

THE PRINCIPLE OF FAIRNESS, POLITICAL DUTIES, AND THE BENEFIT PROVISIO MISTAKE*

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Recent debate in the literature on political obligation about the principle of fairness rests on a mistake. Despite the widespread assumption to the contrary, a person can have a duty of fairness to share in the burdens of sustaining some cooperative scheme even though that scheme does not represent a net benefit to her. Recognizing this mistake allows for a resolution of the stalemate between those who argue that the mere receipt of some public good from a scheme can generate a duty of fairness and those who argue that only some voluntary action of consent or acceptance of the good can generate such a duty. I defend a version of the principle of fairness that holds that it is the person's reliance on a scheme for the provision of some product or service that generates duties of fairness to share in the burdens of sustaining the scheme. And, on this version, the principle of fairness is politically significant: regardless of whether the citizen has a duty to obey the law, she will still have important political duties of fairness generated by her reliance on the various public goods provided by those society-wide cooperative schemes sustained by the sacrifices of her fellow citizens.

1. INTRODUCTION

The assertion of a distinctive principle of fairness is quite prominent in recent literature on political obligation.¹ The ambition is to use such a principle as the basis of a liberal account of the duty to obey the law. For example, in what is arguably the first clear formulation of a principle of fairness in "Are There Any Natural Rights?" H.L.A. Hart claims in passing that this principle, rather than consent, grounds citizens' duties to obey the law.

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those

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¹ For discussion, see, e.g., Richard Arneson's "The Principle of Fairness and Free-Rider Problems" (1982); Idil Boran's "Benefits, Intentions, and the Principle of Fairness" (2006); Garrett Cullity's "Moral Free Riding" (1995); Richard Dagger's *Civic Virtues: Rights, Citizenship and Republican Liberalism* (1997); Ronald Dworkin's *Law's Empire* (1986); Kent Greenawalt's *Conflicts of Law and Morality* (1987); H.L.A. Hart's "Are There Any Natural Rights?" (1955); Gregory Kavka's *Hobbesian Moral and Political Theory* (1986); George Klosko's *The Principle of Fairness and Political Obligation* (1992) and *Political Obligations* (2005); Robert Nozick's *Anarchy, State and Utopia* (1974); John Rawls' "Legal Obligation and the Duty of Fair Play" in *Collected Papers* (1999a) and *A Theory of Justice* (1999b); A. John Simmons' *Moral Principles and Political Obligation* (1979), *On the Edge of Anarchy* (1993) and *Justification and Legitimacy* (2001); and Philip Soper's *The Ethics of Deference* (2002).

who have benefited by their submission.²

Cooperative schemes providing some product or service are common, and, for many of those schemes, the product or service is *non-rival*: one person's enjoyment of the product or service does not hinder others' ability to enjoy the same. For these schemes, the free-rider does not harm anyone by enjoying the product or service without sharing in the burdens of sustaining the scheme, and so the moral wrong of free-riding cannot be reduced to the moral wrong of harming others. The moral wrong of free-riding, as Garrett Cullity puts it, is "a matter of giving [oneself] objectionably preferential treatment":

The benefits only exist because others who seek them take it upon themselves to contribute toward their production: in taking them, [the free-rider] arrogates to herself a privilege—the free enjoyment of those benefits—while depending on the renunciation of that privilege by the others.³

In an early paper, John Rawls makes the political application explicit: a reasonably just democracy is a cooperative scheme providing the benefits of the rule of law to citizens by means of their fellow citizens' submission to that law. Although achieving the rule of law does not require that everyone obey all the laws all the time, to disobey when doing so is advantageous (and non-harmful) would be to act unfairly towards those citizens who do obey.⁴ And so, citizens have a duty of fairness, owed to their fellows, to obey the law.

One constant in the literature on the principle of fairness—both defenses and critiques of such a principle—is the inclusion in the principle of what I'll call *the benefit proviso*:

The benefit proviso: A person can have a duty of fairness to share in the burdens of sustaining some cooperative scheme only if the balance of benefits and costs of the scheme for that person, including the costs to her of her share of the burdens, is positive.

In short, the product or service the scheme provides must represent a net benefit for a person if she is to have a duty of fairness to help sustain it.⁵ This benefit proviso is an important part of the effort to define the scope of the principle of fairness, of who counts as an 'insider' with regard to some scheme—and so has a

² Hart (1955), 185-6.

³ Cullity (1995), 22-23.

⁴ Rawls (1999a), 123.

⁵ Robert Nozick's discussion of the principle of fairness in *Anarchy, State and Utopia* explicitly asserts the need for such a proviso. See Nozick (1974), 93-95. In "The Principle of Fair Play," A. John Simmons asserts, about the benefit proviso, that the principle of fairness "would be obviously objectionable in its absence," and he reads both Hart's and Rawls' accounts as containing it. See Simmons (2001), 3, as well as Simmons (1979), 101-107. George Klosko's discussion of the principle of fairness in *The Principle of Fairness and Political Obligation* takes the benefit proviso for granted, as does Philip Soper's treatment of it in *The Ethics of Deference*. See Klosko (1992), 35, and Soper (2002), 144-146. Garrett Cullity's treatment of the principle of fairness in "Moral Free Riding" is arguably another example. See Cullity (1995), 16-19 and, in particular, 28, where he claims that the charge of unfairness that the principle of fairness is meant to justify loses its force when the target can show that she is not made better off by the scheme.

duty of fairness to help sustain it—and who remains an ‘outsider’ or ‘bystander’ with no such duty.

One main source of disagreement in the literature concerns the need for an additional proviso further defining the scope of the principle, a proviso that Hart’s principle lacks. I’ll call it *the voluntarist proviso*:

The voluntarist proviso: A person can have a duty of fairness to share in the burdens of sustaining some cooperative scheme only if she has enrolled herself into the scheme via some exercise of her own will.

Those who advocate versions of this voluntarist proviso—Robert Nozick and A. John Simmons, in particular, but also Rawls in *A Theory of Justice*—argue that any formulation of the principle of fairness that does not meet this proviso is to be rejected for failing to respect adequately the freedom of persons. Of course, like any duty, a duty of fairness will require some actions and disallow others and so will tend to restrict the person’s ability to exercise choice by narrowing her permissible options. But, they argue, this tendency is objectionable—and grounds for rejecting a proposed principle of fairness—when the principle allows for the creation of such a duty of fairness solely by *others’* decisions to set up some beneficial cooperative scheme: rather than becoming an insider to the scheme herself and because of her own choices—say, her consent (Nozick) or some other voluntary acceptance of insider status (Simmons)—she is enrolled in the scheme by others. I will call this *the voluntarist worry*. For Nozick and Simmons, a principle of fairness that allows for this sort of nonvoluntary enrollment is to be rejected as insufficiently responsive to this person’s interest, as an agent, in exercising choice. Hence the voluntarist proviso.

Both Nozick and Simmons offer versions of the principle of fairness that satisfy the voluntarist proviso. While their voluntarist versions do succeed at avoiding the worry, the changes they make deprive the principle of any real political significance, even in reasonably just states: not only does neither version allow for fairness justifications of political obligation, but they also do not allow for fairness justifications of any of the other important political duties normally attached to citizenship. None of these duties—for instance, the duty to pay taxes to support essential public services, the duty to provide for national defense, the duty to serve on juries—can count as duties of fairness owed to one’s fellow citizens.

