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A CRITIQUE OF FAIRNESS

RICHARD STITH*

Let me start by telling you why I'm against fairness: It's immoral. It's dangerous. Furthermore, it destroys human dignity and the meaning of life. Need I say more?

Now that I have your attention, let me confess that I'm not opposed to all kinds of fairness. One could even say I'm not against the value fairness per se, but only against the misuse or misapplication of it. To be specific, I'm not opposed to fairness where only conflicting interests, rather than other values, are involved. And I'm not opposed to making sure values are fairly applied. But fairness is misused when it is appealed to in the face of other values, where it replaces them to become the sole norm for the resolution of conflict.¹

Here's an example of how the right use of fairness can give way to the wrong use. Suppose you're living in a big apartment house and a new neighbor moves in. He seems nice enough, but he has one disagreeable habit: he plays the violin every night from midnight to six in the morning. It's not that he plays badly. It's just that you've got to work all day, and you need some sleep.²

Now, you're a tolerant person, but after a week you have become a physical wreck, and so one night at 3 a.m. you decide to have a word with your neighboring virtuoso. You call him up and say, "Look here. It isn't fair of you to keep the rest of us awake while you enjoy doing your thing. How about showing a little consideration for others, instead of just thinking of yourself? How would you like it if I picked

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This essay was originally delivered on October 29, 1981, as Professor Stith's Inaugural Lecture upon his accession to professorship at the law school. The original text and colloquial tone of the lecture have been preserved. Footnotes have been added.

1. I am seeking to criticize not the practice of demanding to be treated fairly, but rather an idea of fair treatment upon which such demands might be based. The drawbacks of a litigious, don't-touch-my-share lifestyle seem fairly widely commented upon. I wish, instead and in essence, to focus on the disadvantages of carving up the world into shares — which occurs logically prior to preventing others from getting one's share.

2. I take this illustration in part from R.M. Hare's trumpeter hypothetical. See Freedom and Reason 112, 173-77, 196-97 (1963) [hereinafter cited as HARE]. Hare himself credits the trumpeter to R.B. Braithwaite, but my use of it is much closer to Hare's than to Braithwaite's. (I have changed the musician to a violin player because some people find it difficult to empathize with trumpet players.) The point I wish to make with the example is, however, quite different from Hare's point.
up a gun on Saturday Night Special and practiced shooting early some morning?"

Undaunted, your neighbor responds, “Hey, you’ve got it all wrong. Come on over and let me explain.” Slightly relieved at not having your threat immediately put to the test, you angrily and wearily make your way next door.

To your amazement, you find your neighbor in even worse shape than you are. His eyes bleary and deeply shadowed, he manages a wan welcoming smile and beckons you with a trembling hand to be seated. “Please don’t say I’m unfair,” he implores. “God knows I’m trying to treat my neighbors just as I do myself. I’ve got a job all day, too, and I miss my sleep at night as much as anyone else. Besides, I really don’t enjoy playing the violin, at least not after the first hour or so. I just get too worn out.”

“Why on earth do you keep doing it, then?” you ask.

“Because it’s right,” he explains. “I think we all have a duty to improve the quality of life. We spend our days pursuing materialistic and hedonistic values, so that we are missing the finer things in life. Then we drop into an animal slumber at night. Given my talent for the violin, my duty is clear to me: I have got to force myself and everyone around me to improve the quality of our lives whether we like it or not. (And it’s only after midnight that I can be sure my neighbors are at home.) This is not unfair because I am not favoring myself: I’m applying the same rule to everyone and am giving everyone within earshot the same benefit of fine music.”

Let’s step back from this example and take note of the two concepts of fairness so far appealed to. Before you went over to your neighbor’s, I put words into your mouth which appealed to what might be called “satisfaction-based” fairness. The idea here is that, in order to be fair, we must live by rules which aim at the satisfaction of others’ desires as much as they do at our own satisfaction. We are unfairly favoring ourselves if we cannot formulate any rule permitting our conduct which is impartial as between our own preferences and those of others. So here the violinist was criticized for satisfying his noisy desires late at night when (it was asserted) he would never agree to allow his neighbors to do the same for their desires if they were to conflict with his.

The response of the violin player was not to disagree with satisfaction-based fairness, but to assert its irrelevance. Such a concept of fairness, he implied, is applicable only where personal
preferences, rather than moral ideals, are at issue. In other words, he argued that it's fine to appeal to our mutual interests as long as we do not think the case has already been decided by prior laws not of our making. And, although we would no doubt disagree with him that there is a moral law or ideal requiring violin playing, we would have to concede his formal point. We do not think, for example, that fairness requires an impartial distribution of a bag of money we have jointly found if it already belongs to only one of us. I am not being unfair in failing to share my spouse with my neighbors if I believe in a preexisting duty of marital fidelity. "Satisfaction-based fairness" has a limited scope: it is a residual principle we apply insofar as we do not believe that other rules have already settled the matter.

But wait. Our violin player did not argue "I don't have to be fair." Instead, he claimed that he was being fair, even though he was not abiding by rules aiming at mutual satisfaction. How is this possible? The answer is that he was appealing to another concept of fairness and was asserting that his actions met this second kind of test—which we might call "ideal-based fairness."

This kind of fairness requires that we apply the moral rules or ideals we believe in fairly to ourselves and to others. So, for example, it would have been unfair for our violinist to have turned on a loud recording of violin music, calculated to disturb his neighbors, while he went to get some sleep at a friend's house. He would here be making an arbitrary exception for himself from the alleged duty to listen to the violin, and this would be unfair.

