasure. However, lest matters should start to look simple, the pleasure may be less than hearty; *fair* is quite frequently a grudging acquiescence in the “less than good.” Whether rewards or punishments, gains or losses distributed among similarly placed individuals, are fair—that is, are pleasing to the impartial spectator—is in all likelihood a matter of whether the variables in question depend on such other variables as are deemed relevant to them by the spectator. Pay, for example should be some function of work or pains, not of nepotism or intrigue. Such a functional view of what is deemed fair favors distributions based on sharing rather than on excluding, and it may converge in the limit to strict egalitarianism. Finally, notice that notions of fairness are also applied to compromises between contradictory views of true or false and good or bad.

### Justice and Fairness in Trade

It is pertinent to ask whether the insistent and recurrent demand that international trade—indeed, all trade—must be fair instead of merely free, is a just demand. Pondering the question, one is struck by the formless, elusive character of the notion of fairness and the near-universal practice of talking and writing about it as if it were clearly defined and commonly understood. It now seems to me that the right way to seek answers to the contested justice of trade or, for that matter, of any practice claimed to be unfair and in need of rectification, should pass through a scrutiny of the notion of fairness itself and an examination of the rivalry between it and justice. Among the four possible combinations of the two concepts—just and fair, unjust and unfair, just and unfair, unjust and fair—the last two need resolution.

A little more than half a century ago, the factor-price equalization theorem was enunciated. Since that time, its manifestation in international trade has become massive and conspicuous. The world did not wait for the theorem’s enunciation to start whittling down factor-price differences; the process is presumably as old as exchange. However, for the lay spectator, the convergence of factor prices has become spectacularly obvious only recently. It has been brought along by the fast container ship, electronic mail, the rise of a sort of English as the world language, and wide-ranging inroads into tariff and nontariff barriers. As if this process were something novel, it has a little naively been given a name of its own, *globalization*. By and large, globalization has been conspicuously good for sellers of Asian light industrial goods and their Western consumers. It has raised Asian wages sharply and is still raising them; it has helped to keep

measured inflation rates down the world over; and it seems to have enhanced the return on capital everywhere. Perhaps less noticeably, it has slowed down or stopped altogether the increase of the real wages paid for unskilled work in the Western world. Much of the equalization of productivity-adjusted labor costs is taking the form of Asian wages rising and Western ones standing still to let the former catch up. Thus, free trade does produce some immediate nongainers; and the Western producers of light industrial goods who are driven by Asian competition to seek new livelihoods are clear losers, at least in the short run.

Because globalization generates not only gains but also losses, a debate is provoked about whether it is a good or a bad thing. If it is bad, the further question is what, if anything, ought to be done about it.

Derived in terms of some measure of total income or output, the answer is plain enough. Subject to the problems of aggregating different goods and services into a homogenous sum, world income is higher if trade is freer. However, a rise in the total, a good thing, may well involve changes in its distribution, some of which may be bad; the relative stagnation of Western wages for low-skilled workers and the serious predicament of many Western light-manufacturing industries under free trade are widely judged to be bad things.

Conducting the debate in terms of utilities rather than of income aspires to make allowance for such distribution effects. Instead of netting out income losses against income gains, the utilitarian approach seeks to strike a balance between utility losses and gains by overcoming the lack of a common measure of the utilities of different persons. Because there is no scientific, objectively ascertainable way of doing so, this approach resorts to methods that have at least some irreducible subjective element, such as various “compensation tests” or the construction of hypothetical “social welfare functions.” Stripped to its core, the utilitarian attempt to strike a balance between various distribution effects is tantamount to a subjective judgment that the good effects outweigh the bad ones, a judgment that an individual cannot make for others or justly impose on others.<sup>2</sup>

In terms of the globalization debate, free traders judge the gains of the gainers to matter more than the losses of the losers, and protectionists argue the contrary. I feel perfectly justified in siding with the free traders without having to pretend that my choice has any more support in modern welfare economics than does its opposite.

