Obligations from Fairness:

Expanding the Scope of Fair Play to Include Obtrusively Avoidable Schemes

Presented to the
Department of Government
in partial fulfillment of the requirements
for the degree with honors
of Bachelor of Arts

Harvard College
March 2015
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I. THE PRINCIPLE AND PROBLEM OF FAIR PLAY

It is very commonly suggested that an individual has a moral obligation to contribute alongside others if and when he enjoys some benefits that they have worked, or are working, to secure. He who refuses to recognize such an obligation on himself is often subjected to a range of accusations, such as the accusations of free riding, taking advantage of others, or failing to do his fair share. While the basic idea of an individual’s being required not to benefit freely at the expense of others is in a sense timeless, it nevertheless may behoove our current project to examine a relatively recent pronouncement of the notion into something of a moral principle. HLA Hart’s original exposition of what he deemed the “mutuality of restrictions” can be credited as the original twentieth-century grounding of what had previously been only a moral intuition, a grounding that would give way to rigorous debate among philosophers and moral theorists.

Submitted in 1955, his statement of the principle is as follows: “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 who have benefited by their submission.”1 Hart considers the principle of mutuality of restrictions to constitute a “rights-creating transaction,” by which he means one of several possible undertakings on the part of individuals that result in

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1 Hart, H.L.A. "Are There Any Natural Rights?" The Philosophical Review 64.2 (1955): n. pag.
one party’s having an obligation and another’s having a corresponding right that said obligation be fulfilled.²

Given my intention (and the intention of many like me) to analyze this idea as a moral principle, we see through Hart’s iteration that there are a number of constituent elements that call for examination. The ideas of what constitutes the relevant enterprise, what constitutes a person as a member of the enterprise, what constitutes a benefit, and what constitutes proper rules and restrictions are all problematically underspecified in Hart’s exposition. Finding and substantiating answers to these and other questions surrounding the principle shall form the basis of my inquiry in this paper. I should note at the onset that my objectives are to analyze and substantiate the idea of fair play as a valid moral principle. While this will inevitably involve some interpretation of other philosophers’ thoughts so as to extract substance from their words, interpretation for its own sake will be avoided. The matter at hand is to flesh out the truth of the principle as I see it.

The objectives of this introductory chapter are as follows. First, I will take a bit of time to understand in a more formal way what Hart’s principle (which, due to John Rawls’s re-characterization of it³, we have come to know as the “fair play principle”) is talking about. This involves distinguishing it from other moral requirements by defining it as a theory of obligation from fairness (i.e. divorcing it from considerations of welfare) owed to other people.

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² Ibid., p. 183.
on *non-contractarian grounds* (i.e. divorcing it from the principles of consent or promising). I will refer to these aspects of the principle as its “basic rules.” I will then show how, with very uncontroversial substantiation, the principle seems to lead us to starkly counterintuitive conclusions about the obligations people face. My first step in substantiating the principle will be to understand it as an obligation not to “free ride.” But the principle does not only stipulate a (negative) obligation to *avoid doing something*; the obligation immediately becomes positive since it obligates us, under certain conditions, to do our fair share. I will then show that, unless we specify the background conditions necessary for the principle to take effect, fair play seems to obligate all beneficiaries of cooperative labor to do their fair share, and that such a principle is quite obviously unappealing. I will refer to the resulting dilemma as the “problem of the fair play principle.” This motivates the task of specifying the “background conditions” (distinct from the “basic rules”) necessary for fair play to apply, which will be taken up in the subsequent three chapters.

I conclude this introductory chapter with a brief remark about the occasion and goals of the paper at large.

1.1 *Fair Play’s Three Basic Rules*

1.1.1

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4 For a basic understanding of the rules that broadly define fair play, I am indebted to the Stanford Encyclopedia of Philosophy’s entry on Political Obligation.
The first basic rule of what constitutes an obligation from fair play is that it is an obligation from *fairness*, meaning it does not involve considerations of welfare. Consider the following example. When the teacher assigns Bill, Sue and me to a group chemistry project, my doing nothing and benefitting from the grade earned by my partners is unfair. Of course, this might be so under two different versions of the scenario. First, it might be true that, to earn the grade Bill and Sue wanted to receive, they were forced to put in more work than would have been necessary if I had participated in an equal way. In this sense, my non-participation resulted in their paying a higher price for an equal payout—an overall decrease in their welfare. It can be claimed, in other words, that my non-participation harmed them. Alternatively, it may be that I am an un-insightful group member, or that I stink at chemistry, such that my spending time and energy on the project would not have contributed to (nor detracted from) its ultimate success in any way. In this case, my non-participation does not affect Bill and Sue’s welfare. Still, it may be claimed that I am benefitting from their cooperative labor *freely*—that is, at no cost to me—and I may face an obligation to put in equal effort for the receipt of an equal award. In other words, we might say that my behavior was unfair irrespective of Bill or Sue’s loss of welfare.
According to M. B. E. Smith, “the obligation of fair play governs a man's actions only when some benefit or harm turns on whether he obeys.”

Thus my non-participation in the scenario where Bill and Sue’s welfare was unaffected would not be seen as a shirking of an obligation from fairness. But this is an understanding of the fair play principle I want to reject at the onset. In the event that my actions cause a direct decrease in the welfare of some other party, it is likely that my actions are already prohibited by some other moral principle. I may, conversely, wrong others by acting unfairly toward them in a far broader group of cases. Where Smith sees no wrongdoing because no loss of welfare occurred, I think we can establish with little controversy that unfairness may have taken place. My non-participation in the group endeavor, even though it had no effect on the amount of effort my partners would put forth, is a clear example of benefitting without making a fair contribution, and it is precisely this behavior that we can define as “free riding.” The point is more easily seen, perhaps, when the size of the cooperative scheme is greater. When a village of farmers agree not to let their livestock graze on a central field except during their designated turn so as to conserve the field, the grazing of one free-riding farmer’s livestock out of turn will bring no harm to the rest of the scheme’s members. Nonetheless, we find a fair play violation in his actions, as he benefits without making a fair contribution to the scheme (which, in

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this case, would amount to playing by the rules and restraining his cattle
until his turn to let them graze there comes.)