The two kinds of fairness are similar in that they both require impartiality. The first requires impartiality in the pursuit of self-satisfaction while the second requires the impartial pursuit of ideals. But they differ in their origin. The first requires a separate moral intuition: there is no way to prove that we ought to take everyone's interests into account except by pointing to a feeling most of us have that this is right. The second kind of fairness, by contrast, is logically entailed by the ideals we believe in. If we don't apply the rules we believe in to ourselves as well to others, we are simply not complying with the rules. One need not believe in some additional rule of fairness in order to think that the law should be applied fairly; one need only believe in the law.3

3. Hare, supra note 2, at 10-50, and H.L.A. Hart, The Concept of Law 156-57 (1961), are among those who derive this kind of fairness from the very notion of following rules. Hare also suggests that Kant may be interpreted to maintain only this minimal thesis about fairness, Hare, supra note 2, at 34. Cf. I. Kant, Foundations of the Metaphysics of Morals 18 (L. Beck trans. 1959) [cited as Kant].
Moreover, the very ideals we believe in, which require us to be fair in the second sense, also forbid us to be fair in the first sense. Just as faithful adherence to rules means not making exceptions for oneself, so, too, it means not making up new rules more in keeping with mutual satisfaction. Our violin player would behave immorally, by his own standards, if he either fled from the music to a friend’s house or stopped playing so that he and his neighbors could get some sleep.4

Let me say that I have no objection to either of these concepts of fairness, in theory or as practiced in this example. Satisfaction-based fairness is something I believe to be a duty whenever nothing but mutual self-interests are involved. However, the violin player here rightly saw that this form of fairness was irrelevant, because moral ideals were involved. Ideal-based fairness is something I believe in even more strongly, since it is essential to all morality and law that arbitrariness be excluded. But the violin player rightly pointed out that he was complying with this form of fairness by applying his ideals even-handedly to himself and to his neighbors. If the appeal to fairness stopped here, it would surely be unobjectionable.

Unfortunately, it may not end here — and for a very obvious reason: the conflict between the values of violin playing and sleeping is not yet over. If one of the prime reasons we appeal to fairness, as in this case, is to resolve conflicts, we may well remain dissatisfied when we discover the two forms so far discussed to be unable to do the job. We may try to find some way to reinterpret the facts, or to reinterpret fairness itself, to make it able, after all, to bring about some peace and quiet. Can we succeed in this effort?

Put more generally, can we make satisfaction-based fairness applicable to conflicts of value as well as to conflicts of interests? In a pluralistic society, where we may not agree on substantive values, but we can agree on the need for fairness, this question matters. If a way can be found to use fairness to adjudicate some or even all value conflicts, we need not be perturbed by our lack of substantive

4. In an early essay, Justice as Fairness, 6 PHIL. REV. 164 (1958), John Rawls appears to argue that the idea of having a morality plus the fact of self-interest combine to require us to follow rules we judge impartially to advance the self-interest of everyone. This is a fallacy, for the idea of having a morality includes having substantive rules as well as the form of impartiality. Therefore, to make up and follow rules of one’s own is incompatible with the idea of having a morality. Kant commits a similar fallacy if he argues that submission to law for its own sake, regardless of its content (given Kant’s belief that all content would be entwined with self-love), not only requires impartiality and non-contradiction, but permits one to make up the content of the law according to what one would desire for oneself. See KANT, supra note 3, at 41.
agreement. If it can be shown to be relevant after all, fairness may be able to shut up the violin player without our having to convince him that sleep (as an aspect of the goods of rest and of health) is of greater value than music.  

How can we insist on the applicability of this kind of fairness? One way would seem that of skepticism: we might argue to the violinist that the good of violin music does not exist. He just has a feeling or emotion in its favor, perhaps due to some early childhood training, but this feeling corresponds to nothing objective. It is a fact only about him and not about the world.

If we are convinced by this argument, he may seem to us to be unfairly imposing his feelings on others. But only if he himself is convinced will he voluntarily lay down his violin. And an argument only against violins may seem to him too ad hoc to be convincing. We might have to expand it to a skepticism regarding all aesthetic values, or even values in general, and delve into elaborate argument regarding the limits of human knowledge.

Assuming that we have succeeded in making our musician skeptical, have also made our conflict resolvable by an appeal to fairness? Perhaps not quite yet. On the one hand, our musician can no longer appeal to a supposed pre-existing objective duty to play the violin as an excuse to avoid taking into account his neighbors’ wishes. But on the other hand, he might continue to play saying: “O.K., so it’s not something written in stone. But it’s still something I’m devoted to doing, and I’m not being unfair because I’m not favoring myself.

5. Strictly speaking, there is another kind of fairness intermediate between “satisfaction-based fairness” and “ideal-based fairness.” This other kind might be called “benefit-based fairness.” Like the satisfaction type, it focuses on what each person gets; but like the ideal type, it appeals to values rather than to satisfaction. Here, for example, in addition to appealing to an ideal or rule requiring music, our violinist also pointed out that he was trying to distribute the benefit or good of music as equally as possible.

I ignore this intermediate type in the text for the sake of simplicity, since it ultimately makes no difference in the resolution of conflict. Whether the musician appeals to an ideal requiring music or to the intrinsic benefit of music, the value conflict with his neighbor remains. All substantive definitions of benefit are in some way contentious, even the definition of benefit as happiness. (If God promised to give your child either good character or happiness, but not both, which would you choose? Uncertainty indicates that the second measure of benefit is questionable.)

As long as fairness has to prefer some values to others, it will not be a universal solvent for pluralistic conflict. Satisfaction, by contrast, appears to be the formal or non-substantive aim of every desire, and therefore satisfaction-based fairness can seem to be wholly formal and value-neutral. (But I argue infra at note 6 that this appearance is misleading.)
I'm causing myself at least as much unhappiness as I'm causing my neighbors." Here he would be paraphrasing Nietzsche (no friend of objective value) who somewhere mockingly remarked "I sacrifice myself for my love — and my neighbor as myself." A person who sacrifices himself cannot be said to be favoring himself (and thus to be guilty of unfairness), though such an action may seem senseless in the absence of an objective moral ideal justifying it.

In other words, once moral ideals have been eliminated by skepticism, fairness in our first sense becomes relevant. Our player has to adopt and live by rules which treat everyone's preferences equally. But here, he claims, he has decided to follow a rule which is perversely hostile to everyone's preferences, including his own. We still can't get him to be quiet.

What we need to do is to supplement skepticism with cynicism. We need to deny not only the existence of values, but also his pursuit of them. This we can do easily, in the form of the following common moral argument: "Now, look here. You claim to be sacrificing your own interests as well as those of your neighbors. But this is not so. You admit you desire to play music, and the fact is that you are satisfying your desire. Meanwhile your neighbors desire some sleep and are prevented by you from satisfying their desires. So you are favoring your own satisfaction over that of your neighbors, and that's not fair!" By this argument, we assert that all desires are not only arbitrary (in the sense that they cannot be based upon some objective value) but selfish as well — aiming ultimately at self-satisfaction, even if they appear to be self-sacrificing. All love is thus seen to be secretly self-love, and heroism and sainthood become illusory. Everyone (even Mother Teresa) is just out for his or her own special kind of kicks, and fairness requires that he or she abide by rules which let others do their thing, too.