That they cannot count as duties of fairness is important for two reasons: fairness justifications for such duties seem intuitively quite promising, since the provision of these goods seems plausibly to count as a cooperative endeavor; and, understanding these duties as duties one owes not to the state but to one’s fellow citizens and as duties to engage with them in mutually beneficial kinds of cooperation would enable us to understand them as partly constituting a morally valuable kind of political relationship characterized by important kinds of mutual respect and reciprocity. The challenge posed by the voluntarist worry is important, then, because it concerns not only attempts to provide fairness accounts of political obligation but also attempts to provide fairness accounts of *any* political duties.

My aim here is to rescue the principle of fairness from this threat of political irrelevance. My argument is that the voluntarist proviso is mistaken, but not, as others have argued, because the voluntarist worry is not a legitimate worry. Rather, my argument is that adding the voluntarist proviso to a principle of fairness already containing the benefit proviso is the wrong response to the voluntarist worry, for the concern for freedom that motivates the voluntarist worry actually reveals the benefit proviso itself to be mistaken. It is only in the context of the prior inclusion of the benefit proviso that adding the voluntarist proviso to the principle will seem the only way to accommodate the voluntarist's concerns for freedom. By dispensing with both provisos, we can formulate a version of the principle of fairness—I will call it *Justified Reliance (JR)*—whose scope counts as insiders only those persons who, in exercising their agency in pursuing their own plans and projects, *rely* on the scheme's provision of some product or service, whether or not that provision counts as a net benefit for them. And *JR* avoids the voluntarist worry because, on this version of the principle, persons count as insiders to the scheme only because they exercise their agency in particular ways.

On *JR*, a person's enrollment in a cooperative scheme depends on her own choices, on whether she relies on the scheme's provision of some product or service. How, then, can such a principle of fairness have genuine political significance? Because there are some products and services that, if available, virtually no one can help but rely on in the pursuit of their own projects and plans. And many of the services provided by the reasonably just state seem to be just that sort: fire and police protection, environmental protection and pollution regulation, the maintenance of water and sewage infrastructure, defense against military aggression, basic scientific and medical research, etc. On this account, then, citizens of reasonably just states have duties of fairness towards one another to pay their fair share in taxes to sustain the schemes that provide these services. This sort of account, of course, does not justify the whole of the duty to pay one's taxes, nor does it serve as a blanket justification for a more robust set of the duties of citizenship, but it does offer one way to ground certain core political duties, and that itself is an important result.⁶

2. THE VOLUNTARIST WORRY

The challenge posed by the voluntarist worry is liable to be misunderstood. Consider how George Klosko addresses the worry in developing what is arguably the most sophisticated recent defense of the fairness account of political

⁶ Why not the duty to obey the law? Political obligation is importantly different from other duties, for to have it is to stand in a relation of subjection to another's legitimate practical authority, a relation that one does not stand in when one has other duties, including political duties of fairness. The duty to obey the law is a requirement to treat the law as authoritative, which amounts to treating the institutions and procedures that create the law as practical authorities whose directives thereby merit obedience. This connection to authority makes this duty different in kind from other political duties of fairness, and these differences are too complex to tackle here. For discussion, see Scott Shapiro's "Authority" (2002).

obligation.⁷ On his view, it is enough to avoid the voluntarist worry by pointing out that only certain instances of fairness duties generated by the mere receipt of a cooperatively-provided good are public in a way that could justify coercive enforcement of those duties. In this way, Klosko misunderstands the voluntarist worry as directed at the question of which duties of fairness are coercively enforceable and not at the prior question of whether the mere receipt of a good can generate duties of fairness in the first place.

Klosko accepts Hart's version of the principle, which I will call *the mere receipt version*. On this version, a person's receipt of a good from a cooperative scheme—one that, as the benefit proviso requires, is a net benefit for her—is enough to generate for her a duty to bear her share of the burden of providing that good. In *Anarchy, State and Utopia*, Robert Nozick offers what is now a well-known counterexample to the mere receipt version of the principle of fairness.⁸ Call it *Public Address System*:

Suppose members of [Streett's] 365-person neighborhood decide to set up a cooperative venture to provide entertainment using a dormant public address system. Each person is assigned one day a year to provide the entertainment. [Streett] has benefited from it (and will likely continue to do so), since she has enjoyed a fair amount of music and funny stories. Now, when her turn comes up after 138 days, is [Streett] obligated to do her day?⁹

Nozick says that she clearly is not and that, since the mere receipt version holds that she is, it must be rejected. On Nozick's view, a person cannot come to have obligations simply because others decide to benefit her in certain ways. Because her freedom—her ability to exercise control over the course of her own life—is of independent (and trumping) value, others are unable to decide themselves to set up some beneficial scheme that obligates her and thereby constrains her permissible options.¹⁰ This, of course, is the voluntarist worry.

Klosko observes that Nozick's cases, including Public Address System, work as counterexamples because they “concern the provision of goods that are of

⁷ Klosko offers such an account in his *The Principle of Fairness and Political Obligation* (1992). Later, in *Political Obligations* (2005), Klosko expands his account into what he calls a “multiple principle” account of political obligation. But this expanded account builds on and defends the main arguments in *The Principle of Fairness*, and the principle of fairness remains the basis for this expanded theory, even as it includes other principles to ‘fill the gaps.’ See Klosko (2005), 1, 105. My argument here is not directed against the fairness principle's inability to fill these gaps.

⁸ Nozick's actual target here is Rawls, but only because he misinterprets Rawls as defending the mere receipt version of the principle.

⁹ Nozick (1974), 93-4. (The person's name is my own addition.) That the scheme *assigns* each person a share of the burden is a complication that I intend to ignore in what follows, for it raises important but, for my purposes, irrelevant questions about procedures for arriving at public determinations of persons' fairness duties.

¹⁰ By control over the conduct of one's life I mean not only control over one's actions but also control over the content of one's commitments, obligations and projects. The idea is similar to Joseph Raz's understanding of autonomy as part authorship of one's own life. See Raz's *Morality of Freedom* (1986). For discussion of Nozick's view, see T.M. Scanlon, “Nozick on Rights, Liberty and Property” (1976).

relatively little value."¹¹ But, he asks, what about when the good is a public good—specifically, a non-excludable and non-rival good—that is also “presumptively beneficial”?¹² As Klosko explains, “what characterizes [presumptively beneficial] goods is indispensability: they are necessary for an acceptable life for all members of the community.”¹³ Klosko’s thought here is that, because of the sort of contributions these presumptive goods make to a person’s well-being, her mere receipt of them will generate for her duties of fairness.

From this, we might expect Klosko to defend a narrower ‘mere receipt of presumptive goods’ version of the principle, and so also to agree with Nozick when it comes to schemes providing “discretionary goods,” or goods that, while desirable, are not indispensable. But this is not the view Klosko adopts. Consider what he says about Public Address System, which, recall, provides a discretionary good: “[I]f a given noncooperator benefits from Nozick’s public address scheme, she *does* have an obligation to contribute. If she listens frequently or regularly, it would be wrong of her not to make some contribution.”¹⁴ Here, Klosko rejects the voluntarist worry outright: the mere receipt of a good—discretionary or presumptive—can itself generate a duty of fairness.