Secondly, the fair play principle stipulates an obligation owed to other
people. When I shirk my responsibilities in the chemistry project or land-
grazing plan, I am acting unfairly toward those who have played by the rules.
This, I think, is the basic rule of fair play most obviously captured in Hart’s
original exposition. The individuals who agree to cooperate and thus
mutually restrict their liberty incur a right that others who benefit not shirk
those responsibilities. It is a violation of this right, in other words, to free
ride, and this is true regardless of whether any actual harm results from the
free riding. Owing the obligation to persons is distinct from owing it to an
institution or other non-persons, by which I mean the following: Though the
scheme of cooperation may be seen as something of an institution and may
grow quite large, the obligation one incurs by benefiting from it is not owed
to the scheme as an inanimate object; rather, it is owed to each and every
constituent member of the scheme. When I speak of owing the performance
of certain duties to “the scheme” throughout the paper, therefore, I intend to
convey an obligation owed to the scheme as a group of persons. For only
persons can incur the right that their labor be honored with equal labor from
their co-beneficiaries. A machine (at least, it seems to me) cannot incur such
a right. Whether animals can incur such a right is up for debate. For the
purposes of this paper, only human persons can be owed obligations of fair
play.
Thirdly, fair play obligations arise on non-contractarian grounds. The principle of *consent* holds in all situations where an individual, with full information and of proper mental faculties, expresses his agreement to do something or become part of a transactional relationship. (This principle and its distinctness from fair play will be fleshed out in greater detail later.) The principle of *promising* holds when an individual verbally commits to some action or transaction. Fair play obligations arise in a different way altogether, though an individual can be doubly bound by consent and fair play, as will be evidenced in the next chapter. But in these situations, note that the individual is *doubly* bound; that is, he is compelled to act in a certain way under two *distinct* moral principles.

1.2 The Problem: Fair Play as an Obligation to Contribute

1.2.1

Once we understand the fair play principle as bestowing a *negative* obligation—that is, an obligation not to free ride, as discussed above—the obligation immediately turns positive as well. In order not to free ride in situations like the group project or the cattle grazing, one must *do* something, i.e. contribute fairly to the group effort. “The content of obligations,” according to Rawls, “is always defined by an institution or practice the rules of which specify what it is that one is required to do.”6 This is a point I will

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adopt and hold constant throughout the paper. What one is required to do by the principle of fair play is to not free ride; what it means not to free ride is to contribute one’s fair share; the content of one’s fair share is defined by the “institutional” distribution of duties internal to the scheme. (As we will see in the next chapter, however, there are “background condition” requirements that these duties must meet in order for one to become obligated to fulfill them—namely, requirements of internal distributive justice.)

So it does not always seem possible to avoid violating an obligation of fair play simply by doing nothing. But this, as may by now be evident, can quickly turn problematic. The principle, as we have thus far substantiated it, reads: An individual must contribute his fair share, as defined by the distribution of duties internal to the cooperative scheme, when such a scheme confers upon him the benefits it has secured through the cooperation of its members. It would be consistent with this version of the principle, therefore, to say that anytime an individual receives a good (secured through some cooperative scheme) and a duty (determined by that scheme), they are obligated to fulfill that duty.

We can turn to Robert Nozick for an account of why this is (perhaps obviously) problematic. Nozick rejects the sufficiency of mere receipt of benefits and duties as a trigger of obligation under fair play by asking us to imagine the following scenario: a group of neighbors have organized a list assigning each neighborhood member to run a public entertainment system
for one day of the year. Individual X did not participate in the organizing of the list, nor did he volunteer to operate the system for a day, nor did he ask to receive the benefit of the public music. During the first few days of the year, he occasionally hears the music and various talk programs broadcasted by the system, and he finds amusement in some of them. But when his turn comes to operate the system for a day, Nozick asks, is he so obligated? Nozick’s answer: “surely not.”7 While several reasons are given in support of this conclusion, the basic intuition can be summed up by the notion that “one cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this.”8

Nozick has given an example of what I will define in the next chapter as an “obtrusively avoidable scheme,” which is the locus of the problem of fair play. Schemes of this nature bestow their cooperatively-produced goods onto everyone (say, for our purposes, everyone within a certain geographic locality). The benefits simply “fall upon” individuals without their having done anything to get them, or even to signal that they wanted them. And Hart’s unedited principle seems to obligate every recipient, while this is clearly undesirable, as Nozick’s example shows.

By now we can recognize that, from Hart’s rather destitute statement of principle, additional clauses are needed in order to prevent our obligating every recipient of cooperatively produced goods when we invoke fair play.

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8 Ibid., p. 95.
The only specification of what constitutes the obligated population that Hart gives is “those who have benefitted by [the scheme’s cooperators’] submission.” (Note: I have not said, nor should it be said definitively, that Hart’s considered intention is to set the scope of the fair play principle at this broad level. It may be that Hart thought he was conveying a more limited principle than I have read his words to mean. Our task, again, is not to interpret Hart; I have only used what I take as the plain meaning of his words as the starting point of our inquiry. If we find narrower specifications to be necessary, it may be that Hart would agree with them; I merely aim to add them to our reconstruction of the principle in more obvious language.) If this population cannot be reduced in a coherent and more intuitive way, our conclusion, as Nozick points out, should be to reject the viability of the principle. The next chapter will be spent considering four attempts to reduce this population (in other words, to establish the “background conditions” necessary for fair play to apply).