A different strand of the debate avoids the divide between good and bad. It runs instead along the divide between just and unjust. If it is the case (and we must fervently hope that it is the case) that the rules of justice are not subjective, the outcome of this debate should be more decisive than the dead-end arguments where my say-so confronts your say-so, and each is as bona fide as the other. Free trade is the

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2. **Editor's note:** For a clear yet rigorous demonstration of these propositions, see Pierre Lemieux's article in the previous issue of this journal.

market-clearing outcome of willing seller agreeing with willing buyer. Such dealing violates no liberties and no third parties' rights. It may well harm them, but because these liberties and rights remain intact, third parties have no valid claim for protection and no immunity from harm beyond that provided by their liberties and rights. This assessment is not a subjective judgment that might go either way, but a decisive result of applying the rules of justice. Protection against such results of free trade involves applying force to prevent some dealings and to alter the terms of other dealings from what would be voluntarily agreed to. Protection thus offends against the rules of justice.

Two lines of attack can be pursued against the thesis that agreement suffices to make a deal just. One is that agreement must proceed from a status quo that precedes it.<sup>3</sup> That status itself may be just if it is the result of an agreement that preceded it. *That* agreement is just if it proceeds from a just status . . . and so on in an infinite regress. If the initial status quo, being initial, cannot proceed from a previous agreement, it may be unjust, and so may all subsequent ones, including the one that just precedes the agreement in question. Why, then, should one regard the agreement itself as just? If Asian exports are produced in sweatshops by shamelessly exploited laborers, the cut-price deal between exporter and importer is surely an unjust one? This attack is one more appeal to the notion of fairness in general and to a fair price in particular. It seeks not only to persuade us that dealing in goods produced in sweatshops is unjust, but also that even if it were not (that is, if working in a sweatshop can be a matter of voluntary agreement untainted by a vice in the status quo that gave rise to it), the terms would still be unfair, and fairness ought to override justice.

However, it is arbitrary to hold that a status quo itself must be the result of agreement in order to be just and that agreements proceeding from it are also just. To validate this kind of arbitrary assertion, the burden of proof must be discharged, and the burden rests with the accuser. Moreover, it is a fallacy to jump to the conclusion that an agreement proceeding from an unjust status cannot be just. However deplorable the terms on which many or most Asian workers still work, these conditions do not make the seller of the goods they make less willing to sell and the buyer less willing to buy at the "cut" price. In fact, the contrary will tend to be the case. Agreement between the two makes the resulting status quo less unjust than the one that preceded it; the Asian laborer's working conditions will become less deplorable and converge toward Western conditions if Asian exporters can sell freely to Western importers. Insistence that the Western importer must pay a "fair" price would obviously thwart this process by reducing the demand for labor in Asian export industries.

The other line of attack against the justice of the agreed deal is likewise based on an appeal to fairness. Globalization is good for Asian producers and Western consumers, but it generates a negative externality for the Western producer of a wide

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3. I owe the following argument to comments by Hartmut Kliemt.

range of easy-to-make products, leading to businesses becoming worthless and jobs being lost. Because the Western producers are innocent third parties, victims of this negative externality through no fault of their own, why should they have to suffer it? Surely fairness demands that they be protected or compensated. (It is worth noting that if suffering from a negative externality entitles one to get compensation from others, benefiting from a positive externality should in turn make one liable to compensate others.)

Nothing illustrates more tellingly the working of fairness arguments than the phrase “through no fault of his own”—that is, the disapproval and displeasure attached to a consequence that springs from the “wrong” cause. It is deemed unfair that anyone should suffer an “undeserved” windfall loss or pocket an “undeserved” windfall gain. The technical term *externality* lends an air of intellectual respectability to the popular notion that bad luck “ain’t fair” as well as to the extravagant contention that good luck is “morally undeserved.” Such sentiments have no standing in justice (though they do form the backbone of the strange theory of “justice as fairness”).

## Herding Cats

A number of more or less poorly defined and loosely employed ethical notions have an impact on public preferences and expectations of how individuals ought to order their affairs. Spurred on by these notions, the public demands that in certain contexts individuals should sacrifice their own interests, but because they cannot be counted on to do so voluntarily, public opinion directs politics to oblige (force) them to conform. Compulsory care for the poor and compulsory solidarity with victims of wars and disasters are examples of the general public’s moral sentiments that provide at least part of the motive for policies that force individual conduct to differ from what purely voluntary choices would produce. Among these ethical notions, the idea of fairness is perhaps the most influential.