Why the distinction, then, between presumptive and discretionary goods? Klosko’s account uses it to answer the different and distinctively political question concerning whose judgment of the content of a person’s fairness duty has standing as determinative. Streett, as Klosko observes, “can easily *say* that she prefers not to receive the benefits,” and her neighbors are in no position to dispute her because “it is not clear exactly what this obligation [of fairness] commits her to.”¹⁵ Klosko’s point seems to be that, when a good is discretionary, the precise content of the person’s fairness duty is generally inaccessible to others; and, because it is inaccessible to them, it does not override what Klosko calls “her usual liberty to decide for herself the burdens she will bear.”¹⁶ Since her ‘liberty to decide’ here cannot be the liberty to decide whether she has the duty at all—she does have it—it seems instead to be the standing to determine both for herself and for her neighbors what her duty requires. And so, Klosko’s claim about Streett is that, because the good of entertainment is discretionary, her own determination of what her fairness duty requires of her has standing, which her neighbors’ determinations lack, as authoritative for them all. If she determines that the duty requires little or nothing of her, her neighbors must abide by her determination when interacting with her, whether or not they agree with her (and whether or not her determination is correct).¹⁷

¹¹ Klosko (1992), 39. See also Klosko (2005), 6.

¹² A good is a public good when it must be provided to everyone falling within its range or sphere of distribution in order to be provided to anyone within that range or sphere. For more on public goods, see Simmons (2001), 18; Rawls (1999b), 235-6; and Klosko (1992), 36.

¹³ Klosko (1992), 39.

¹⁴ Klosko (1992), 44. Emphasis added.

¹⁵ Klosko (1992), 44. Emphasis added.

¹⁶ Klosko (1992), 44.

¹⁷ As Klosko puts it, “[u]nder these circumstances it seems clear that the noncooperator [Streett]

This explanation makes sense of the primarily epistemic role that a good's status as presumptively beneficial plays in Klosko's account.¹⁸ Consider: "If a given benefit is indispensable to A's welfare... then *we can assume* that he benefits from it, even if he has not sought to attain it."¹⁹ In this way, when a good is a presumptive one, a person's refusal to cooperate only admits of one interpretation: it "must be interpreted simply as a desire to profit from their labor without doing his fair share, and so a clear instance of free-riding."²⁰ In the case of presumptive goods, what the fairness duty requires is accessible to the cooperators and so they may demand that he fulfill that duty as they understand it without infringing on his usual liberty to decide.

The problem, however, is that establishing that third parties can sometimes determine with sufficient certainty that a person is receiving benefits from a scheme without sharing in the burdens is not yet to show that this person, by receiving those benefits without sharing in the burdens, is violating some duty of fairness. Klosko's distinction between presumptive and discretionary goods is directed at fulfilling the former task, but the voluntarist worry is directed at attempts at fulfilling the latter one, and so Klosko's argument here misses the mark. Granted, once we have an account of when it *is* unfair for a person to benefit from or otherwise take advantage of a scheme without sharing in the burdens, developing an account of when third parties can determine with sufficient certainty that a person is unfairly benefiting from some scheme will be an important task, especially for fairness accounts of a citizen's political duties. Political duties, after all, must at least be candidates for coercive enforcement. However, we must develop the former account first by formulating a defensible version of the principle of fairness, and, to do so, we must confront the voluntarist worry directly. And Klosko's argument does not do this.

3. THE BENEFIT PROVISIO MISTAKE

The right way to confront the voluntarist worry is, first, to reject the benefit proviso. This benefit proviso aims to define the scope of the principle— who is an

herself must be the judge of what she owes" (Klosko (1992), 44). That these considerations of agreement and correctness are irrelevant are hallmarks of her judgment's possession of authority.

¹⁸ There remains some difficulty in interpreting Klosko here. Consider his example of Blue and Gold: they share a sidewalk and so share a duty to shovel it when it snows. Klosko does say that Gold has a duty of fairness to help Blue shovel, even if Gold thinks that he does not. And so, Klosko seems to accept the mere receipt version. But this fairness duty, he says, is not strong enough, the benefits not substantial enough, to justify allowing anyone else to make the judgment of what Gold's duty requires of him: "because the benefits in question are not of great value, it is not clear what they commit Gold to, and it seems that he himself must be the judge of this." And Klosko concludes from this that "Gold would not be behaving unfairly in refusing to help." This implies a rejection of the mere receipt version. See Klosko (1992), 44-5.

¹⁹ Klosko (1992), 39, italics added. Also: "[B]ecause the benefits of national defense are presumptively beneficial, *we can presume* that Pickerel *would* pursue them (and bear the associated costs) if this were necessary for their receipt" (Klosko (1992), 42, first italics added). Klosko says similar things in *Political Obligations*: "[I]f a given benefit is indispensable to Smith's welfare... then we can assume that she benefits from it, even if she has not sought to attain it" (Klosko (2005), 6).

²⁰ Klosko (1992), 42.

insider and who a bystander—and in an intuitively plausible way, for, if the benefits provided to the person by the scheme do not outweigh her share of the burdens of supporting it, then she would be better off without the scheme altogether. It is difficult to argue that she has a duty to take up her share of the burdens of supporting some (morally optional) scheme that, in the end, makes her worse off while making others better off. Furthermore, when this benefit proviso is met, it can seem superfluous to argue for a separate voluntarist proviso, for, if the scheme does satisfy the benefit proviso—if it does make the person better off in the end—it would seem unreasonable, from the perspective of her own good, to refuse the benefits in order to avoid the burdens. In this context, insisting on an additional voluntarist proviso would amount to insisting on an ‘escape hatch’ that, by allowing the person to free-ride permissibly, would render the principle of fairness toothless. If the benefits she receives depend on others’ willingness to bear the burdens of the scheme, and they would still count as a net benefit were she to bear her share of those burdens, what grounds could she have for refusing?

The problem, however, is that, for paradigmatic cases of unfair free-riding, the unfairness of the free-riding does not depend on whether the scheme actually benefits the person. In these cases, the schemes at issue provide some product or service that a person may take advantage of in pursuing her plans or projects. That a person takes advantage of some product or service in pursuing her own plans and projects, however, does not imply that she thereby benefits from doing so; but that she does take advantage of it without sharing in the burdens is sufficient to judge her action unfair. She can have a duty of fairness, then, even if the benefit proviso is not satisfied. This point is clearest in cases where a person’s participation in some scheme is marked by her clear voluntary acceptance of the scheme’s product or service. Consider the example Garrett Cullity— who himself defends a mere receipt version of the principle— offers as ‘the paradigm case’ of unfair free riding, which he calls *Fare-Evasion*:

Fare-Evasion: Public transport in [Krishnamurthy’s] town is efficiently run on an ‘honor’ system, which places the onus on passengers to buy a ticket before traveling and to cancel it in a machine on any vehicle they use. [Krishnamurthy] rides it without paying.²¹

What makes Krishnamurthy’s conduct unfair is that she gives herself “objectionably preferential treatment”: the trip she takes depends on others’ willingness to pay the fare for their trips, but she is taking a trip to her destination without being willing to pay the fare herself. But Krishnamurthy’s failure to pay is unfair whether or not her use of the public transport system is a net benefit for her. It is unfair because she has *taken advantage* of the public transport system for a trip but neglected to pay the fare. Whether her use of the transport system does benefit her simply does not matter.

Consider a variation, *Fare-Evasion 2*, that specifies why Krishnamurthy is using the transport system:

²¹ Cullity (1995), 6. (The person’s name is my own addition.)