The problem is that this frequent cynical argument rests on a verbal trick: the logical truth that one satisfies one's desire when one gets what one is aiming at is treated as an empirical proof that some net subjective benefit called "satisfaction" flows back to the subject in all successful action, and that this satisfaction was all along the goal of the action. Moreover, as an empirical statement, it is simply false. For the most part, we desire goods, not satisfaction. We go outside to see the sunset, not to get the satisfaction of having had our desire to see the sunset accomplished.\(^6\) We find satisfaction in our

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\(^6\) There are two separate difficulties in alleging that satisfaction is the goal of our desire to see the sunset. The first is that such an allegation is not a correct report of our conscious intent. Robert Nosick has devised a thought experiment to
work, again, largely insofar as we care about it. If we cared only about ourselves, we would actually end up less satisfied.

Convincingly to insist that human beings are secretly pursuing only self-satisfaction, when they claim to care about values for their own sake, is then quite difficult. Thus it seems that the attempt to make satisfaction-based fairness applicable to value conflicts—as in the violin example—must fail. But wait. Perhaps the problems of skepticism and cynicism can be bypassed by claiming not that they are in fact justified, but that fairness requires that we treat them as if they were justified. Perhaps for the sake of fairness itself we must treat everyone's values (or rules or ideals—as you can see, I've been using these terms interchangeably) as though they were self-centered interests, even if in fact they are not.

There might be a number of reasons to take this "as if" approach. One would still be simply worry about how otherwise to resolve conflicts. We might think we've just got to act as though only mutual satisfaction were at issue, in order to find some calculus which can be used to increase the number of disputes resolvable without resort to violence (the Saturday Night Special). And, in point of fact, I suspect that conflict avoidance is a primary motivation people have for insisting on the application of fairness in this "as if" mode.  

But, of course, such a justification is only result-oriented. It proves at most that it would be socially useful if we thought it unfair to appeal (like the musician) to objective moral ideals in cases of con-

show that we would not even wish to have direct access to the experience of satisfaction (or happiness) if we could do so. He imagines a machine into which we could be permanently plugged, which would cause us to think that our every desire were being fulfilled. Would we plug in? He thinks not. Our desires are for things we want really to happen, not just for things we want for the sake of the subjective experience they produce in us. See Anarchy, State, and Utopia 42-45 (1974).

The second difficulty is that it is impossible for any desire to be for its own satisfaction. Even if, say, I consciously desired the happy emotion which accompanies watching the sun go down, it would remain untrue that the satisfaction of this desire for an emotion, rather than the emotion itself, would be my aim. It is bizarre even to imagine a desire not for any good but simply for desires to be satisfied. But even if some odd monarch had as his only aim that his random whims be satisfied, it would be his goal that whims be satisfied, not that his desire for whim satisfaction itself be satisfied. The satisfaction of all desires cannot be intended; self-consciousness cannot be complete.

7. Treating values as if they were interests might be convenient for other reasons, too. For example, privatizing the good mutes or eliminates public criticism of society, particularly of a consumer society aimed at the satisfaction of desires. Special beneficiaries of this privatization include those who instruct us on desire-satisfaction and those who produce the means for the endless satisfaction of desires.
flict, not that it actually is unfair to do so. To go ahead and claim actual unfairness would be a rather obvious pretense which would lack the moral weight of true unfairness. If fairness is going to be able to turn value conflicts into interest conflicts, something more than convenience must be behind it.

I suggest that besides convenience, confusion may help. If the two senses of fairness are confused, the first may come to seem universally applicable — even to situations involving moral rules. Recall that the two senses have the same name (fairness) and a similar central characteristic (impartiality). They are alike in one further important respect: the reasons we make claims of unfairness are always connected with the interests of ourselves or of others — even when pre-existing moral or legal rules are at stake. When I say "You're not applying the rules fairly" I mean to express my concern that everyone get their due share of benefits under the rules. If I were concerned instead with rule-following for its own sake, I would contend "You are acting immorally (or illegally)." So it seems fairly easy to confuse the two senses of fairness.

How might this confusion arise concretely? Well, you might argue (sincerely or insincerely) with your violinist neighbor this way: "Wait a minute. You admit you can't ever be moral without being fair. And you also admit that fairness requires you to follow rules which give a 'good deal' to everyone concerned — that is, which take everyone's satisfaction into account. So if you want to be moral, you've got to look to our mutual interests rather than to some objective values which supposedly underlie or oppose these interests." Such an argument is, of course, a non-sequitur: the fact that fairness in one sense is a necessary requirement of being moral (because it follows logically from the existence of moral rules) does not entail that fairness in the other sense (our intuition about how to divide things up when no preexisting rules tell us what to do) is a necessary or universal requirement of being moral. But because of the similarities we have discussed, the two senses may well be confused in the manner suggested.

Such confusion is further compounded by the frequent use of a contract metaphor to explain the meaning of fairness. Fairness, it is said, requires us to abide by rules to which all parties concerned would (without coercion) agree. Such a definition is functionally equivalent to treating the interests of others as I do my own, as long as I am in fact pursuing my own satisfaction. But it seems also to forbid me

8. For a general discussion of such misleading "persuasive definitions," see Stevenson, ETHICS AND LANGUAGE 210 (1967).
to pursue moral ideals for their own sake — for one thing because the contract metaphor (arising as it does from business) seems inappropriate to ideals. More importantly, where my values are idiosyncratic, the contract metaphor tells me I cannot use them to decide what is fair, because my co-contractors will not agree to them. Mutual satisfaction — being the lowest common denominator among all contracting parties — seems alone able to dictate the contractual content. The misuse of this metaphor lets satisfaction-based fairness be applied to social conflicts arising from disagreements on value.

A leading contemporary example of a theory in which satisfaction-based fairness is taken to govern even value conflicts is that of John Rawls. 9 According to Rawls, justice as fairness requires that we

9. For a summary of the main idea of Rawls' theory as here outlined, see A THEORY OF JUSTICE 11 (1971) [hereinafter cited as RAWLS].

