

FAIRNESS VERSUS WELFARE

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Thesis: Policy Analysis Should Be Based
Exclusively on Welfare Economics

Plan of Book

- Define/contrast welfare economics & fairness
- Support thesis through:
 - general arguments about the nature of the two approaches
 - chapters on legal policy: torts (accident law), contracts, procedure, and law enforcement
- Reconcile the appeal of fairness with thesis that it should not guide policy analysis
- Discuss implications for policy analysts, government officials (e.g., judges)
- Address possible criticisms

ILLUSTRATION OF CONFLICT BETWEEN FAIRNESS AND WELFARE

Tort Reform: Move from Negligence Rule to No-Fault for Automobile Accidents

- Consider full repeal of tort liability, replaced with first-party insurance system and heightened enforcement of traffic laws
- Imagine, for example, that the net effect is, prospectively, to make all individuals better off
 - deterrence same (loss from tort repeal offset by heightened traffic enforcement)
 - compensation of risk-averse victims improved
 - savings in administrative costs (cost of insurance + greater traffic enforcement less than savings from eliminating litigation)

Welfare Economic Assessment

- Favorable: everyone prospectively better off

Fairness-Based Assessment

- May be unfavorable: repeal of liability in conflict with notions of fairness that require wrongdoers (negligent drivers) to compensate their victims

Why Make People Worse Off in Name of Fairness?

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WELFARE ECONOMICS

Based Exclusively on Individuals' Well-being
(determined by analyzing effects of rules)

$$W(x) = F(U_1(x), U_2(x), \dots, U_n(x))$$

Concept of Well-Being Is Inclusive

- Incorporates risk and whole range of factors
- Even a “taste” for fairness is included in welfare
 - e.g., if people are upset when vicious criminals do not receive just deserts, their upset counts
 - fairness as a taste is purely empirical question
 - *contrast fairness as an evaluative principle*
- Disputes over “true” meaning of well-being are largely irrelevant to our thesis
 - our analysis applies whatever concept of well-being one endorses

Income Distributional Concerns *Included*

- In whatever way social welfare function indicates
- Our position is *not* “wealth maximization”
 - note: may be best to do redistribution through tax/transfer system, but irrelevant here

FAIRNESS

Our Critique Addresses All Notions that Give Weight to Factors Independent of Individuals' Well-being

- For our purposes, we define notions of fairness to include all principles (justice, rights, ...) *not* reducible to well-being
 - all notions that conflict with welfare economics, as just defined: corrective justice, promise-keeping, retributive justice ...
- Our stance is equivalent to the moral position that should be concerned *exclusively* with individuals' well-being
- Note: some notions of fairness are exclusively concerned with income distribution (and some others may be fully reducible to well-being) — these are not included when we speak of “fairness”

Nature of Notions of Fairness

- Nonconsequentialist (typically): based on situational character of events
- Understood as independent evaluative principles
- Relevance of welfare in fairness theories
 - mixed views most common
 - may be general tradeoff, fairness as constraint, or (often) unspecified

PURSUING FAIRNESS REDUCES INDIVIDUALS' WELL-BEING

Nature of the Conflict

- Always: essentially a tautology
 - if give weight to something independent of well-being, will have to sacrifice well-being in the balance
 - does not, however, seem well appreciated
- Any notion of fairness may lead to *everyone* being worse off [Am. Law & Econ. Rev. (1999), J. Pol. Econ. (2001)]
 - if logically consistent, must reject all notions of fairness or the Pareto principle
 - sharply poses question of point of fairness

Demonstration of Pareto Conflict in Symmetric Cases

- Symmetric case means everyone is identically situated
 - e.g., all equally often an injurer and a victim in a nuisance setting
- *All notions of fairness result in everyone being worse off in every instance in which they do not make the same choice as a pure welfarist approach*
- Proof: Consider any case in which fair rule and welfare-maximizing rule differ.
 - E.g., strict liability maximizes welfare and negligence rule more fair
 - If pick more fair rule (here, negligence), total welfare is lower — by assumption
 - Since case is symmetric, however, *everyone's* welfare is therefore lower under fair rule
 - Note: logic is perfectly general, as claim states
- Special significance of result for symmetric case
 - Golden Rule, categorical imperative, veil of ignorance, ... — each is equivalent to requiring rule to be tested *as if* in symmetric setting
 - Accepting any such framework (as most fairness advocates do) creates serious conflict: must reject all fairness notions or *systematically* favor making everyone worse off

ADDITIONAL PROBLEMS WITH NOTIONS OF FAIRNESS

1. Problems with Definitions

- Often, no reasonably rigorous, precise definition given (what counts as “fair” compensation? when must it be paid?)
- Question-begging and incomplete definitions (“wrongdoers” must pay compensation or be punished, but no definition of what counts as a “wrongdoer”)
- Domain of notions of fairness (does corrective justice apply to contracts as well as to torts? how can we tell?)
- Conflicts among notions of fairness: when many, conflicting notions apply (as is typical), what is the theory that resolves them?