Fare-Evasion 2: Sturgeon was arrested the night before after a bar fight, and needs someone to bail him out. Sturgeon calls Krishnamurthy for help. Krishnamurthy has the money and, though it is a substantial sum for her, she agrees to go to the police station to bail Sturgeon out. Unfortunately, Krishnamurthy's car is in the repair shop. Krishnamurthy rides the public transport system without paying.

It seems plausible to think that, in this instance, though her use of the transport system aided Krishnamurthy's pursuit of her plans, she was not thereby benefitted by that use: she herself would have been better off had she been unable to get to the police station. Of course, she would have been unable to carry out her plan of bailing Sturgeon out, but her plan plausibly consisted of sacrificing some component of her own well-being for the sake of Sturgeon's. Now, we might be able to offer an account of Krishnamurthy's well-being whereby this sort of sacrifice for Sturgeon's sake actually does contribute to Krishnamurthy's own well-being, since it is generally good for the person herself to realize the good of friendship. But I have my doubts that this recasting of sacrifice for a friend can always work.²² The important point here, though, is that whether it can or not—and so whether Krishnamurthy does or does not benefit from her use of the transport system—does not matter for the question of whether her fare-evasion is unfair.²³ Krishnamurthy's fare-evasion is unfair simply because she decided to take advantage of the transport system to carry out her plan of bailing Sturgeon out of jail.

In these sorts of cases, what the cooperative scheme does in providing a person with some product or service is promote her ability to exercise her agency in the pursuit of her own projects and plans, and, though this promotion will usually also count as benefitting her, it will not always. The mistake made by including the benefits proviso in the principle, then, is taking what is only a relatively common effect of a cooperative scheme on insiders and elevating it into what does the work of making someone an insider. And so, we should reject the benefit proviso. With this realization that what such cooperative schemes do

²² We might suppose that, once Sturgeon is bailed out, he will be unable to face Krishnamurthy and so their friendship will dissolve. She may nevertheless be acting as their friendship requires, but this added feature of the case makes it even less likely that bailing Sturgeon out benefits her. Or, we might suppose instead that Sturgeon has only been acting as Krishnamurthy's friend: he has been faking it, using her and her willingness to help him as a friend for his own purposes. Even here, if Krishnamurthy uses the transport system to get to the jail to bail him out, she has a duty to pay the fare.

²³ Is this argument sophistical? After all, Krishnamurthy's use of the transport system might seem obviously a benefit when the baseline is her having to walk to the police station. The argument, I think, is not sophistical. Why? If we are to regard her use of the transport system in this sort of case as a benefit, we must rely, it seems, on some claim that, when something makes it easier for someone to carry out her freely-chosen ends, it thereby counts as a benefit to her. But this sort of claim is false, for whether it is a benefit depends on whether it is better for her to achieve her end than not, and, in this case, while it is better for Sturgeon that she bail him out than not, it is not (or, at least, may not be) better for Krishnamurthy. And so, while Krishnamurthy's use of the transport system, compared to walking, makes it easier for her to carry out her end of bailing out Sturgeon, she herself would have been better off had she not made it to the police station, and so her use of the transport system, by making it easier for her to get to police station, does not benefit her. I thank an anonymous reviewer for pressing this objection.

is promote insiders' agency, we can see more clearly the core truth of the voluntarist worry: to have duties of fairness to support some scheme, there must be some connection between the scheme—and what it provides—and the person's own will.

The argument thus far has considered only cooperative schemes that provide excludable products or services, that is, those that the person has to *do* something in order to get. Cullity might object that, even if it does not matter for the question of unfairness in Fare-Evasion whether Krishnamurthy benefits, the benefits proviso may still of use when the product or service the scheme provides is a public good: not only non-rival but also non-excludable. Since no one has to *do* anything to get the product or service, the way to narrow the reach of a mere-receipt version of the principle of fairness for these schemes is by including the benefit proviso: all and only those for whom the mere receipt of the product or service counts as a net benefit are counted as insiders.²⁴

But using the benefit proviso even in this restricted way only for schemes providing public goods is a mistake. Why? The provision of some product or service can count as benefitting a person even if there is no sense in which she takes advantage of it. That is, even when the availability of the product or service does not influence how this person lives her life—how she pursues her projects and plans—that it is available to her can count by itself as a benefit since, should she need to take advantage of it, it will be there. Now, suppose this person refuses to bear what the public-goods-specific mere receipt version has as her share of the burdens. Does she count as giving herself 'objectionably preferential treatment'? This sort of case exhibits just the sort of "dependence" that, on Cullity's view, counts as such preferential treatment:

One feature of obvious relevance is her dependence for the benefits she receives on others' willingness to [bear their share of the burdens], without being willing to do so herself... [T]here is surely a sense in which any case exhibiting a dependence of this sort is one where the agent gives herself preferential treatment: she makes a special case of herself, allowing herself not to [bear her share of the burdens] for goods that she either does or ought to realize are worth paying for, and which she only receives because the others are moved by the same realization to [bear their share].²⁵

This person receives the benefits, benefits that depend on the others' willingness to share in the burdens. But so do these others—*no one* does anything to get them—and so, her mere receipt, like theirs, establishes the morally relevant dependence. And so, On Cullity's view, she has a duty of fairness in this sort of public-good case, regardless of whether she has done anything that, akin to the act of boarding the bus in Fare Evasion, could count as actually taking advantage of the benefits.

²⁴ For a version of such a narrowed principle of fairness, see Richard Arneson's "The Principle of Fairness and Free-Rider Problems" (1982).

²⁵ Cullity (1995), 23.

But this claim that she must be making a special case of herself is mistaken. Consider the cooperators. Why do they sustain the scheme providing the product or service? Presumably because the product or service, available only because the scheme exists, is something they wish to take advantage of in carrying out their own projects and plans. For these cooperators, it cannot be that the scheme only benefits them in the way it benefits her—as providing merely an available option whose availability is itself not practically significant for them—for then the scheme, though beneficial, would not be beneficial in a way that would make sense of their participation in the scheme. Because these cooperators themselves take advantage of the product or service in some way, her refusal to bear a share of the burdens of the scheme would not count as giving herself objectionably preferential treatment, for she has available the following justification: ‘This product’s (or service’s) availability as an option, as something I can take advantage of, has not changed how I pursue my plans and projects. Though it matters practically for you (the cooperators), it does not matter practically for me.’ Notice that she does not make use of the voluntarist proviso, since she is not appealing to the absence of some voluntary act of enrollment, but rather to the absence of a weaker, though still real, connection with her will, a connection that persons can have (or lack) even in cases of public goods.

Though this weaker connection does not rise to the level of the voluntarist proviso, it captures what I think is the core truth in the voluntarist worry: a person’s status as an insider to some scheme must be the result of her own voluntary choices making the product or service practically significant for her. As I will show, the voluntarist proviso goes awry in insisting that the only choices capable of generating this insider status are either the choice to consent to that status or the choice to voluntarily accept the product or service provided by a scheme, where ‘voluntary acceptance’ is understood to mean ‘accepting it with the knowledge that such acceptance confers insider status.’ This narrow reading of the core truth underlying the voluntarist proviso actually fails to capture fully the voluntarists’ underlying concern for voluntary choice and the exercise of agency, for it neglects the cooperators’ interests in exercising their agency in morally permissible ways. So long as their cooperative scheme does not otherwise infringe on others’ rights, it merits respect from bystanders as the product of their coordinated exercise of agency.²⁶ But, because the scheme is a coordinated exercise of agency whose aim is to provide some practically significant product or service that, absent the scheme, would be unavailable, respect for them as agents requires that one regard taking advantage of that good—making it practically significant for oneself and so relying on the scheme

²⁶ A. John Simmons has defended the most sophisticated contemporary version of voluntarism, and he understands its underlying concern to be that “[t]he course our lives take should be determined as fully as possible by our own voluntary choices” (Simmons (1993), 37). My claim here is that, if we take this commitment seriously, then we should think that the cooperators have some claim that their voluntary choices to set up a cooperative scheme are to be respected, so long as the requirements of that respect, requirements borne by bystanders, are generated in a way consistent with a commitment to voluntarism. Indeed, it is hard to see why a voluntarist would even wish to defend a version of the principle of fairness—or, at least one that does not reduce it to a principle of consent, as Simmons’ version does not—unless the cooperators have some claim of this sort. I thank an anonymous reviewer for pressing for clarification.