Ronald Dworkin is another person who attempts to treat value conflicts as though they were conflicts of interest, settling them by an appeal to "equal concern and respect" for all persons (which, I take it, is his version of fundamental fairness). Dworkin is particularly candid in asserting that his ideal precludes treating one conception of the good life as superior to another. Those who incorporate ideals into fairness are unfairly favoring themselves and others who agree with them. The equal distribution of cultural education by the state, for example, would be for Dworkin unfair if those receiving the opera tickets or whatever did not wish to be culturally sophisticated. It is unfair because it treats the views of those desiring sophistication as more worthy of respect than other views. In no uncertain terms, he states that his conception of equality "prohibits a government from relying on the claim that certain forms of life are inherently more valuable than others." See TAKING RIGHTS SERIOUSLY 273-75 (1978) [hereinafter cited as DWORKIN].

John Finnis particularly criticizes Dworkin for implying that judging someone mistaken, and so acting, is equivalent to despising him or treating him unfairly. NATURAL LAW AND NATURAL RIGHTS 221-23 (1980) [hereinafter cited as FINNIS].

It is interesting that Dworkin was led to this position despite a contrary recognition in his analysis of judicial decision making. Supra, at 123-24. There he argues that the mere fact that a judge relies on his own beliefs regarding right and wrong does not mean that he is unfairly favoring himself. The fact that he is the one holding the beliefs may play no role in his decision. Rather, he may be relying on them because he considers them true. But surely the same may be so of those seeking to advance their beliefs regarding what is an inherently more valuable form of life. They may be in no way seeking to favor themselves, and it is as odd to call them unfair as it is to call the judge unfair.

One way to reconcile these two sections of Dworkin's work would be this: Dworkin is seeking, inter alia, to discover one or a number of fundamental political theories which undergird liberal politics and law. He correctly observes that in adopting and enforcing a particular view of that ultimate ground, one is not favoring oneself but rather one is impersonally favoring what one supposes to be the right answer. Nevertheless, this very process leads him to an ultimate liberal premise of our system which states that all ideals are to be treated as personal preferences. In other words, the content of this liberal theory contradicts the process by which it is reached and affirmed. It is not Dworkin himself who is inconsistent. Rather, he has revealed an inconsistency in the body of thought which he is so profoundly examining.
evaluate social practices from the point of view of an "original position" in which we are making a social contract and from which all concepts of what is right, beautiful, good, sacred, and the like have been excluded. Left without any other reason for choice, those in the original position necessarily agree on those constitutional rules, and only those rules, which they think are likely to maximize their own future satisfaction.10 And these rules become absolute or final: considerations of what is good in itself can never override the rules generated by satisfaction-based fairness.11

10. It may be objected that I have misdescribed Rawls' theory as one focusing upon satisfaction. Indeed, Rawls specifically rejects satisfaction as the unit of calculation in favor of "primary goods" — those instrumental goods which persons in the original position know they will want because they are necessary for the achievement of any long-range goals of life. Liberties, opportunities, wealth, and even self-respect are considered such primary instrumental goods.

But why do we wish to achieve any goals at all, since in the original position we cannot yet be bound to them by duty or by love? That is, we cannot think it is right for us to achieve some particular goals, since at this point we are indifferent to all goals. We cannot truly care about goals we do not yet have (and which may well contradict each other). We can be interested only because we want to end up satisfied. Put simply, the primary goods are desired because they are necessary for satisfaction. Thus Rawls' focus on primary goods as his unit of analysis does not contradict the satisfaction-based character of his theory.

Rawls himself relates satisfaction and primary goods in describing his theory of the good: "To put it briefly, the good is the satisfaction of rational desire. We are to suppose, then, that each individual has a rational plan of life. . . . This plan is designed to permit the harmonious satisfaction of his interests . . . . But whatever one's system of ends, primary goods are necessary means." RAWLS, supra note 9, at 92-93.

11. See id. at 135. My arguments in this paper are frequently against this "finality" of satisfaction-based fairness as applied to value conflicts. I am not alleging that Rawls considers fairness in itself to be a complete or sufficient criterion for morality, though some have understood me so to argue. By analogy, someone might hold the view that promise-keeping is an absolute rule, so that once one has made a promise he can never appeal to any other value in order to justify breaking his promise. Even in this view, keeping promises might be insufficient to define morality, in that not only is the rule irrelevant to many situations calling for moral choice, but even where it does apply it may not, for example, tell us whether or not promises must be kept unbegrudgingly. To criticize such a view for making promise-keeping too independent and final a rule in certain contexts is not the same as mistakenly to accuse this view of assuming promise-keeping to be the sole criterion of morality.

However, the further argument could still be made that no one would ever adhere to such a view of promise-keeping unless he cared little or nothing about other values, especially if he insisted on implying promises almost everywhere. In this way, promise-keeping could come to be taken as a sufficient criterion for morality, but only because and insofar as its finality seemed to preclude other values from even being taken into consideration. I do make a similar argument infra against satisfaction-based fairness — not an argument that Rawls intends such fairness to be the only moral norm but an argument that such is one implication of theories like Rawls'.
In other words, we must put aside our beliefs that, say, we ought to obey God, or we ought not be cruel to animals, or violins should be played, while we decide on a definition of fairness. And such beliefs can never later justify nonconformance to fairness as so defined.\footnote{12}{Compare John Finnis' advocacy of a viewpoint which is impartial as between persons but consciously favors basic or intrinsic human goods. Finnis is explicitly critical of Rawls on this point. \textit{Supra} note 9, at 106-09.}