This idea appears in an extraordinary variety of forms in everyday discourse, in descriptions of reality and debates about the truth of these descriptions, as well as in advocacy of public action that imposes a course of action on others. Trying to discern a recognizable pattern in the ways in which the word *fair* is actually employed is a task not unlike the herding of cats. It should cause no surprise that in the attempt to form anything like a coherent herd, some of the cats have to be allowed to escape and not be pursued.

A few examples illustrate the difficulty of ordering into a pattern most characteristic turns of ordinary speech about fair and fairness.

“*A fair statement.*” A statement that takes due account of both sides of a contested case. Often a hint that “the truth is halfway” between conflicting positions.

“*Fair play.*” Taking no advantage of the other’s weakness. Giving him an even break.

*“A fair day’s pay for a fair day’s work.”* The pay should depend in some particular way on the work done.

*“A fair deal was struck.”* Neither party got the better of the other. If one party gained much and the other merely came out even, the deal was not fair (a Pareto improvement is not necessarily fair).

*“Fair shares for all.”* It is common knowledge among fair-minded people what everyone’s share ought to be. Barring good reasons to the contrary, everyone’s fair share is the same as everyone else’s. (There is a presumption of equality, with inequalities ascribed to causes accepted as relevant).

The egalitarian sympathies that transpire from everyday turns of speech apparently do not rely on any doctrinal support or on habits of thought ingrained by egalitarian political practice. If anything, reliance works the other way around: the egalitarian sympathies are antecedent to and inspire doctrine and practice. Where, then, do the sympathies come from?

## The Boxing Match and the Laborers in the Vineyard

Intuition is hardly a reputable guide to moral judgments, but it is a fact of life, and it is powerful when not reined in or crowded out by less subjective conceptual constructions. It is surely the most powerful influence on what is regarded as fair and unfair. Some insight into its working is gained by considering how it classifies a consequence as fair or unfair according to the cause to which the consequence is (rightly or wrongly) imputed. A consequence—a fighter wins a boxing match, a laborer is paid a sum of money—may spring from or be attributed to a variety of causes or combinations of them. People accept the consequence as fair according to whether they accept as proper the cause they think was at work.

Take, for example, a series of boxing matches. At the end of each, it is found that one of the fighters has won. What has brought about this consequence? In one fight, the winner was heavier and more muscled than the other; therefore, he could hit harder. The impartial spectators find that this was not a fair fight. In another match, the winner “danced like a butterfly and stung like a bee,” his opponent being but a sorry hunk of meat by comparison. The spectators find that the loser never had a chance and the fight was not fair. In yet another encounter, a trained veteran defeats a strong but callow youth, and the spectators again judge the contest a bit unfair. In the matches they find fair, neither contestant has a conspicuous advantage in the obvious characteristics of muscle, speed, or skill that contribute to victory, and the winner’s win is attributed to courage, spirit, or the ability to take punishment. It is not obvious why our intuition should work this way, excluding plausible causal variables as irrelevant to fair fights and admitting perhaps less plausible ones as relevant.

Empirically learned cause-effect functions tell us that muscle makes a win likely, and more muscle makes it more likely. Similar functions are found to relate speed

and a win, skill and a win, and so forth. In a generalized theory, one would represent the potentially relevant cause-effect relations by a function with the corresponding number of independent variables. In a theory of fairness, some or all of these variables would be ruled out as irrelevant on ethical grounds, the grounds being furnished by personal intuition. In the special theory of fairness that underlies the well-known attempt to construct a theory of “justice as fairness,” every independent variable capable of generating unequal outcomes in different people’s command over “primary goods” (which would be called their income in ordinary speech) is ruled out. Whether inherited or acquired, all independent variables that can affect this income are declared irrelevant because morally undeserved, leaving equality of incomes as the sole fair position from which to agree on “background institutions” and the principles of justice. People’s varying intuitions “overlap” to render this conclusion more objective and less contingent on a political culture. However, for the theory to stand up, the overlap must cover the identification of fairness with equality.