(and the cooperators) to provide it—as conferring insider status.

4. VOLUNTARISM AND JUSTIFIED RELIANCE

What we need is a formulation of the principle of fairness that is appropriately responsive both to the cooperators' interests as agents in creating and sustaining cooperative schemes providing practically significant products and services and to the would-be bystanders' interests as agents in not being enrolled into scheme merely by the actions of others; and it must be so responsive for public goods. The following principle, which I call *Justified Reliance*, is such a principle:

Justified Reliance (JR): Absent special justification, it is impermissible for a person, when pursuing her own plans and projects, to rely on a cooperative scheme for the provision of some product or service without also sharing proportionally in the sacrifices the cooperators make via their participation in the joint task of sustaining this scheme, provided those others do not force such reliance by unjustifiably depriving that person of an opportunity, one to which she has a right, to engage in the private provision of that product or service.

Justified Reliance has the added feature of making the principle of fairness politically significant for, unlike Nozick's and Simmons' versions, it allows that a person can simply find herself with a duty of fairness to support a scheme; and it does so while at the same time avoiding the voluntarist worry by holding that this person has this duty of fairness only because she exercises her agency in a particular way.

What do I mean here by 'relying' on a scheme to provide some product or service? I intend relying on a scheme to contrast with both the mere receipt and voluntary acceptance of some benefit provided by a scheme, and so it is meant to pick out the relation a person has to the scheme that explains why concerns of fairness arise from her use of the product or service it provides. The clearest instance of relying on a scheme is when a person uses the product or service the scheme provides as a means towards some end she has. Krishnamurthy relies in this way on the transport system. There are other ways a person can rely on a scheme. A person may rely on a scheme by incorporating the use of the product or service it provides into her plan: it becomes a component of the plan and, to that extent, she relies on the scheme to provide it when carrying out the plan (even if she has not yet used the product or service). More precisely, a person relies on a scheme when the presence, availability, or use of the product or service that scheme provides is a nontrivial premise in a practical argument, one that she accepts, whose conclusion is some (present or future) action or series of actions in the pursuit of some end. In this way, a person relies on a scheme even when the availability of some product or service is merely an enabling background condition of her actions or plans.²⁷ Importantly, relying on a scheme

²⁷ For example, the ready access to healthcare that I have as a U.S. resident with health insurance is

for some product or service does not require that one know (or even should know) either that one is making use of the product or service or that the product or service is available only because some scheme is providing it. It requires only that the product or service in question play a certain role in one plans.²⁸

Consider the following examples—call them *Neighborhood Concerts I and II*—for they illustrate JR:

Baltazar and Muller live in the same neighborhood, and their neighbors decide together to put on a weekly concert series on the neighborhood green featuring professional musicians playing jazz, blues, folk, gospel, bluegrass, and other classic American musical genres.

Neighborhood Concerts I: Every evening, weather permitting, Baltazar goes for a walk around the neighborhood. Very much a man of routine, he does not vary his route. On concert days, he will often catch much of the concert while on his walk, and he enjoys the music played.

Neighborhood Concerts II: Muller runs a small but successful bio-sciences research firm, and she is always recruiting scientists in a very specialized and competitive labor market. Recognizing that the concert series—and the image of the community it conveys—would prove a selling point to a fair number of her potential hires, she makes it a point to have job candidates over to her house for dinner on concert nights. Many candidates are impressed by the sense of community they witness at these concerts and report it as one of the things that make the job attractive.

Do either Baltazar or Muller have a duty of fairness to contribute money to finance the concert series?

JR says that Baltazar does not have such a duty but that Muller does, even though neither have agreed to the scheme but both benefit from it. The difference is that Baltazar does not rely on the scheme for the provision of enjoyable music while Muller does. Muller very much takes advantage of the scheme: she pursues her ongoing end, as head of her company, of recruiting qualified

a benefit I rely on, and it is a benefit even if I do not ever need to go to a hospital or require the services of a doctor: I do certain things and take certain risks regularly in the pursuit of my various ends that I would not if I did not have this ready access to healthcare (and this can be the case whether or not I actually realize it). And so, this access is an enabling background condition of many of my actions and plans.

²⁸ I do not think that we can understand 'relying on a scheme to provide some product or service' as 'being such that one would consent to the availability of the product or service (along with the attendant duty) were one placed in the relevant choice situation.' The problem is that, while it may be true that a person would, in the right choice situation, consent to the availability of every product or service upon which she does actually rely, it does not seem true that a person relies on every product or service to which she would offer her consent. In other words, it seems to me that the fact that a person does actually rely on the product or service explains her hypothetical consent in those cases, not the other way around. I thank David Estlund for pressing me on whether hypothetical consent may be a possible way to understand reliance.

scientists by using the community concert series as a selling-point.²⁹ Baltazar does not take advantage of the scheme: he goes for his walk at the same time and along the same route whether or not there is a concert and so, while he does enjoy the music when there is a concert, its existence makes no practical difference to what he does.

And what does *JR* say about Public Address System? According to *JR*, Streett may indeed have a fairness duty to support her neighbors' public entertainment scheme. But whether she does depends not on whether she has consented to the scheme—as Nozick's view has it—or received benefits from it—as Klosko's has it—but rather on whether she relies on the broadcasts for entertainment or just happens to enjoy some broadcasts when she's around her house.³⁰ The idea is that, by relying on the scheme for entertainment—by incorporating the entertainment provided by the broadcasts into how she lives her life—she is taking advantage of the scheme in a way that she is not when she simply happens to enjoy some broadcasts now and then.

4.1 *Why not the consent version?*

Consider the would-be cooperators who wish to institute some stable scheme providing some morally optional but important public good. Someone sympathetic to the voluntarist worry should also be sympathetic to the thought that persons living in close proximity have morally significant interests as agents in being able to form cooperative schemes with others when they judge them appropriate. Should some permissible ends require a product or service provided by some ongoing cooperative scheme, their interest in achieving those ends gives them an interest in establishing and maintaining the scheme. This will be particularly true of public goods, for these are often quite important products or services—their provision may be required if persons are to be able to exercise choice in valuable ways in the first place—and persons generally cannot provide them on their own. The voluntarist, then, should think the would-be cooperators' interests in creating and sustaining such schemes are morally significant ones; but, as a result, the voluntarist should be troubled by the threat that permissible (non-harmful) free-riding would pose to these would-be cooperators' abilities to create and sustain such schemes.