Can our moral beliefs still survive? Can we act as if we were utterly skeptical and cynical, as if nothing but personal preferences were at stake in value conflicts (and moreover give this "as if" point of view final governing authority!), and still believe in preexisting moral ideals? Rawls seems to think so,\footnote{13}{To avoid possible misunderstanding, I should say that while I find Finnis' criticisms of Rawls' theory and others like it often similar to my own, and while I agree with most of his ideas of the basic human goods, I am trying in this essay to make a point quite different from his. He is arguing in favor of a polity founded on concepts of basic goods which he finds self-evident; he argues that Rawls has no sufficient reason for excluding such concepts from the original position. By contrast, I am not claiming truth or validity for any determinations of what is good, but I am, nevertheless, trying to argue for the inclusion of those concepts of the good which others (e.g., Finnis) may advocate. One might say I am advocating the public pursuit of various goods while seeking to maintain a neutral stance on the nature and even the existence of most such goods. I should also add that John Finnis, unlike myself, does not "oppose" fairness. Instead he argues that Rawls and Dworkin are misinterpreting fairness. Finnis' approach may be wiser than mine from a rhetorical point of view, though I do not perceive a substantive difference.} but I disagree. If the violinist thinks he has a duty to play, then it is immoral to ignore that duty without ever having taken it into account. That is, while he might agree that the duty is outweighed by some other considerations (such as compassion for others), he could hardly agree to abide by a point of view which utterly disregarded that duty \textit{qua} duty, unless he felt in his heart that it were merely a strong personal preference. Could a believer commit himself to refusing God's future commands with the excuse "Sorry, Lord, I can't go against the rules I agreed to while assuming Your commands didn't exist." Even if I thought that cruelty to animals \textit{might} be intrinsically wrong, this would be enough to keep me from pledging allegiance to universal satisfaction-based fairness. I would want to keep an open mind on whether I should stop sadists from having the satisfaction of torturing animals if I came ever to be convinced of a moral rule against such cruelty. The only way it could be morally right to agree to go along with Rawls' kind of fairness would be if I were certain that I would never come to believe in the
existence of objective rules or ideals which might contradict and outweigh the rules laid down in an original position contract for mutual satisfaction.  

To contract "as if" there were no relevant moral ideals, while in fact believing that such ideals may exist and might override our mutual interests, is simply to promise to act immorally (from the point of view of one holding these ideals). To apply the satisfaction-based fairness test to conflicts of value can be moral only if we are sufficiently skeptical and cynical to believe that no values (except fairness itself) exist or are pursued.

Yet I do not wish harp upon this charge of inconsistency or immorality. Someone, such as Rawls himself, might somehow be able to think that fairness required us publicly to think and act as though other values did not exist, without agreeing that this contradicts the possibility of their existence. He might feel that he were keeping them safe in some private back pocket, even though I am arguing the pocket has a hole in it.

I want, instead, to concentrate on the quality of public thought and life which accompanies satisfaction-based fairness. This outlook on life exists to a degree for all of us, in that we rightly believe in and use this kind of fairness in situations involving only the distribu-

14. Similar points might be made with regard to Rawls' exclusion of religious facts from the original position. A religious person will not agree that his doctrines (e.g., heaven and hell) are part of his point of view rather than matters of objective truth. Consequently, he will not see that fairness requires their exclusion. Moreover, even if he assumes Rawls' original position in ignorance of these facts, he will not wish to commit himself to ignoring their behavioral implications if he should later acquire religious enlightenment. And even if he were forced to treat such facts as false myths or the like from the point of view of the original position, he would not wish to commit himself to not acting in response to such false beliefs if he should have them in the future. For example, he would not wish to commit himself to a formula of fairness which might later prohibit those actions which he might believe necessary in order to avoid hellfire. So Rawls' original position works only if religious beliefs are never considered true on either side of the veil of ignorance.

15. Treating values as preferences may also lead to treating even non-religious facts as preferences, in that one major reason for affirming the truth of concepts is belief in value. That is, if we believe in real values which describe what ought to be, we must necessarily believe in real facts which can tell us when the valued entities do or do not exist. If we could factually define a situation in any way we wished, values could not possibly place any demands on us. Value demands, then, require a real factual world, and their destruction endangers that world. Satisfaction-based fairness may lead to the elimination of notions of objective fact as well as of objective value. See R. Stith, The World as Realty, as Resource, and as Pretense, 20 Am. J. Juris. 141-53 (1975).
tion of satisfaction. It dominates the public thought, however, of those like Rawls who look at value conflicts as if they were conflicts of interest. And it is the only way of thinking (though perhaps still not the only way of feeling) for those who have faced up to and accepted the skepticism and cynicism necessary for the universal application of satisfaction-based fairness.

Let's say we argue with our neighboring violinist. We urge him to consider his values to be merely his personal preferences which he should not, in fairness, impose on others. He listens sadly for a while. Finally his violin drops to the floor, and we head back to bed pleased with our accomplishment.

What have we done to this man? How have we changed the world in which he lives? Let me try to describe phenomenologically\(^{16}\) the impoverishment of this world first in regard to actions and objects, second in regard to the self, and third in regard to others.

What is the world when I view it solely as a source of subjective satisfaction for myself and others, rather than as something good, beautiful, or otherwise of value in itself? The best word I can think of is "resource." Resources (think of oil, mineral, or timber resources) have no goodness or even shape in themselves. Indeed, they hardly even exist except to be used and consumed by us. Certainly we cannot love, respect, or revere them as long as we categorize them simply as resources. They can give rise to no duties, except the prudential one of "resource management." There is nothing we can do with a world qua resource except exploit it and distribute it.

For me, at least, the image which epitomizes the world as resource is the aspirin tablet. I do not consider the tablet good in itself. I do not enjoy it for itself. I enjoy only the pleasurable experience it produces in me (i.e. the cessation of my headache). It is nothing more than a resource for the production of this experience. (Those, unlike myself, who have not been raised on aspirin can choose some other medicine or drug as an example here.)

The word "resources" emphasizes our complete unconcern with whether or not such things actually exist. What I care about is that

\[16. \text{For a full elaboration of phenomenological methodology, see Spiegelberg, The Essentials of the Phenomenological Method reprinted in II. H. SPIEGELBERG, THE PHENOMENOLOGICAL MOVEMENT 655-701 (1960). For purposes of this essay, however, Ronald Dworkin's offhand definition of phenomenology, made in a remark to me when I was his student, is adequate: to describe something phenomenologically is to tell what it "feels like." Thus a phenomenology of fairness is a description of what it feels like to be fair.}\]
my desire, say, to move about is satisfied. I do not care at all whether or not I consume oil or electricity in doing so. I just want to get rid of my headache; I do not care whether aspirin or something else provides me with relief. Only the final received and experienced units of pleasure or satisfaction count; their origin does not matter. If usefulness is the measure of all things, if the world is of merely instrumental value, then its being does not matter as long as its effect on me remains the same.17

This world for distribution envisioned by fairness dominates public discourse in both its political and its technical forms. But it does not correspond to the personal worlds in which each one of us actually lives. Most obviously, we do experience the real demands of duty and obligation. We normally think and act, say, as though the rule that promises are to be kept were in itself a sufficient justification and motive for keeping promises, i.e. as though promise-keeping were of intrinsic value rather than merely something to be pursued for our own or others' satisfaction. Or, again, the intrinsic evil of cruelty as a form of life is known phenomenologically in a clean and immediate manner, for most of us, without the intervention of a calculus of self-interest or of fairness.