1.3 The Paper’s Occasion and Goals

1.3.1

Before we begin, a brief word will help locate our current project in the greater literature of political and moral philosophy. As theories of political obligation based in consent (of the governed) came under greater fire in the twentieth century, John Rawls considered the fair play principle in attempt to find an alternative grounding. The thought was that, if the state
can be understood as a cooperative enterprise, then persons who benefit from the provisions of the state (national security, the rule of law, infrastructure, etc.) may face an obligation of fairness to support it in turn. Perhaps foreseeing Nozick’s objection of too-broad applicability, however, he added the (in)famous—if ambiguous—stipulation that, in order to be so obligated, an individual must “voluntarily accept” the benefits of the enterprise.\(^9\) As we will soon see, however, many goods provided by cooperative schemes (including the aforementioned public goods provided by the state) are provided across entire communities of individuals regardless of whether each performs an action to get them or not; they simply “fall upon” the individual, we might say. As Nozick points out, obligating recipients of goods of this sort seems problematic because, although they may find the good to some extent beneficial, perhaps they also find it not worth the price they are being asked to pay.\(^\) Most of the authors I will mention in this paper, including Nozick and A. John Simmons, focus almost entirely on finding ways to excuse individuals of this description from obligation.

My project, conversely, spends a great deal of its time considering the good-recipient who does in fact find the benefits worth the burdens he has been assigned, and yet, since those benefits are being provided regardless of what he does, chooses not to contribute. (I take it as a constant that, in all the schemes of interest to us, the individual’s contribution or non-contribution

\(^9\) Ibid. 6, p. 302.
\(^\) Ibid. 7.
has a *negligible effect* on the efforts of others and on the scheme’s ultimate provision or non-provision of the goods, which is important to keep in mind.)

If we are able to find grounds on which to oblige the individual who receives goods that are provided publicly (i.e. regardless of what he does), then we will have made a notable contribution to the ongoing efforts to ground political obligation in fair play. (The actual grounding of political obligation, as it were, is not a task with which I concern myself here. Such a project involves deeper contemplation of the nature of *actual* democratic political societies and the regard with which they are held in the minds of their citizens.\(^\text{11}\) The current project is rather to lay the moral-philosophical groundwork—using smaller, easier-to-handle cooperative schemes as examples—for a claim about political obligation to be made later.)

1.3.2

The goals of the paper, more specifically, are the following: In Chapter II, I take “voluntariness as action” as the first condition for obligation under fair play, which I hold constant throughout the chapter. My next step is to show that with the condition of voluntariness as action, the schemes under which individuals can be obligated are limited to schemes that provide what I call “unobtrusively avoidable” goods—goods that, to be gotten, require an *action* on the part of the individual. In the rest of the chapter, I articulate three other necessary conditions to be adopted under the voluntariness as action conception: that the individual possess sufficient awareness about the

\(^{11}\) A task taken up in great detail by, for example, A. John Simmons in *Justification and Legitimacy*, 2001.
nature of the cooperative scheme; that the scheme assign its benefits and burdents according to standards of internal distributive justice; and that the individual find his share of benefits and burdens subjectively net beneficial.

In Chapter III, I take voluntariness as mere willful receipt as the axiom, which understands voluntary acceptance without the action of getting goods from the scheme. This limits the discussion to schemes that provide “obtrusively avoidable” benefits—i.e. benefits the avoidance of which requires an action on the part of the individual that ought not be required of him otherwise—or, in other words, benefits that simply “fall upon” the individual. I will then make a case for keeping the awareness, internal distributive justice, and subjective net benefit conditions from voluntariness as action. At this point, the two conceptions of voluntary acceptance will be populated with the same list of conditions, except for the fact that no action is taken to get the benefits in the case of voluntariness as mere willful receipt. Despite these similarities, our intuitions still seem unable to assign obligation to good-recipients under this conception. I will ask why this is the case, and I will consider possible claims the individual might possess against the obtrusively avoidable scheme which could explain his non-obligation. Next, I will develop an additional condition to stipulate against treatment that leads to those claims, and I will add that condition (called “presumptive acceptance”) to our list.

I will start Chapter IV with the observation that, even with the satisfaction of the presumptive acceptance condition, we still seem hesitant
to assign obligation to the individual who accepted benefits from the
obtrusively avoidable scheme through voluntariness as mere willful receipt.

Our last hope for obligation in this scenario is to consider fair play as an
obligation not to take advantage of the co-cooperators of the scheme by
performing an action one could not possibly will to become a universalized
maxim.\textsuperscript{12} I will show that the action of advantage-taking, correctly defined, in
fact cannot be universalized so long as one last condition (the “condition of
proper ordering”) is met (which, in turn, calls for the rejection of the
condition of presumptive acceptance that we once thought was necessary).

Thus our conclusion is that, so long as awareness, internal distributive
justice, subjective worth, and the condition of proper ordering are satisfied,
the individual who receives goods from the obtrusively avoidable scheme
through voluntariness as mere willful receipt in fact faces a fair play
obligation to contribute.

This is an important conclusion in the context of the literature.