Suppose that, instead of a principle of fairness, we have a principle of necessity governing participation in cooperative schemes:

A person is required to contribute to a scheme which she relies on for the provision of some product or service just in case her contribution is

²⁹ Muller has this duty of fairness to contribute money even if her reliance on it does not in fact benefit her, that is, even if it turns out that the concert series fails as a selling-point and instead persuades her recruits to go elsewhere.

³⁰ In this way, Klosko is right to think that Streett will likely have a duty of fairness in Public Address System if she 'listens regularly' to the broadcasts, for in that case it is likely that she is relying on the broadcasts. Notice that Klosko's account, unlike mine, cannot explain why it matters that she is a *regular* listener.

necessary for that scheme's stable and ongoing success.

By making (non-harmful) free riding permissible, this principle would, of course, make for highly unstable schemes. In large schemes, any one participant is likely to judge (accurately) that her contribution is not necessary for the scheme's stable and ongoing success either because (a), if the scheme is stable, it will remain so even absent her contribution, or (b), if it is not, her contribution will not be enough to make it so. And, recognizing that others are in similar circumstances, each would know that such schemes are at greater risk of being unstable (and so unsuccessful), giving them even less assurance that sharing in the schemes' burdens will pay off for them and so less reason to join such schemes. In this way, the interests of would-be cooperators in being able to form and sustain such schemes—an interest they have as agents living in close proximity with one another—should lead the voluntarist to think that there is a principle of fairness.³¹

But this same reasoning should also persuade the voluntarist to reject Nozick's *consent version* of the principle of fairness whereby a person is bound by a duty of fairness just in case she has consented to the duty.³² On Nozick's account, Streett does not possess a fairness duty in Public Address System because she did not *consent* to being a participant of the scheme; instead, she remains merely a bystander. By including a consent requirement, the duty of fairness becomes self-imposed—a person cannot be enrolled by others but only by her own explicit and expressed intention to enroll herself—and, as a result, the principle of fairness generates just those duties that her consent already generates. It should be clear how this avoids the voluntarist worry. The problem, however, is that it is overly burdensome to require that the cooperators' scheme provide someone a clear choice situation such that it is her action in that situation—either some express declaration of consent or some action (or failure to act) that counts as tacit consent—that determines whether she has a duty of fairness to share in the burdens.³³ Providing a person with such a choice situation amounts to allowing her to decide herself whether to make her potential free

³¹ Of course, this discussion is a recap of standard treatments of the free-rider problem as an *n*-prisoner's dilemma. For such a treatment, see Rawls' discussion of the isolation and assurance problems in *A Theory of Justice* (1999b), 236-9. It does, however, have a different emphasis: the problem is not merely that certain sorts of benefits will not be provided, but that would-be cooperators will have their good-faith attempts at providing them thwarted. The emphasis, then, is on their inability to satisfy their interest in exercising choice in valuable ways. And this emphasis is important, for both Nozick's and Simmons' arguments about the principle of fairness, based on claims about the value of freedom, emphasize the interests in exercising choice of those who are bystanders to the scheme but overlook the interests of the would-be cooperators.

³² Nozick (1974), 95; Simmons (2001), 15.

³³ What counts as tacit consent? As Simmons makes clear, the difference between express and tacit consent lies merely in the manner in which the consent is publicly expressed to others. Express consent is consent given, say, by uttering the phrases "I consent to..." or "I agree to...", or by acting in some other way that conventionally signifies expressing consent, for instance, by raising one's hand, nodding one's head 'yes,' or signing one's name to a contract. Tacit consent, by contrast, is consent given by remaining silent or inactive or by a failure to do some particular thing(s) in the relevant situation. The distinction, then, lies simply in the manner in which the consent is publicly given—consent by action vs. consent by inaction—not in its significance or bindingness. See Simmons (1979), 80.

riding permissible or impermissible, for, on the consent version, what matters is not whether she takes advantage of some product or service but whether she attaches via her consent a duty of fairness to that advantage-taking, thereby making free riding impermissible. And, of course, she would have little reason to make it impermissible, unless doing so were necessary for the scheme's success. The consent version, then, collapses the principle of fairness into the principle of necessity, and so little, if anything, is gained on behalf of protecting would-be cooperators' interests as agents by opting for it.

4.2 Why not the voluntary acceptance version?

In *A Theory of Justice*, Rawls rejects his earlier fairness account of political obligation, but not for Nozick's reasons. Rawls' revised view is that, to have a duty of fairness, one must have "voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests."³⁴ But, he observes, since citizenship is normally nonvoluntary, this version of the principle of fairness cannot ground political obligation (or, it must be said, any other political duties). In "The Principle of Fair Play" and "Fair Play and Political Obligation," A. John Simmons has mounted a defense of what we can call the *voluntary acceptance version* of the principle, which restricts Rawls' view here to only the first half of his formulation: benefiting from a cooperative scheme generates for a person duties of fairness to support that scheme when she has voluntarily accepted those benefits.³⁵

On Simmons' account, to count as voluntarily accepting a benefit, a person must either "(1) have tried to get (and succeeded in getting) the benefit, or (2) must have taken the benefit willingly and knowingly."³⁶ The first way of accepting a benefit concerns excludable or avoidable goods, which are those goods whose provision can easily be restricted to selected persons. The Fare-Evasion cases concern such a good, and, as they make clear, voluntary acceptance of an excludable good is fairly straightforward, for a person must actually *do* something in order to get the good.³⁷

Now consider public goods, for they are non-excludable and unavoidable and, as such, those who receive them need not do anything in particular to get them. Can persons nevertheless count as voluntarily accepting a product or service they cannot help but receive? Simmons argues that a person can

³⁴ Rawls (1999b), 96. See also Rawls (1999b), 301-308.

³⁵ Both Simmons articles are to be found in his essay collection *Justification and Legitimacy* (2001). One way of understanding my argument against the benefit proviso and in defense of JR is as claiming that the two halves of Rawls' formulation are very different and, while he is mistaken about the first half, he is correct about the latter.

³⁶ Simmons (2001), 18.

³⁷ Simmons' example is of a cooperatively dug and maintained well: even after refusing her consent to the scheme, a person generates for herself a duty of fairness to help maintain the well when she secretly retrieves water from it at night because, by doing so, she voluntarily accepts the benefits of fresh water provided by the well. See Simmons (2001), 19. On my account, of course, she incurs a duty of fairness here because she decides to rely on the scheme for the water.

voluntarily accept public goods by receiving them “willingly and knowingly” or, in other words, by having “certain attitudes towards and beliefs about the benefits [she has] received” while unavoidably receiving them. For instance, the person must not regard the product or service provided by the scheme is forced on her or worth less than the price to be paid, and she must know that the product or service is provided by a cooperative scheme.³⁸ Simmons’ belief-and-attitude requirement for public goods may strike us as quite plausible, for it might seem relevant for our judgments about the fairness of advantage-taking whether, say, the person in question knows that the product or service she uses comes by way of a cooperative scheme.³⁹ And, it might seem relevant for the reasons captured by the voluntarist worry: if a person could come to have a duty of fairness by unknowingly (or unwillingly) but unavoidably relying on some scheme for the provision of some product or service and thereby benefitting from that provision, this duty would seem to be *imposed* on her.

Simmons’ belief-and-attitude requirement makes for a principle that rules out this sort of duty imposition. *JR*, on the other hand, seems vulnerable to this imposition objection, since it is unconcerned with the attitudes or beliefs of the person relying on a public good. Indeed, it holds that she has a duty regardless of whether she knows that the product or service is being provided by a cooperative scheme. Surely, the worry goes, a person’s interest in exercising choice justifies holding that this sort of non-culpable ignorance absolves her of a duty of fairness. And so, it might seem that the voluntarist would have good reason to reject *JR* in favor of something like Simmons’ version of the principle.