Nor are the categories of non-instrumental value18 exhausted by

17. I have sometimes thought that the best model of such a world is that advocated by some economists and called "the imputation of income." For example, my home is said to provide a hidden income to me equivalent to the market value for which I could rent it but choose not to. Similarly, my garden gives me an income equivalent to the market value of what grows there. When I clean my home, or even brush my teeth, I get an income equivalent to what such services would be worth if bought and sold. Even when I am at leisure, I must be getting the same satisfaction as I could get by working at my highest possible pay, for otherwise I would surely choose to work.

Why must an income be imputed to me? A powerful reason is that otherwise I am not bearing my fair share of the redistribution of satisfaction by means inter alia of an income tax. And, indeed, it is hard to see how else to take the measure of human inequality without ever asking how we ought to live. See e.g., the articles excerpted and cited in B. BITTKER & L. STONE, FEDERAL INCOME ESTATE AND GIFT TAXATION 62-67 (4th ed. 1972).

Such imputation is conceptually similar to the conversion of use value to commodity value, as described in Marxian analysis and recently and acutely by Ivan Illich in his discussion of "specific counterproductivity" in MEDICAL NEMESIS (New York: Random House, 1976) at 214. Here of course, the reduction is done not directly via the market exchange mechanism but instead by the fairness calculus, which likewise demands fungible value.

18. In this essay, I use the word "value" to include the objects of all moral and aesthetic attitudes. I make this generic use of "value" with some trepidation, however, for I am convinced that the ideas of "value" and "valuing" are quite inadequate to express the full scope of our moral and aesthetic lives, even when sometimes
the positive or negative commands of duty. In addition, for example, that which is contemplatable is experienced as good, beautiful, or delightful in itself: the loveliness of a spouse, the virtuosity of a musician, the delicacy of an insect, the endurance of a great tree. We do not usually treat a sunset as we do an aspirin tablet, as something to be consumed and used by us. A scholar does not pursue truth like a drug designed to produce an enjoyable sensation. We submerge ourselves in gazing upon, or in seeking to gaze upon, these things because we know them to be good, not because (like aspirins) they make us feel good.

All these things, and the actions responding to them, are experienced as good-in-themselves. But even the category of the good-for-us is not cast in the image of an aspirin tablet. Even if I raise flowers in order selfishly to possess and keep them, I am unlikely to be thinking of them simply as means to my satisfaction. In fact I no doubt want them for myself because I take them to be beautiful in themselves. I honor them in possessing them; I do not reduce them to the resource status of useful stimuli. Even many benefits, such as health, which cannot easily be separated from being "for someone" are desired by us because they are thought truly good regardless of our personal preferences, not just because they produce pleasure or satisfaction in us.

The world of fair distribution of satisfaction, or of resources for the production of satisfaction, is a world without the goods which give life meaning, which lead us beyond ourselves to delight in being. And ironically, the reduction of the world to an aspirin-like resource for satisfaction thus ends up denying us the satisfaction of a meaningful life.

19. See also the discussion of whether satisfaction is the object of desire at note 6 supra and accompanying text.

20. Rawls himself notes that when "we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution." Supra note 9, at 440. Rawls’ theory makes all plans aim at the very thing (satisfaction) which they cannot have unless they aim at something else.

Utilitarianism, by contrast, preserves one intrinsic value which can give mean-
The self envisaged by fairness is above all a “consumer.” Actually, it has no world at all, only a stockpile of drugs and devices which it can use to produce satisfying experiences. It is never permitted to forget itself and enter unself-consciously to live in the value structures of the house which is the world. It is always outside the world, using it for the sake of itself.\textsuperscript{21}

But fairness requires that we do not take the point of view of our particular self. We have to stand outside our self — in some neutral “original position” — from which, while we watch that our self gets its fair share, we also make sure that it does not consume more than its share. The word “consumer” imputes too much action and too much passion to this self we watch over. Instead, I suggest that our self for each of us is more like a kind of pet. Like a pet, our self never really does anything but eat, and we never do anything but scout about for food for it, under the constraint of rules permitting other selves also to be fed by their masters.

In other words, satisfaction-based fairness requires not only that our world be a resource, but that we be self-conscious — that we stand outside the self and its feelings and values, treating them as characteristics of the self rather than of the purely resource world.\textsuperscript{22} From this inhuman perspective we soon forget what it is like really to be a self — a self in a world. As many phenomenologists have shown, my self is in reality not some dimensions point inside my body getting satisfaction, say, by gazing at the autumn foliage. Nor am I even limited by the surface of my eyeball. Rather, I am in that tree, ing to life: amazingly, it is precisely satisfaction (or, alternatively, happiness). This is possible because for utilitarianism satisfaction or happiness is truly good; for Rawls, it is just something we happen to want. So utilitarians can find a substantive meaning in life (the pursuit of happiness with indifference to self) denied to those who follow Rawls. Of course, all other goods are destroyed by utilitarianism just as much as by Rawlsian fairness.

\textsuperscript{21} Even the body is not the self for satisfaction-based fairness; it is only a resource producing income for the self and others. The self seems to be some dimensionless point somewhere inside the body. Cf. M. HEIDEGGER, BEING AND TIME, (T. Macquarrie & E. Robinson trans. 1962) [hereinafter cited as HEIDEGGER] and M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION, (C. Smith trans. 1962).

\textsuperscript{22} The flight from the self to a point of view outside the self is, of course, a general tendency of modern thought and not only of fairness. It is evidenced most clearly in social science and in the adoption of “external” social scientific descriptions by people describing their own behavior (e.g. speaking of how certain forces “cause” that behavior). I think a kind of fear (of death?) underlies this escape. If I look through my own eyes I cannot protect the back of my head. Self-consciousness seems to secure my life, though (I here argue) at the cost of hardly living at all.
among its branches. Similarly, the delight I find in the world is not a statement about the experience of some isolated subject, but rather is about the world — an attempt, even if possibly mistaken, to discern what is truly good, beautiful, or holy in it. To take the point of view of fairness (except in those valueless contexts which concern only the distribution of resources for satisfaction) is to become utterly alienated from one's real life self, to make it impossible to think about what one still is.