Neither Nozick nor Rawls (the way I interpret him) were able to find a basis
for fair play obligation under schemes that provide public goods.\textsuperscript{13} George
Klosko thought he was able to, though, as we will see, his account actually

\textsuperscript{12} It should be mentioned that I am not adopting the ethical standard of universalizability
from the get-go of the paper. I am rather observing, in the final chapter, that adopting this
standard is perhaps the only way to find obligation in the case of the recipient of obtrusively
avoidable goods, though a coherent and plausible way nonetheless. While I may employ the
word “Kantian” to describe the ethical structure I am considering, I do not intend to wed
myself to Kant in any way, nor am I citing any of his work. I maintain that I am able to use
the standard of universalizability to ground my case for obligation because it is a free-
standing ethical standard that enjoys sufficient support in moral philosophy.

\textsuperscript{13} Ibid. 6 and Ibid. 7.
relies on something like natural duties of justice, rather than fair play.\textsuperscript{14} Simmons, finally, acknowledges the possibility, but his explanation of the necessary conditions is very incomplete.\textsuperscript{15} Even if other theorists can claim to have found such a basis grounded in the test of universalizability, as I claim to, I still consider the conclusion important, as it involves lots of normative work in specifying the necessary conditions for obligation on this basis, which, to my knowledge, has not been satisfactorily accomplished.


II. VOLUNTARINESS AS ACTION

We said in the first chapter that fair play obligations are limited to the recipients of goods produced by cooperative schemes. We then observed that, as it stands, this is too broad a population—not just anyone who receives a benefit, as Nozick pointed out, can be obligated. So our first attempt at limiting this population further is to consider Rawls’s stipulation that, in order to incur a fair play obligation, one must “voluntarily accept” the benefits of the scheme. So we begin from the axiom that at least some form of voluntary acceptance is a necessary condition for obligation under fair play. But what, more precisely, might this consist of?

At first, speculation on the meaning of voluntariness and acceptance as concepts could suggest rather broad applicability. Acceptance in some contexts, for example, very nearly means mere receipt. The unsealed table accepts the varnish, or the socket accepts the plug. In contexts involving human agency, however, acceptance carries with it at least a modicum of necessary mental endorsement or willingness. The admittedly crude example that comes to mind is that the female sexual anatomy may “accept” the male’s, but the female does not accept the sexual acts of the male without mental endorsement of the activity. So “willingness” seems necessary for acceptance in human exchanges, but perhaps the buck stops here. It may be the case that any transaction, so long as its recipients are willing (i.e. “happy”

\[16\] This is offered alongside the condition that the scheme be just, which I will evaluate in the third section of this chapter.
to receive the good), is voluntary. This principle would hold that I need not do anything necessarily to accept a benefit as a volunteer. If you give me a new toy car without my prompting or asking, and the car becomes absorbed into my sphere of ownership willingly, i.e. happily, then have I not accepted it voluntarily?

Rawls’s “voluntariness,” however, seems to focus on something else. Though he gives us few clues on the matter, one phrase is particularly illuminating: "obligations...arise as a result of our voluntary acts; these acts may be the giving of express or tacit undertakings, such as promises and agreements, but they need not be, as in the case of accepting benefits." The key word here is of course “acts,” which expresses—I think, more than implies—that one must indeed do something in order to accept a benefit voluntarily and consequently become obligated. Klosko interprets Rawls in the same way, as we see in the following comment about Rawls’s intended implications for political obligation: “Because he is unable to identify the requisite binding actions that create general political obligations, Rawls believes that the principle of fairness does not give rise to such obligations.” So we have now a second general principle (attributable to Rawls), which holds that there is no voluntary acceptance without action. The obligation-attributing action occurs, as Simmons tells us, when an individual tries to get (and succeeds in getting) the cooperatively produced

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17 Ibid. 6, p. 97.
18 Ibid. 14, p. 244, emphasis mine.
good from the scheme. One does not voluntarily accept a benefit, in other words, when one merely performs an action that *happens to have the consequence* of obtaining the good despite this not being the individual’s intention. Voluntariness as action, therefore, requires both an action that results in obtaining the good *and* the intention that this be the effect (i.e. a willingness to accept the good).

So we have two versions of the “voluntary acceptance” picture: willful action to obtain the good, and willful receipt of the good without action. I will refer to these as “voluntariness as action” and “voluntariness as mere willful receipt,” respectively. This distinction, however, represents such a crucial divide in thought on fair play that I will be considering each conception in turn, one chapter at a time. In the rest of *this* chapter I will take voluntariness as action as the first necessary condition for obligation. I will turn to voluntariness as mere willful receipt in the next chapter.

I will begin this chapter with the argument that the condition of voluntariness as action limits the scope of fair play obligation to what I will call “unobtrusively avoidable” schemes. From there, I will delineate three additional conditions for fair play involving voluntariness as action: that the individual possess sufficient awareness about the nature of the cooperative scheme; that the scheme assign its benefits and burdens according to standards of internal distributive justice; and that the individual find his share of benefits and burdens subjectively net beneficial.

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19 Ibid. 15, p. 18.
2.1 The Limitation to Unobtrusively Avoidable Schemes

2.1.1

Taking voluntariness as action as our first necessary condition, the next question that naturally arises is: From which type or types of schemes can individuals incur obligation under voluntariness as action? We recognize that some schemes may require a certain type of action on the part of the individual to acquire the benefit, while others require different types of action or no action. If, consequently, there exists some scheme whose bestowal of benefits is not triggered by voluntariness as action, then, on our current account that requires voluntariness as action, individuals would be considered incapable of incurring obligations under that scheme and others like it. Through the course of this section I will show how the inclusion of this version of the voluntary acceptance stipulation limits the application of the fair play principle to schemes that provide what I will define as “unobtrusively avoidable” goods. My first task, therefore, will be to characterize cooperative schemes based on relevant, normatively consequential qualities, and then to say which scheme types require voluntariness as action for their goods to be bestowed and which do not.