However, there are difficulties with Simmons’ version of the principle. To see why, consider first the case of promising. Normally, a person is not required to do what she intends to promise to do until she actually promises to do it, for it is her act of promising itself that generates the requirement. As a voluntarist, Simmons should intend voluntary acceptance to work similarly: a person need not share in the burdens of a scheme until she actually voluntarily accepts the goods it provides, for it is this act of voluntary acceptance that generates the duty of fairness. For public goods, however, it is supposed to be the person’s coming to have certain beliefs and attitudes that generates the duty of fairness.⁴⁰ And, unlike promising (and unlike voluntary acceptance of excludable goods), this coming to have certain beliefs and attitudes is not itself the exercise of agency: a

³⁸ Simmons (2001), 20. For additional discussion of the criteria for voluntary acceptance of public goods, see Simmons (1993), 252-7.

³⁹ Or, if one is also concerned about cases of culpable ignorance, whether she should know that she is benefiting from a scheme.

⁴⁰ Admittedly, Simmons’ claim in “The Principle of Fair Play” is that having the requisite belief and attitude structure is necessary for voluntary acceptance of public goods, not that it is sufficient. But, if his account here is to leave open the possibility of voluntary acceptance of public goods—and Simmons wants his account to do that—then it is plausible take his position here to be claiming that possessing the requisite belief and attitude structure is not only necessary but also sufficient for voluntary acceptance of public goods. And, not only is it plausible, it is the interpretation Simmons gives of his position in *On the Edge of Anarchy*: “Provided I am adequately informed about the benefits and their costs... and want them independent of the presence of factors that would make suspect my desire... benefits I unavoidably receive can surely be viewed as voluntarily accepted by me” (Simmons (1993), 254). I thank an anonymous reviewer for pressing this concern.

person does not have the kind of freedom over her beliefs and preferences that she has over decisions, say, about whether to make a certain promise. In this way, the underlying voluntarist rationale for how, by promising, she can bind herself with a new duty is unavailable as an explanation of how 'voluntary acceptance' of public goods as Simmons understands it generates a duty of fairness. This part of Simmons' view, then, is without basis.

Furthermore, the appeal to a voluntary acceptance condition is not the only available reply to the imposition objection. Consider this example, which we'll call *Public Water System*⁴¹:

Public Water System: Before Miller moved into his neighborhood, his neighbors restarted the old but dormant water system and created an ongoing scheme to share the burdens of upkeep. The only feasible option is to provide water to every house on the old system, including Miller's. However, Miller doesn't know that he is relying on their scheme: He is either asleep or away during the day, so the neighbors' knocks on his door go unanswered, and they are all asleep when he's around at night. Also, a neighbor's dog snatches every notice they leave for Miller.⁴²

Miller has not voluntarily accepted the service provided by the water system and, because of his ignorance, has no reason even to think he may have a duty of fairness to help with system upkeep. About this sort of case, a defender of *JR* can say that, even though Miller does have a duty of fairness on account of his unknowing reliance on the system to provide him water, his non-culpable ignorance excuses his failure to fulfill his duty. And saying this is sufficient to defuse the imposition objection, since no actual burdens are imposed on Miller as a result of his unknowing reliance.

Simmons' voluntary acceptance account defuses the objection in a different and problematic way. It claims that, because Miller did not voluntarily accept the water provided by the scheme, he lacks a duty of fairness to share in the burdens of system upkeep. His failure to share in system upkeep, then, is not merely excused but rather *justified*. The difficulty with finding his failure justified is that Simmons must then also say that, in this case, Miller's friend Sturgeon lacks good reason to inform Miller of his reliance on the water system and, as his friend, even has good reason *not* to inform him: Miller's reliance harms no one, poses no threat to the scheme's stability and, on Simmons' view, is also *not* unfair. And, on Simmons' view, Miller's reliance would only become unfair were Sturgeon to inform him of the scheme—causing him to count as accepting the water voluntarily, thereby generating a duty of fairness—and were Miller not to bear what only then has become his fair share of the burdens. As his friend, Sturgeon should avoid causing Miller to come to have this new duty and so should not

⁴¹ I have taken certain elements of this example from one of Kent Greenawalt's examples. See his *Conflicts of Law and Morality* (1987), 127.

⁴² Assume that Miller's use of his water tap doesn't affect anyone else's access to water and that his potential contribution to maintenance is not missed. Assume further that Miller has no reason to inquire about where the water comes from (e.g., he reasonably thinks that his pipes are fed by a backyard well).

inform him. But this result strikes me as very implausible. Surely Sturgeon, as his friend, does have good reason to tell Miller that he is taking advantage of the scheme, and the route taken by *JR* explains why: though excusably unaware of it, Miller is taking unfair advantage of his neighbors, and he needs to be made aware of it so that he may stop.⁴³

Though *JR* holds that persons such as Miller can unintentionally come to have duties of fairness, these duties will not be objectionable impositions, for non-culpable ignorance excuses their failure to fulfill them. Granted, informed failure is not excused on this view, but the same holds true of voluntary acceptance, for, on that version, when a person does possess the right beliefs and preferences, her failure is not only no longer justified but also not excused.⁴⁴ And so, the voluntarist does not have reason, based on a worry about the imposition of duties, to reject *JR* in favor of the voluntary acceptance version.

4.3 Why Justified Reliance?

But we still have an important imposition worry: What about those reliers who do not want to rely on the good provided by a scheme? Such unwilling reliers seem to have a strong complaint against *JR*.

They do not when their reliance is up to them, for if they do not want the product or service for the price of a fair share of the burdens, they need not rely on it; and this will be true even of a product or service they cannot help but receive as a benefit. And reliance does not count as 'up to them' only when they have chosen in some clear choice-situation to rely. It also counts as such when their reliance results from other informed choices they make, choices, say, to pursue various projects: when the pursuit of some project requires relying on some scheme to provide some product or service, a choice to pursue the project also counts as a choice to rely on that scheme. One cannot plausibly claim that such reliance is unwilling, for taking responsibility for one's choices requires, in part, taking responsibility for the reliance that enables their pursuit and taking such responsibility requires, in part, regarding the reliance itself as chosen. In this way, when their reliance is up to them, they cannot complain that a duty of fairness generated by their reliance is imposed on them.

But what about when their reliance is *forced*? It does seem objectionable to find duties of fairness in such cases. Simmons' discussion of the following case, which we'll call *Water Trench*, suggests this sort of argument:

Water Trench: Each house in [Kosch's] neighborhood depends on its own well for water. Unfortunately, a drought has dried up each house's well.

⁴³ I am relying here on the following assumption about friendship: genuine friends have some concern for each other's moral agency—that each other is exercising it responsibly—and are moved sometimes to act on that concern. I do not think that this assumption is terribly controversial, or at least when it is taken to be no stronger than necessary for this particular case of one friend simply *informing* the other of a moral mistake he is unknowingly making.

⁴⁴ The same holds for failure as a result of culpable ignorance.