Another story in which the intuitive idea of fairness strongly operates by asserting which variable is relevant to a fair result, wherein the potential clash with the precepts of justice is made explicit, is the classic parable of the laborers in the vineyard found in chapter 20 of the New Testament’s Book of Matthew. The lord of a vineyard goes to the marketplace at daybreak and hires the men looking for work at a penny for a day’s labor in his vineyard. At intervals during the day, he visits the marketplace again and sends the men waiting to be hired to his vineyard, telling them only that they will be duly paid. The last lot he hires do only an hour’s work before the day ends. When the master tells his steward to pay everybody, starting with the last lot and leaving to the end those who have done a full day’s work, they all are paid the same one penny, regardless of the hours they worked. Among those who have worked the most, there is murmuring about the unfairness of this manner of payment. However, the lord of the vineyard reminds one of the grumblers of the agreement they had struck at a penny for the day, whereas the others had no agreement and their pay depended on his good grace.

Justice is clearly on the lord’s side: he fulfilled his agreement, and he exercised his liberty where no agreement bound him. Many (though not all) fairness notions rebel against this course of action, demanding at least some proportionality between work and pay, where *work* may have a variety of different meanings, such as time spent, effort, result, responsibility, and so forth. Some people’s intuitions would regard a linear relation as an obvious requirement of fairness.

More intriguingly, others might lean toward a nonlinear relation—for example, pay increasing at a diminishing rate as work increases (the chief pilot is twenty times more productive than the cabin steward, but in fairness he should not be paid twenty times more). As one leans more and more toward such a nonlinear notion of fairness, one will eventually converge on the strict share-and-share-alike egalitarian position wherein everybody is paid the same regardless of how much or how little he works or

how great or how little effect he produces: it would be a penny a day for all, a case of act irrelevance.

## Evolutionary Selection: The Propensity to Fairness

If, as the immediately preceding considerations suggest, within the somewhat disorderly and formless body of intuitions of fairness, there is a hard core that is internally consistent and resembles a function in which independent variables chosen as relevant determine the value of the dependent variable, namely the fair result, one has to ask: Where does this core intuition come from?

I do not know the answer. However, it is relatively easy to construct a scenario that can plausibly explain how the basic intuition of fairness might first have taken root. There may well be more plausible scenarios, though none occurs to me, so they must be left to others to propose.

Imagine two small groups of very early prehistoric men, sedentary cave dwellers or wanderers who are not masters of their fate and depend on luck to survive. Nature feeds them in a somewhat random fashion, often inadequately.

In the first group, when nature provides food, the ranking male eats first, and he eats to satiety. Weaker males, women, and children share the remains. Any attempt to force the ranking male to give up food has always been defeated and punished by him, so the group's dominant strategy is never to challenge the ranking male, but to take what he leaves. Pregnant women, children, and adolescents may starve some of the time, and the group has a significant probability of becoming extinct.

The other group has also lived through rebellions against the ranking male to make him give up food. These attempts were inconclusive and bloody. Both the ranking male and the rest of the group would prefer to avoid them. However, simply to yield to the other side and let it take all the food is also unsatisfactory to each. The situation can be expressed formally as a game between two players, the ranking male and the others, in which each player can choose between two pure strategies, "aggressive" and "yielding." Which strategy is best depends on the strategy the other player will adopt, but neither player knows that choice in advance of deciding his own strategy.

For each player, four possible outcomes exist in each round of the game, according to the strategy he and his opponent happen to adopt. If he is "aggressive" and the other is "yielding," the result is very good for him. If he is "aggressive" and the other is also "aggressive," the result is very bad for both. If he is "yielding" and the other is "aggressive," the result is poor for him. Finally, if both are "yielding," the result is fair for both. Let the ordinal number 4 stand for "very good," 1 for "very bad," 2 for "poor," and 3 for "fair." For each player, then, the pair of possible outcomes 4,1 that may result from an "aggressive" strategy *straddles* the pair of possible outcomes 2,3 that may result from the "yielding" strategy. One pair is no better than the other for the player who is only playing for the expected payoff and ignores the strategy the other player will adopt in any given round of the game; there is no pure-strategy

equilibrium. (A mixed-strategy equilibrium, with each player's being "aggressive" some of the time and "yielding" the rest of the time, is possible, but it cannot be reached by conscious calculation if the player can think only ordinally—that is, can judge that one outcome is better than the other, but not how much better).