The first relevant quality of cooperative schemes, called “exclusiveness,” is a characteristic of the scheme as an institution. It refers to the extent to which operators of the scheme can prevent select individuals from accessing the good. It has nothing to do, therefore, with the nature of
the good itself, rather with its particular administration. An exclusive scheme does not bestow the goods it secures necessarily onto everyone; it is discriminant. Individuals are excluded from accessing the goods of these schemes until they pay the going price. Klosko uses the notion of *excludability*, relatedly, to describe types of *goods* rather than types of schemes. In his words, “excludable goods can be provided to some members of a given community while being denied to specified others.” But it seems more fitting to talk about exclusion as a characteristic of the scheme itself. In Klosko’s example of four people digging a well and denying access to a fifth, the good itself (water) is not by its own nature excludable; it is rather that the well as an institution (given its particular administration) is *exclusive*. Non-exclusive schemes, conversely, have no mechanism to prevent select persons from accessing the good. Were the same well to be set up in a public place, unguarded, open for the enjoyment of all, the scheme would instead be non-exclusive.

The second relevant quality, called avoidability, refers to the ease with which an individual can avoid receiving the benefit if he chooses. I say “ease” because this conception asks whether or not avoiding the good requires something of the individual that ought not be required of him—whether it necessarily involves a violation of the individual’s moral baseline. The moral baseline of an individual refers to the course or courses of action that

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he morally deserves—i.e. that would constitute no violation of his moral entitlements and expectations. Any wrong committed onto me, for example, is a violation of my moral baseline, as is any non-execution of punishment that in fact should be administered. If it is right for me to be forced to pay retribution for stealing, for example, and I somehow avoid this enforcement, there has been a violation of my moral baseline. The concept is relevant here, therefore, in that the avoidance of some goods can involve my having to do something that I should not have to do, and would not have to do if it were not for the scheme. Music being blasted from loudspeakers that permeates everyone’s closed doors and windows within a five-mile radius, the avoidance of which would require my moving to the next town over, cannot be avoided without a violation of my moral baseline. This is not to say it cannot be avoided at all (as I could indeed move away), but it could not be avoided unobtrusively—i.e. without a violation of my moral baseline. The important distinction for our purposes, therefore, is whether a good is “obtrusively” or “unobtrusively” avoidable—whether its avoidance does or does not (respectively) require the individual to perform some action he ought not otherwise be required to perform.

One might also think of rivalry—or, borrowing from economic terminology, the limit to which the good can be enjoyed before running out—as a third characteristic of cooperative schemes. But exclusiveness and obtrusiveness of avoidability turn out to be the only consequential characteristics for our purposes, so I will leave rivalry out.
For comparison, Klosko and Simmons use different sets of descriptors for goods and their respective schemes that I find problematic. I will give a brief account here before moving on. Klosko uses the language of “excludable” and “non-excludable” to describe types of goods, making no reference to the obtrusiveness of their avoidability for individuals or the exclusiveness of their administration. Simmons breaks goods down into the “open” and the “readily available.” Open goods, like Klosko’s non-excludable ones, are freely supplied to everyone (say, within a certain geographic locality). I have suggested that these be reclassified as “obtrusively avoidable,” because their avoidance is never impossible (one can always move to a different town—a different country, even), but it does constitute a violation of the recipient’s moral baseline. For the purposes of normative evaluation, I have argued, this is the relevant feature worth highlighting. Simmons’s category of “readily available” refers to goods that are not restricted to select individuals by the operators of the scheme, but that are not bestowed automatically, either. Rather, they require some sort of action on the part of the individual who wishes to receive them. Under my conception, goods of this nature should be classified as “non-exclusive,” “unobtrusively avoidable,” and “non-rival,” as each modifier adds its own element of the scheme’s description. One may freely get goods of this nature or avoid them as one chooses, and neither their avoidance nor their receipt constitute departures from the individual’s moral baseline. The convenient

\[22 \text{ Ibid. 14, p. 242.}\]
\[23 \text{ Ibid. 15, pp. 18-19.}\]
"readily available" descriptor does not quite capture these important nuances.

2.1.2

That aside, we may now turn to our question of which types of schemes can and cannot obligate under the conception of voluntariness as action. The exclusiveness of schemes is a good starting point, because the bestowal of goods from exclusive schemes, by definition, requires a voluntary act. Individuals must pay the going price in order to access the goods of exclusive schemes, as physically required by the scheme’s operators. My friends and I run a fruit stand, and we only give out fruit to individuals who have paid us the going price; i.e. no one gets the fruit without paying. No one gets the fruit, therefore, without performing an action to get the benefits out of wanting them. So we can say that exclusive schemes require \textit{at least} voluntariness as action in order for their goods to be handed over (but, as we will see, they may require something stronger than that in addition).

Non-exclusive schemes are more complicated; their bestowal of benefits does not necessarily require voluntariness as action. The enjoyment of music blasting from public loudspeakers is not restricted to select individuals, and we would not say that it takes voluntariness as action to hear it. On the other hand, enjoying fruit from an unmanned fruit stand on the side of the road that says “Free Fruit” does require voluntariness as action. So, when it comes to exclusiveness, a scheme’s being positively
exclusive tells us that it necessarily requires (at least) voluntariness as action for its goods to be handed over. We cannot draw an immediate conclusion, on the other hand, with non-exclusive schemes; we need more information about them.