She wants to solve her problem by digging a deeper well; her neighbors unite to dig a water trench from the nearest river. Their trench travels over the only place on [Kosch's] property where she can dig a sufficiently deep well, and her neighbors forcibly keep her from diverting the trench in order to dig her well. She has no option, then, but to use the trench. Does she have a fairness duty to help maintain it?⁴⁵

Simmons argues that Kosch does not, for she must rely on the trench only because "collective action has *precluded* the possibility of private provision... of the public good in question."⁴⁶ Kosch, he thinks, would be justified in free-riding. However, Water Trench is inadequately described, for it matters what reasons the neighbors had to dig the trench where they did. Indeed, if private provision is already morally precluded – if Kosch lacks the prerogative of private provision here – being deprived of it as an option does not constrain Kosch's agency in an objectionable way.

Chance or circumstances can force a person to rely on some scheme without the forced nature of that reliance rendering considerations of fairness inapplicable. Suppose, for instance, that there is only one suitable spot for a deep well, but, as Kosch digs there, the drill bit breaks off, rendering the half-finished well utterly unsalvageable. Or, suppose that Kosch discovers while drilling her deeper well that under the whole of her property is a layer of bedrock through which she cannot drill. In these cases, chance or circumstances, respectively, give her no choice but to rely on the trench for water but, once she does, she incurs a duty of fairness to help maintain it.

Other moral duties may similarly force reliance without rendering considerations of fairness inapplicable. Suppose that, with a deeper well, Kosch will take water that a nearby nursing home counts on as its only water source. In this case, it would be wrong for Kosch to dig that well: the nursing home counts on that water and she has convenient access to a trench of water. Or suppose that digging the trench where the neighbors do is the only feasible way for them to restore their water supply. In these cases, though Kosch is (morally) forced to rely on the trench, once she does, she incurs a duty to help maintain it. It is not always the case that a person has a right to private provision and, when she does not, she has no complaint if collective action precludes such private provision.

In this way, a person forced to rely on some cooperatively-provided good in the pursuit of her own plans and projects will not always have a complaint of imposition against a duty of fairness. But she certainly will, it seems, when the other participants force her reliance without sufficient justification – suppose, for instance, that in Water Trench the neighbors could have just as easily dug the trench somewhere else – and, in such cases, *JR* ought not hold that she is required to share in the burdens of sustaining the scheme.⁴⁷ Since this narrower

⁴⁵ Simmons (2001), 34. The person's name is my own addition.

⁴⁶ Simmons (2001), 36. Of course, Simmons' discussion does not concern the specific question of forced reliance but rather forced benefit via the preclusion of private provision of a good.

⁴⁷ I have restricted this question of forcing to forcing done by other participants because I am inclined to agree with Kent Greenawald's judgments about certain examples in which participants have a duty of fairness even though they are unjustifiably forced by non-participants to adopt the

imposition objection goes to the heart of the justification of any version of the principle of fairness, *JR* includes a proviso ruling out such cases:

Justified Reliance (JR): Absent special justification, it is impermissible for a person, when pursuing her own plans and projects, to rely on a cooperative scheme for the provision of some product or service without also sharing proportionally in the sacrifices those cooperators make via their participation in the joint task of sustaining this scheme, *provided those others do not force such reliance by unjustifiably depriving that person of an opportunity, one to which she has a right, to engage in the private provision of that product or service.*

This proviso might seem worrisome, however, because applying *JR* to cases of forced reliance will require judging whether that forcing is morally justified and *JR* provides little guidance on this question. Indeed, judgments about what the principle of fairness—here, *Justified Reliance*—requires will, in those cases, depend on judgments about rights to private provision and if (and when) such rights may be overridden by competing moral concerns. But this just means that *JR*, like many moral principles, is not a standalone principle but rather depends, in part, on the content of other moral judgments. Even so, *JR* does still identify the sort of relation a person can have to a scheme—reliance on it to provide some product or service—that, because it is connected to the person’s agency in a way that both mere receipt and voluntary acceptance of the product or service is not, makes possible a principle of fairness that is responsive both to would-be cooperators’ interests in forming stable cooperative schemes and would-be bystanders’ interests in remaining outside of such schemes.⁴⁸

scheme. Consider: Each member of a village is required to transport a certain amount of water each day to the village from a nearby stream as a way to deal with the village’s water shortage. Each relies on the water supply, and the distribution of transport burdens is in fact fair. However, this scheme is demanded of the villagers (and their obedience coercively enforced) by the foreign army that has recently and unjustly conquered the area. It is plausible to say, as Greenawalt does, that the villagers do have a duty of fairness to each other to do their part in the scheme, even though the army’s coercive implementation of the scheme on the village was unjust. See Greenawalt (1987), 130.

⁴⁸ You might think it a problem for my account that it does not help specify persons’ rights to private provision, since, after all, we cannot use *JR* to generate political duties of fairness without knowing which rights to private provision persons have. I think it is not a problem for the account as an account of the principle of fairness, for what the proviso does is to isolate certain kinds of disagreements between libertarians and non-libertarians as disagreements that are really about the prior question of rights. For instance, consider the dispute between libertarians and non-libertarians about whether a person has a duty to pay his fair share in taxes to support the communal provision of police protection. The standard libertarian assertion is that persons have a right to private provision of police protection, with non-libertarians denying it on the grounds that police protection, if it is to be provided at all, must be provided to (virtually) all within a territory as a public good. That this dispute about rights must be settled before *JR* can come into play does not prevent *JR* from identifying the distinctive sort of relation that a person has to a scheme—reliance on it for the provision of a good or service—that generates duties to share in the burdens of the scheme. (A similar point can be made about accounts of the moral power of consent: what a person can and cannot consent to will depend, in part, on which rights and prerogatives she already has, but a satisfactory account of consent as a moral power need not include an account of the rights persons have, since questions about the rights persons have are not ones uniquely confronted by accounts of the moral power of consent.) I thank an anonymous reviewer for pressing this objection.

5. CONCLUSION

According to *Justified Reliance*, a person can find herself with a duty of fairness to support a scheme providing public goods, but she has that duty not because she unavoidably benefits from that scheme—though it is probably true that she does benefit—but because, in exercising her agency in the pursuit of her ends, she relies on the scheme’s provision of those public goods. That it is her reliance that does the work matters because it allows that persons can simply find themselves with duties of fairness, but in a way that does not run afoul of the voluntarist worry. And, as a result, people in most political communities will have important political duties of fairness, ones that they owe to their fellow citizens *qua* fellow reliers. The specific duties they have, of course, will depend on the particular character of the cooperative schemes in place in their communities. But it is safe to say that citizens of many contemporary states have duties of fairness owed to their fellow citizens to support the municipal fire service, the maintenance of the road network, the scheme of traffic regulation and enforcement, the municipal water and sewer systems, the system of jury trials, among other cooperative schemes. And they have these duties not because the law says they do—the question of the duty to obey the law is a separate one—but because they rely on the benefits these schemes provide when pursuing their own personal projects, plans and relationships. And so, even when citizens lack political *obligation* (or, a duty to obey the law), they will still have important political duties of fairness that, because they share them with and owe them to their fellow citizens, give them reason to regard their co-citizenship as a morally valuable relationship marked by significant kinds of mutual respect and reciprocity.

Furthermore, we can even say that the goods provided by these community-wide schemes are goods that every person within their area of provision relies on when pursuing *any* of their own important projects, plans or relationships. For these goods, then, reliance by (virtually) all citizens is something we can presume. And, as the discussion of Klosko’s account emphasized, this feature of these goods—this presumptive reliance by all—is itself politically quite important, for then the duties become at least candidates for coercive enforcement.

6. WORKS CITED

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