Because such a point of view cannot appreciate the goods discerned by the self, to adopt it seems likewise to lose self-respect. Self-respect, unlike pride, comes not from standing outside the self and evaluating it, but rather from the sense that what one is doing is of value, that one is steadfastly directing one's powers toward a goal or goals worth pursing. There are many—perhaps an infinite number—of goals which could worthily pursued, but the skepticism and cynicism required for the application of satisfaction-based fairness have destroyed all but one: fairness itself. Except for being fair, no


24. Such alienation may be in itself a disvalue. That is, besides the other criticisms made in the text, it can be argued that fairness is wrong insofar as it creates a disjunction between our private experience and our public discourse and so (because our concepts are largely determined in public) between life and thought.

I sometimes wonder whether once one is used always to think outside oneself, the real self does not in fact atrophy, leaving behind only an appearance, a hollow shell. Suppose a woman who says that she believes cruelty to animals to be wrong, but that this is only her personal feeling or preference and that she would not wish to argue with someone who believed otherwise, much less to impose her views on him by law. Paraphrasing her, we might say that his beliefs are just as valid as hers, because they describe him while hers describe her and neither describes a common world. Can we say that this woman truly believes cruelty to be wrong if she does not believe it to be truly wrong? And if she does not find it really evil, can she really abhor it, or does it not come to seem simply a resource — producing satisfaction for some and dissatisfaction for others but in itself neither good nor bad, somewhat like limburger cheese.

25. The goals need not be moral ones, and may even be immoral ones. In some conceptions, even Satan deserves a certain respect for hanging in there despite rather overwhelming odds. But not every kind of tenaciousness is worthy of whole-hearted respect. A stance which is inconsistent, and so is unprincipled, is not respect-worthy no matter how firmly held. Nor is one worthy of respect if one's firmness is based on incompetence, e.g., on an inability to grasp obvious facts. Still we must be wary of presuming our opponents to be unprincipled or incompetent simply because we do not perceive the coherence of their positions.

Dworkin's analysis of what counts as a moral point of view is similar to my analysis here of what counts as a respect-worthy position. Supra note 9, at 248-53. For a critique of a moral position not worthy of respect, see R. Stith, The Problem of Public Pretense, 8 INDIAN PHIL. Q. 13 (1980).
value demand is taken to be worthy of response for its own sake rather than for the sake of satisfaction. And fairness is but a hollow basis for self-respect: the substance of what each of us does, our actual aims and goals, remain self-interested; only the form, the limits and rules within which we act, have value in themselves. To look at ourselves in this way is to lose much, though not all, of the basis for self-respect. (Think here of the violinist losing his aesthetic mission and having it replaced only by the duty to let others sleep if he personally finds satisfaction in sleeping.)

What is our image of others, as we think only of the fact that we must be fair to their interests? Insofar as we view them as creatures like ourselves who have and can have no higher hope in life than to satisfy desires, we lose respect for them. To be fair to Mother Teresa's interests is to take quite a different attitude towards her from that of respect. She becomes another consumer, another pet to be fed.

But do we not at least feel concern, compassion, or pity for those to whom we are to be fair? I think not. Fairness requires me to do good for others only insofar as I do good for myself. To the extent to which I am not doing anything for anyone, I am not being unfair. Of course, fairness may claim that by definition I am always doing something for myself, am always satisfying some preference, and so the issue of arbitrary favoritism always arises. But it is at least an odd sort of care which does for others only because it cannot avoid doing for self. It most certainly is not concern, compassion or pity (or love or altruism), which demand action in the absence of and possibly even against any benefit to the self.

Nor is it solidarity. To the extent to which we have solidarity with others, we care not who receives a benefit, as long as it is received by some one of us. For example, a husband has solidarity with his wife when he is genuinely indifferent as which of them gets to use the single concert ticket they have been given. Fairness, by contrast, lacks solidarity. It does not desire satisfaction in general, so that it is indifferent as to who gets it. Instead, it is always weighing

26. Note that I am here describing only the feeling we call respect. The word "respect" is also used for actions which may be quite unconnected to feeling respect. So, for example, one might respect someone's rights, in the sense simply of not violating them, while feeling nothing at all or even contempt for them.

and watching to make sure everyone gets his due benefit and no more than this benefit. Each remains an isolated individual enjoying only his own satisfaction. Fairness might lead the husband and wife to calculate how many concerts each of them has gotten to hear so far, and allocate the ticket accordingly. Or perhaps they might make a "contract" to the effect that one of them gets to go now and the other one next time.

Still, despite the demeaning aspects of satisfaction-based fairness to which I have pointed, human beings seem bright and fixed stars in its otherwise gloomy contracting world. Other persons are the only entities in the world which, as rights-bearers, are not mere resources. Yet this singular status of others itself creates tensions, and even contradictions, in the world of fairness.

First, note the extremely sharp dualism of fairness. There are only two kinds of being in its world, people and resources, and there is an absolute difference between the two. Gone are the variegated value patterns recognized by ordinary life, the many degrees and kinds of intrinsic value (e.g. human life, human excellence, animals, plants, inanimate beauty) which approach almost imperceptibly the complete instrumentality of an aspirin tablet.

The result of this contrast is that others are always living on the edge of a cliff over an infinite abyss. Those who must rely on our moral sense of fairness for their rights (that is, who do not have the power to demand their rights) are always on the verge of dehumanization - e.g. the handicapped. We urge fairness and proclaim bills of rights for the handicapped in one breath, and in the next argue that so-called "defective" newborns are non-persons and so can be disposed of without qualms.