The most revealing quality of cooperative schemes for fair play is avoidability, or, as I have specified it, the obtrusiveness of avoidability for particular individuals. The enjoyment of unobtrusively avoidable benefits only takes place once an individual for whom the benefit is unobtrusively (easily) avoidable in fact does not avoid it. If I accept a benefit the avoidance of which does not take me off my moral baseline, then I can be said to have chosen to accept that benefit. I can be said, more correctly, to have taken an action to obtain that benefit out of a desire to have it. If pollution in Boston is lessened so that the air around the city is cleaner, then to avoid that benefit I, as a Boston resident, would have to move away. I would not otherwise be required to change where I live, thus the avoidance of the clean air is obtrusive. A lemonade stand set up down the street, however, can be avoided at no normative cost whatsoever, thus my buying a drink from the stand only comes from voluntary action to get its benefit, made in the absence of external pressure, out of a desire to have the benefit. I can only get unobtrusively avoidable goods through voluntariness as action. And voluntariness as action is only necessary for getting goods from unobtrusively avoidable schemes.

2.1.3
Therefore, most importantly, the voluntariness as action conception of voluntary acceptance includes the condition that obligating schemes must be unobtrusively avoidable. No one accepts goods through voluntariness as action from any scheme whose benefits are obtrusively avoidable, and everyone who accepts benefits from unobtrusively avoidable schemes does so through voluntariness as action. But I also said that everyone who accepts benefits from exclusive schemes necessarily does so through (at least) voluntariness as action. (The intuition behind that statement was the following: to access the good of an exclusive scheme, I am first required to pay; if I pay to access a good, then I have necessarily performed an action to get it, which constitutes, at least, voluntariness as action.) Which scheme characteristic, then, can we safely attach to voluntariness as action—exclusive or unobtrusively avoidable schemes?

The answer is that if benefits are accepted from an unobtrusively avoidable scheme, then they have necessarily been accepted through voluntariness as action; and if they are accepted from an obtrusively avoidable scheme, then they have necessarily not been accepted through voluntariness as action. Exclusive schemes, as I have hinted, require more than voluntariness as action; they require consent, which I will define shortly. Thus, if a scheme is both exclusive and its benefits unobtrusively avoidable, then to accept its benefits requires both voluntariness as action and consent. If a scheme is non-exclusive and its benefits unobtrusively avoidable, then only voluntariness as action is required for the individual to obtain the good.
If a scheme is both non-exclusive and obtrusively avoidable, then to accept its benefits requires neither voluntariness as action nor consent, because the recipient takes no action whatsoever in order for benefits of that description to be bestowed—goods under these types of schemes are bestowed regardless of what the individual does. In the table below, column headers indicate avoidability of the benefit, row headers indicate exclusiveness of the scheme, and the words written at their intersections indicate the type(s) of action required to accept the given type of benefit from the given type of scheme.

<table>
<thead>
<tr>
<th></th>
<th>Unobtrusively Avoidable</th>
<th>Obtrusively Avoidable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusive</td>
<td>Voluntariness as Action</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>Consent</td>
<td></td>
</tr>
<tr>
<td>Non-Exclusive</td>
<td>Voluntariness as Action</td>
<td>None</td>
</tr>
<tr>
<td></td>
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The intersection of exclusive and obtrusively avoidable is marked “N/A” because the action necessary to obtain goods under this type of scheme is irrelevant, since obligation cannot possibly result from it. Say a large concert is set up outdoors in public space, and ropes are drawn at just the right circumference such that those outside the ropes cannot hear the music and those inside the ropes can. There are guards at every entrance allowing entry only to those who have paid an admission fee. But the roped-in area interferes with your normal path to work. Thus the scheme is
exclusive and yet its goods are obtrusively avoidable. But we need not consider the necessary conditions for obligation to this scheme, since, by physically keeping you out of an area you are otherwise entitled to occupy unless you pay a price, the scheme is coercing you unjustifiably. On the grounds of your resulting moral claim against the scheme, you cannot possibly be obligated to it.²⁴

2.1.4

So at the intersection of Exclusive and Unobtrusively Avoidable we have two notions of action: voluntariness as action and consent. Which one is active and generates the binding moral principle, and which one is superfluous? Simmons recognizes this fear of superfluity: “If the principle of fair play can bind only ‘insiders’ in a cooperative scheme, it will bind only those individuals who have already become bound to do their part in the scheme in becoming ‘insiders.’ The principle is superfluous; it collapses into a principle of consent.”²⁵ But his response to it is unsatisfactory. He starts with the following hypothetical: Jones’s community is facing a water shortage, thus town residents hold a meeting to discuss proposals for the digging of a community well. Jones thinks the idea is stupid, does not vote for it, and does not contribute toward its implementation. Eventually, however, he gets very thirsty, so he sneaks to the well in the middle of the night and draws water. Simmons draws the conclusion that Jones has clearly not

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²⁴ More about relief from obligation based on moral claims against the scheme will be discussed in Chapter III.
²⁵ Ibid. 15, p. 15. We can take Simmons’s “insiders,” in this context, to mean those who have voluntarily accepted the benefits of the cooperative scheme through voluntariness as action.
consented to the scheme, but has nonetheless voluntarily accepted its benefits (through, clearly, voluntariness as action). This, he claims, proves that fair play is not always superfluous to consent, as we have an instance in which fair play is the only moral principle active over an individual. But recall that Simmons lacks a distinction between a scheme's exclusivity and the avoidability of its benefits. He does not demonstrate that, as the well is left unguarded during the night, it is in fact non-exclusive when Jones takes the water. Thus there is no real fear of superfluity, for, as my analysis concludes, of course he is not bound under consent (note the intersection of non-exclusive and unobtrusively avoidable in the chart above).