If history nevertheless tells us that one group of prehistoric men has survived through many generations and reached the stage of development in which inventions and innovations finally enable it to overcome the caprice of nature, it is a reasonable conjecture that they must have opted most of the time for the strategy where both sides "yielded" and practiced some "fair" manner of dividing the food to which each could agree. In reaching this strategy, the independent variables implicitly selected by the players are force and need, and this selection produces the dependent variable—the fair division.

Let me stress that there is no obvious ground for supposing that these prehistoric men placed any value on the survival of future generations of their species. Therefore, within the standard payoff-maximizing, rational-choice explanation, they had no reason to favor the "fair" outcome of the game. If, as seems to be the case, they did favor it, the explanation must lie outside standard rational payoff maximization. We might as well call this extra explanatory factor the *propensity to fairness*, a name for the sort of genetic makeup that comes to dominate through evolutionary selection.

Some form of limited, core, internally consistent fairness might be, then, a successful evolutionary strategy. The propensity to fairness that appears to motivate it might be the taproot of the basic intuition people have about fairness, though perhaps not of the full, luxuriant, formless, often internally inconsistent variety they express in everyday life.

## **Adaptive Selection: Conventions of Property and Contract**

In this article, I treat it as an accomplished fact that conventions against the crudest torts, such as killing and maiming without good cause, are unproblematic and are solidly in place. The case of other torts, notably the violations of property and contract, is a little less obvious and merits brief consideration.

The use and free disposition of property raise some of the same problems for prosperity as the distribution of food must have raised for the survival of prehistoric man. In both settings, a solution based on sheer force is likely to prove less successful and be crowded out by a solution based on the "yield-yield" convention. However, although the fairness convention wins in the course of slow evolutionary processes, the conventions of property and contract bear fruit relatively fast and can spread and crowd out alternative systems of holding and exchanging property by means of more or less conscious adaptation. Demonstrably, "capitalism works," if not well, at any rate better than other known ways of organizing an economy, and over history more societies tried to adopt it than tried to opt out of it.

The convention of property has a logic that remains straightforward, thanks to Hume and despite the confusion injected into Anglo-American ethics of property by Locke and his followers regarding first acquisition and by Kantian awe for law. At its base are the natural conventions “first come, first served” and “finders keepers”—“natural” in the sense that they cannot be replaced by different ones (such as “first come, last served” or “finder never keeper”) without utter disorder resulting. They largely settle the matter of first acquisition.

The remaining problem concerns what Hume calls “the stability of possession” (secure tenure) and “its transference by consent” (i.e., that possession resulting from voluntary exchange, legacy, or gift is as valid as possession by first acquisition). The stability of possession is achieved by the recognition by all parties, owners and nonowners, that possession creates a presumption of good title that remains valid until disproved, and that respect for title is more rewarding for all than attempts to dislodge owners and appropriate their property. (In game-theory language, the payoffs to all from mutual respect are higher than payoffs from usurpation in indefinitely repeated play).

This convention is an equilibrium if and because deviation from it by usurpation, robbery, and theft is punished by some or all of those who are interested in the stability of the convention, “the regime of private property,” and not only by those whose property the deviant is violating. (In Hobbes, only the latter try to resist the violation of their property, and it is implicit in the Hobbesian outcome that they lack sufficient strength to do so). This willingness to defend the convention justifies Hume’s famous statement that stable possession (and its first cousin, the convention of contract) are “antecedent to government”—that is, do not presuppose enforcement by the state or a similar monopolistic enforcer.

Needless to say, when a state does assume the enforcement function and crowds out or actually outlaws enforcement by the interested parties themselves, the latter will naturally behave as free riders (enforcement is paid for by the general taxpayer), and their capacity for self-defense may wither away altogether.

The same attraction of superior long-run payoffs to nearly everyone that generates the convention of property works to coordinate behavior on what Hume calls “the keeping of promises” and, more precisely for the hugely important special case of reciprocal promises, establishes the convention of contract. Enforcement to deter default operates under the same logic as the enforcement of the security of property. Long-run maximization of payoffs from the convention dictates that adherents to it should be prepared to incur commensurate enforcement costs to deter deviation from the convention. The most elementary form of enforcement, of course, is retaliation against the trespasser, the robber, the usurper, and the defaulter.