Or, look at this: Fairness is often taken both to require that we recognize intrinsic value in human beings and to insist that it is unfair to impose our ideas of intrinsic value on others. What if these two commands contradict each other? What is the conscientious anti-abortionist (who believes abortion to be murder) to do? If he votes to permit abortion, he thinks he is being unfair to unborn children. If he votes against abortion, he is told he is unfair to those who wish to have abortions. It is easy to say that his subjective duty in fairness is to oppose abortion. (After all, universal fairness would seemingly not countenance an argument that abolishing slavery is unfair to those who wish to practice slavery.) But social pressures being what they are, we have today the bizarre spectacle of millions of people who
believe abortion to be murder, but who also believe it is unfair of them to try to prevent it along with other forms of murder. In effect, even the human rights presupposed by fairness are ignored or denied for the sake of fairness.²⁷

There is another and even more far-reaching contradiction: The skepticism and cynicism used so well by fairness as weapons against its rivals may also redound against itself. Like germ warfare, they may not only annihilate the enemy population, but eventually debilitate and destroy the new occupiers as well. For if fairness makes us envision a world where objective value does not exist and actions are undertaken only for the sake of satisfaction, why is fairness itself pursued? The epistemological and motivational arguments developed for fairness can be used also against it, so that a growing class of the intellectually sophisticated come to realize there is no more reason to oppose injustice to humans than to oppose cruelty to animals.²⁸ All values, even fairness itself, come to seem subjective and a mask for self-interest.

Sophisticated people, like the original Sophists, will naturally not admit publicly that justice or fairness has no intrinsic value, because they will hope that others continue to believe in it. No one, not even someone who does not believe in justice, likes being treated unjustly. But this public pretense is surely unstable, at least in a society with free access to information, and talk of fairness or justice as an intrinsic value must gradually be displaced by pure contractualism.²⁹ In the latter, I publicly bind myself with others to follow certain rules (e.g. ones protecting life and property) in order to further my self interest by getting a reciprocal commitment from the strong, but I am under no illusion that these rules really obligate me in conscience. I am ready to break them in secret whenever the risks of so doing are outweighed by the potential benefits, and I am ready even openly to mock them if I (or my group) become strong enough to do so. Since I know

²⁷. Please note that this ultimate reductionism is not necessarily ascribable to those who do not consider abortion to be killing a human being. They have not consciously chosen fairness over the right to life, made human beings into a resource for private consumption, in the way done by the above-mentioned anti-abortionists.

²⁸. Fairness may also be peculiarly self-stultifying, in that it seems unfair for fairness to say that it alone, and no other value, has a right to rule. It seems only fair to treat fairness itself as merely another personal preference. See Finnis, supra note 9, at 221-23.

²⁹. An effort will no doubt be made to "re-educate" skeptics. See Rawls' plans to deal with those who refuse to adopt his original position as the ultimate standard of judgment, supra note 9, at 513-20.
that others have no more compunction than I, I reluctantly agree to the enforcement of the agreed-upon rules by an omniscient and omnipotent State.\textsuperscript{20}

In short, universally-applied fairness tends to become contractualism because only contractualism can emerge from the purely instrumental rationality elsewhere espoused by fairness. Furthermore, contractualism at first \textit{sounds} like fairness, so the shift may be imperceptible. But once moral motivations for action have been eliminated, contractualist instrumentalism must turn to totalitarianism in order to avoid anarchy.

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The price at which satisfaction-based fairness sells peace is too high. When applied to conflicts of value, I have argued, it is immoral because it requires ignoring the strongest demands of objective value. It is dangerous because it renders questionable even its own value and the dignity of human beings. And it is unwise in that it destroys much of the meaning of life and of the basis for mutual respect. These are the claims with which we began today.\textsuperscript{31}

But can we rest here? No, not while that damned violinist is keeping us awake! Isn't there anything we can do, with all due respect, to reach some agreement with him?

Yes, there certainly is. First of all, many of us no doubt can discern more merit in his position. Is it all so clear that sleep is a greater good than music? If not, then we might be in the wrong, and a humble concern for the good requires that we not ignore this possibility. We need to think it out with him in dialogue — letting the chips fall where they may, although we may hope that we won't be convinced to take up our violin and follow him.

He, on the other hand, may likewise admit that sleep is a good thing; it's just outweighed by the greater good of music. Moreover,

\textsuperscript{30} Mancour Olson has demonstrated that rationally self-interested individuals often will not, without coercion, do even what is indisputably in their group interest. \textit{See} \textsc{The Logic of Collective Action} (1965).

\textsuperscript{31} I do not mean to imply, however, that a rejection of the extreme claims of satisfaction-based fairness will necessarily remedy all these evils. There are other causes of contemporary skepticism and cynicism (both of the absolute and of the "as if" varieties), such as utilitarianism, prediction as the sole criterion of truth, belief in the total corruption of nature by sin, suspicion of values resulting from their frequent use to justify oppression, marketplace reduction of all goods to commodities having subjective value only, and the lust for possibility (moral and technological freedom) as an end in itself.
it is clear that his ideal in this case is not just that sounds be made but that human beings flourish. He simply thinks they cannot flourish without partaking of some of the finer things in life. Are we really so far apart? Isn't it possible that we might be able to convince him of the importance of sleep (and/or of autonomy) for human fulfillment? We might find ourselves in some middle position (say, agreeing to a recital once a week) which gave a place to both values as values, not just as interests.

But there are some points of view, e.g. religious ones, which we cannot share. We may have a different faith from our neighbor. Even here there is no need to reduce faith to fairness. We can argue from within an opponent's position, even if we do not share it. One could have suggested to the violinist that even if music is the greatest good, we should still make room for other goods such as sleep. Even if it is the only good, some sleep now might help achieve more violin playing in the long run. There is a world of difference between telling a Jerry Falwell that he is being inconsistent with the Gospel he claims to follow, even if we do not ourselves believe in that Gospel, and telling him that he should treat his faith as just a matter of personal preference.

If nothing else works, we can pray for our opponent and try to convert him. When confronted with a religion or philosophy of violence, we can present our belief (if we have one) in non-violence rather than in fairness. We can read out the Sermon on the Mount, rather than John Rawls' Theory of Justice. We do not destroy the meaning of life when we offer someone a new god, while respecting his present virtue and devotion to what we think to be a demon.

Yet suppose that none of these strategies are effective; suppose that neither we nor our opponent can yield without abandoning deeply-
held principles. Within the bounds set by each of our consciences, there is nothing left to be done but to fight. If our ideals bring us unavoidably into conflict with an equally principled opponent, not fairness but a struggle for power is required by morality and by mutual respect. This is, to be sure, a kind of tragedy. But it is a tragedy which, like the battle of two epic heroes, ennobles rather than demeans the human race.