The (more interesting) example where superfluity does arise, which Simmons does not consider, is that of the exclusive and unobtrusively avoidable scheme. Consider a car dealership. In (voluntarily) getting a car from the dealership, two things are true of me: first, I am benefitting from the cooperative labor of others, having gotten the benefits through voluntariness as action; and second, I must have either already contributed to the scheme or promised to contribute—i.e. either paid in full or agreed to a plan of financing the car. So I have both taken action to accept the good through voluntariness as action, which might bind me under fair play, and promised to pay for the good, which binds me under consent. (I am not considering the possibility of stealing the car because I am counting the dealership as an example of a truly exclusive scheme, meaning that

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26 Ibid. 15, pp. 16-17.
customers are physically prevented from obtaining its benefits until they have either contributed or promised to contribute.) Had Simmons considered a scheme of this description, he might have recognized that fair play is sometimes a superfluous moral principle and sometimes not, depending on the exclusiveness of the scheme. Since consent is typically regarded to have a more powerful bite than fair play, we can conclude that in instances of exclusive, unobtrusively avoidable scheme, fair play is the secondary, and thus superfluous, principle at work. In instances of non-exclusive, unobtrusively avoidable schemes, however, it is the only one in play.

2.1.5

So let us recap our distinction between obligations from fair play and from consent. For consent to hold, the individual must a.) know that his agreeing action is going to result in his being obligated in some way, and b.) know exactly what it is he is going to be obligated to. In the acceptance of benefits through voluntariness as action, conversely, neither of these awareness requirements exists. Simmons’s Jones did not have to recognize that he would receive an obligation, either at the well’s “beginning moment” in the town meeting or at the moment of acceptance of benefit when he took the water, let alone recognize the extent of this obligation; he incurred an obligation regardless. The town meeting attendees who voted for the well, conversely, recognized, in so doing, both that they would be obligated and to what extent.
2.2 The Awareness Requirement

2.2.1

There is a limit, however, to just how ignorant about the cooperative scheme (an individual like) Jones can be if he is to incur an obligation under fair play. While it was not necessary that Jones consent to the cooperative scheme that became the public well, it is necessary that he recognize it as a cooperative scheme. In other words, during his late-night water-drawing escapade, Jones knew he was taking something for himself that was produced through the efforts of cooperative labor, and this is what allows him to be obligated under fair play. But imagine a different scenario: Jones, not having attended the neighborhood meeting, nor known about it, one day stumbles across a well in the middle of town. Unaware of how it got there, or whether its builders had an expectation of compensation, the thirsty Jones drinks from the well. Now, while some of us, in that scenario, may feel somewhat inclined to leave a bit of money near the well once we took from it, we can hardly make out a definitive moral obligation to do so. For all Jones knew, the well could have been a public work, already paid for by his tax dollars. Or it could have been a philanthropic initiative, someone’s altruistic decision to assume all the costs of an effort to provide greater general access to clean drinking water. Nor would Jones be pursuing an especially ignorant line of thought in doing this.  

27 As Simmons stipulates against on pages 32-2.
So there is a limit to the ignorance about a cooperative scheme one can have if he is to be obligated under it. For one thing, the individual must, as mentioned, recognize that the good he is accepting is the product of cooperative labor, and that that labor was not carried out for philanthropic ends. This need not entail that the scheme must be a for-profit initiative. It merely requires that the scheme intends for its beneficiaries to share in its costs, and that the individual in question recognizes this fact. Simmons discusses this awareness as a requirement for obligation in the context of what I have defined as obtrusively avoidable schemes. When we receive benefits without taking willful action to obtain them, he thinks, one requirement for fair play to apply is that we recognize the benefits as the product of cooperative labor.\(^\text{28}\) I bring it up here to make clear that it applies to unobtrusively avoidable schemes as well.

Now, Jones must be honest with himself in his considerations of the good. He may not think to himself: “Oh, this good is likely the product of cooperative labor, and I have reasons to believe that the producers of the good do not wish for it to be enjoyed freely—reasons such as the fact that I would never produce such a good for free, or that there are relevant social queues suggesting that payment is expected. Nevertheless, as there is no one here physically preventing me from enjoying the good until payment is given, I shall accept the good freely.” Such feigned ignorance does not serve to rid the individual of his obligation (and it may be morally unacceptable in and of

\(^{28}\) Ibid. 15, p. 20.
itself). But in cases where the individual is *genuinely* ignorant of any expectation for payment, his taking of the benefit does not land him an obligation to contribute under fair play. In Jones’s case, conversely, he knew that the well was the product of mutual labor initiated by those present at the town meeting, and that they intended for all the beneficiaries of the well to contribute a fair share. (Note that this does not mean the administration of the well was intended to be *exclusive*—i.e. its builders did not intend to make receipt of the water *physically contingent* upon contribution—but the builders *did* intend to be compensated with a contribution nonetheless, and Jones knew this.)

Finally, since, to be obligated, Jones needed to have known that he was accepting benefits from a cooperative scheme that intended to be compensated, he must, by extension, have known that *he would receive an expectation of contribution*. The parallel feature in cases of consent is the individual’s knowing he would receive an *obligation*. We also said in consent that the individual would have needed to know the extent of his obligation. In fair play, however, I am not ready to make the claim that he must know the extent of his expected contribution (or his “duty,” or “burden”). Determining whether this is necessary must wait until we know more about the timing of the several moving parts of voluntary acceptance. I will thus remain agnostic on whether fair play requires the individual to know the extent of his future duties at the time he obtains the goods until later in the paper. We can conclude at this time, however, that, in order to be obligated under fair play,
the individual must at least be aware, at the time of his acceptance action, that the goods he is taking are the products of a cooperative scheme that intends to be compensated for its efforts.