“This is how we always do it” and “this is how I expect every sensible person to behave” express nearly everyone’s state of mind about the convention to which he adheres. When it is added that “this is how everyone must behave on pain of a sanction” (the claim made by whoever in effect happens to be doing the sanctioning), we may say that the convention has become a *rule*.

The rules against torts, broadly understood, are the essential *rules of justice* that fill with specific content the merely formal, arguably empty maxim of justice “*render to each his own*,” which is perhaps better known as the maxim *suum cuique*.

*Suum cuique*, or rather those conventionally generated rules against torts that fill it with content, regulates what is probably the greater part of human coexistence (I deal presently with the part it does not regulate). In forbidding wrongdoing against life, limb, and property (including contract), it defines liberty by laying down what must not be done to a person as long as he forbears from what he must not do to others. It defines rights by asserting the liberty of surrendering a liberty and assuming in its stead an obligation as the counterpart of another’s right. By implication, *suum cuique* secures the presumption of title to possessions and the force of voluntary exchange, necessary conditions for most people to attain a reasonably prosperous livelihood.

### Is Fair Just?

Rules of *suum cuique* do not regulate matters of coexistence that do not have significant elements of mutual interest, mutual agreement, and behavioral convention, and where outcomes and states of affairs are in large part owed to discretionary judgment. Again with regard to the parable of the laborers in the vineyard, the penny-a-day reward received by those who worked a full day was a matter of contract, of *suum cuique*. The penny that the lord’s steward gave to each person who worked less than a full day was an outcome regulated by justice’s other maxim, “to each, according to . . . ,” where benefits and burdens are functionally related to a relevant variable (or combinations thereof). Here, the logic of justice and the logic of fairness have exactly the same form. However, the just and the fair outcome do not necessarily coincide.

In the laborers-in-the-vineyard example, the relevant variable determining the penny-a-day reward each received—relevant, that is, except to those who worked a full day—was the lord’s grace, the same for each regardless of whether he worked few hours or many. It was a case of “to each, according to my grace,” and the relevant variable “my grace” was adopted at the lord’s complete discretion. Arguably, he was at perfect liberty to dispense his own grace or anything else in his sole gift at his discretion. Thus, the distribution of rewards he chose was strictly just. Some champions of what I earlier called act-irrelevant fairness might approve of this result because it gave the same reward to each, regardless of the work they performed, thus conforming to fairness as equality. However, most people’s intuition would be that this recompense was not fair; a fair distribution should have given at least some weight to the amount of work each laborer did and perhaps to other variables, too, to reflect aspects of work other than the time spent at it. Nevertheless, to undo the distribution the lord made, on the ground that it was unfair, would have been unjust.

In other, perhaps more important situations, however, the relevant variable is not a matter of discretion, but clearly a matter of fairness. A teacher marking students’ papers must, in good conscience, judge the mark he gives as the result of relevant

variables agreed as fair for the purpose, which he must believe to be objective. The grade he gives would then be, as far as we can tell, both fair and just. The same type of case is the sentencing by judges; the awarding of medals, prizes, and distinctions; and the division of the fruits of joint efforts. In such cases, fair would make the result just, and only fair could do so. These are the cases of happy coincidence whose rarity makes them doubly pleasing.

However, it would be negating the logic of spontaneously adopted rules to claim that an appeal to fairness, no matter how much in tune with people's intuitions, ought to override the demands of justice. Adapting to a preferred mode of behavior necessarily overrides what has gone before because the adaptation emerges from a juxtaposition of evolutionary and adaptive selection, and instincts selected in evolution can be no exception. Where the rules and fairness clash, the rules must prevail because they have been chosen for the purpose.

Trade made "fair" by regulation, like any other transaction whose terms are imposed by the political authority, violates the freedom of contract, a freedom clearly established by the system of spontaneously adopted rules that separate the free from the unfree. As such, regulation is, strictly speaking, a tort, and to mandate it is to require an injustice.

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