2. Problems with the Nature of Notions of Fairness

- Ex post character
 - focus on what has happened to exclusion of other (often more likely) outcomes (e.g., focus of retributive justice on the criminals who are caught)
 - ignore ex ante behavior (decision about care, regarding accidents; what contracts individuals will enter; deterrence of criminals)
- Nonconsequentialist character
 - are we really indifferent to cost of accidents, extent of crime, ...?
 - Paradox I — pursuing fairness can reduce fairness: e.g., under fair level of punishment, can have *more* individuals unfairly punished
 - Paradox II: pursuing justice narrowly may reduce overall justice (e.g., deterrence is ignored, but what is being deterred are acts that are *wrong* according to the very notion of fairness in question)

3. Lack of Sound (or Any!) Rationales for Notions of Fairness

- We examine literature (legal and philosophical) as well as common notions that seem apt
- Typically, little explicit rationale; often stipulated
 - treatment simply called unjust or unfair
- Some patently question-begging formulations
 - retributive justice: punishment “restores moral balance” (conclusory metaphor)
 - “desert” (with no answer to question of *why* some treatment is deserved)
 - “respect” or treatment as a “person” (with no answer to question of *why* people should be seen, treated, or respected in one manner or another)
- Appeals to moral instinct or intuition
 - such appeals are frequent, usually unelaborated
 - if reject our access to infallible, divine revelation, however, this is not a rationale
 - *theorists ignore alternative explanations for moral instincts and intuitions, explanations that reconcile them with welfare*

RECONCILING THE APPEAL OF FAIRNESS WITH OUR CLAIM

Fairness Derived from Internalized Social Norms

- Social norms = guides to behavior in everyday life, outside formal legal system
 - e.g., keeping promises
- Notions of fairness correspond to such social norms
 - corrective justice and retributive justice: norms about treatment of others, rectification in cases of mistreatment, dealing with aggressors
 - promise-keeping contract/philosophical theory: promise-keeping social norm
- Social norms are functional: they promote welfare
 - curbing opportunistic behavior, maintaining social harmony, allowing for productive interactions (e.g., promise-keeping)
 - many also serve as rules of thumb to help advance self-interest, including by avoiding deviations in heat of the moment (we're too inclined to cheat, ignoring reputational costs)
- Origins of social norms
 - socialization (including inculcation in children)
 - evolution (e.g., retributive urge)

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Main Implication: Fairness Naturally Seems Attractive,
But for Reasons that Do *Not* Support Its Use as an
Independent Evaluative Principle

- Because social norms are internalized, corresponding notions of fairness will seem important even to policy analysts
- But underlying purpose of social norms is promotion of welfare
 - therefore, to give such social norms weight *against* welfare would be contradictory
- Systematic difference between contexts
 - types of sanctions used, administrative costs, availability of information
 - leads one to expect that there will be conflicts and that pursuing fairness in such cases will lead us astray
- *Indeed, the conflicts between fairness and welfare that we identify throughout are attributable to respects in which the fairness notion is crude and/or the contexts differ*
 - e.g., requiring injurers to pay victims deters, but not always (and sometimes the administrative cost is not worth it)
 - note: the (imperfect) proxy character of notions of fairness further lends to their appeal

Further Implication: Individuals May Have a *Taste* for Fairness

- People may care about fair punishment in same way they have taste for food, aesthetic preferences
 - E.g., bothered by fact that grossly negligent driver may not have to pay anything
- Then is included, because is part of welfare
- Empirical question; *entirely different* from evaluative principle of sort elaborated by philosophical inquiry

Further Implication: Feedback Effect of Law on Social Norms

- Perceived legitimacy of system, which may affect cooperation and compliance
- Legal rules sends messages about right and wrong
 - e.g., tort liability for dangerous driving may reinforce norms of good driving behavior
- A purely empirical question
 - significance? more effective than substitute of traffic enforcement (e.g., tougher sanctions for drunk driving)?

WHO SHOULD EMPLOY WELFARE ECONOMICS?

Ordinary Individuals: *No*

- Fairness norms often are appropriate, socially useful in everyday life

Policy Analysts: *Yes*

Government Decisionmakers (judges, legislators, regulators): *Complicated*

- In principle, yes
 - subject to limits implied by specialized roles within government
- But there is issue of communication and accountability to citizens

OTHER ISSUES WE ADDRESS

(note: issues are largely independent of our argument)

Design of Legal Institutions

- accuracy
- controlling government officials' behavior
- legitimacy of legal institutions

Preferences and Individuals' Well-Being

- imperfect information, cognitive limitations, ...
- effect of law on preferences
- “objectionable” preferences

Bad Luck and Inequality

- ex ante versus ex post evaluation
- equality and equal treatment

Additional Concerns

- valuing life, ...
- omission of “soft” variables
- possible costs of permitting market trade
- indeterminacy
- individuals not necessarily rational maximizers ...

PRIMA FACIE REQUIREMENTS FOR NOTIONS OF FAIRNESS

1. Define the notion with some precision and in a complete, non-question-begging manner
 2. Address internal tension — i.e., that under most nonconsequentialist notions of fairness, the fairer rule may result in more unfairness
 3. Clearly identify the inevitable sacrifice in individuals' well-being (potentially all individuals' well-being) — and in basic settings, so that the nature of the conflict can be appreciated
 4. Offer clear rationale — explicit and not purely metaphorical (“restore moral balance”)
1. Address alternative explanations for the notion's appeal, especially our moral instincts and intuitions, which derive from social norms that function to promote well-being