2.3 The Justice Requirement as Internal Distributive Justice

2.3.1

The next step in limiting the principle I will consider involves adding a stipulation originally proposed by Rawls, which is that the scheme of cooperation must be “just.” The basic intuition, we might think, is that one should not be obligated to contribute fairly into something that is bad or unfair to begin with. But beyond this it is unclear what precisely a justice requirement would mean. The condition in Rawls’s own words is “that the institution in question be just, if not perfectly just, at least as just as it is reasonable to expect under the circumstances.” He elaborates:

“Acquiescence in, or even consent to, clearly unjust institutions does not give rise to obligation. It is generally agreed that extorted promises are void ab initio. But similarly, unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind. The reason for this condition is that the parties in the original position would insist upon it.”

There are two ways I see in which we could interpret Rawls’s stipulation of the scheme’s justness. Perhaps he had in mind that, in order

29 Ibid. 6, p. 302.
30 Ibid.
for an individual to face a fair play obligation toward a cooperative scheme, the scheme must not be one that pursues unjust ends. But we should discard this suggestion, because it seems that fair play obligations can arise even under schemes that do pursue unjust ends, say by violating the rights of parties external to them. Bandits who join together to rob a bank, for example, seem to face obligations to do their fair shares if they are to enjoy the fruits of the cooperative labor.\textsuperscript{31} (This is not to say, of course, that competing moral requirements, such as the requirement not to steal, would not \textit{override} each robber’s fair play obligation; it is just to say that those fair play obligations exist.)

2.3.2

What seems more intuitive to attribute to Rawls is what I call the condition of “internal distributive” justice.\textsuperscript{32} We may be inclined to think that schemes face a requirement to distribute duties and benefits to their members in a fair way—that no individual could be obligated to a scheme that has given him less or demanded from him more than a fair share (or at least that he can only be obligated to contribute \textit{up to} what constitutes a fair share, and not more). Indeed it seems quite necessary that some measure of this type of precaution be enacted; I adopt this position based on what I see as the intuitive principle that one does not face the same obligation of fair treatment toward a party that treats him arbitrarily as he would toward a party that treated him fairly. But still, various elements of this idea are

\textsuperscript{31} To borrow Simmons’s example \textit{and} conclusion, from pp. 6-7.

\textsuperscript{32} Simmons interprets him in a similar way as well.
unspecified, which I boil down to three main questions: 1.) What is the proper unit of analysis in discussing fair treatment of scheme members? 2.) Is there a range of permissible inequality, in terms of this unit, or do we require strict equality? 3.) Must the entire membership of the scheme be treated fairly in order for anyone to be obligated, or need only those who are to be obligated be treated fairly?

Firstly, the proper view of internal distributive justice holds that for an individual to be treated fairly by the scheme, he must receive a proportion of benefits to burdens that is equal (or no more than tolerably unequal) to every other member’s proportion. Thus:

\[
\frac{\text{benefit}_1}{\text{burden}_1} \approx \frac{\text{benefit}_2}{\text{burden}_2} \approx \ldots
\]

where “≈” signifies “no more than tolerably unequal.” This view is interested in evaluating whether the scheme treats everyone with a basic amount of equality or, if it treats people unequally, whether it does so justifiably. And we have reasons for adopting this condition: no one can be obligated to a scheme that treats them as an unequal member, say by arbitrarily assigning them an objectively worse deal than it assigns other members.

Our comparison in this view uses the relation of “no more than tolerably unequal” (≈) as opposed to “strictly equal” (=). Although either would be an acceptable method of evaluating internal distributive justice, this view holds that the former is a more mature standard for justice than strict equality. The more flexible stance allows for the employment of, for
example, Rawls’s difference principle\textsuperscript{33} as a standard of permissible inequality.\textsuperscript{34} Under this conception, we would say that every individual with a benefit quotient less desirable than someone else’s must have been assigned it on a non-arbitrary basis. In effect, this would likely mean that its being less than someone else’s must be necessary for the existence or survival of the scheme, which is in itself more beneficial to the less-well-off individual than the absence of the scheme would be. But here we see again why the scope of the justice evaluation must be scheme-wide and not individualistic,\textsuperscript{35} for the difference principle is either wholly respected or wholly violated. Either all inequality-generating features\textsuperscript{36} of the scheme are to the benefit of the least well off or they are not; the fairness of the treatment of the individual under this conception is necessarily affected by changes in the treatment of other individuals. We might think of the difference principle (and strict equality even more so) as a balance, one end of which cannot be altered without affecting the opposite end.

2.3.3

But there is a question I have not answered in my substantiation of our conception. If the required balance of benefit and burden is not achieved—or, in other words, if the individual receives a ratio of benefits to

\textsuperscript{33} Ibid. 6.
\textsuperscript{34} For this idea I am indebted to a conversation with Arthur Applbaum.
\textsuperscript{35} Simmons suggests, contrarily, that the whole scheme need not be just; only the treatment of the individual(s) who is (are) to be obligated must be. But what constitutes fair treatment of the individual should be his being given a non-arbitrary benefit quotient, and this is only discernable against the backdrop of the benefit quotients of others. The fairness of his treatment, in other words, cannot be evaluated in a vacuum. Simmons, p. 8.
\textsuperscript{36} For this phrasing I am indebted to the lectures of Thomas Scanlon.
burdens beneath the low end of the range of permissible proportions in the scheme—to what extent is the individual ultimately obligated? It seems natural upon reflection to hold that the individual can only be obligated to his assigned duty so long as that duty falls within the range specified by internal distributive justice. If that duty exceeds that range, therefore, the individual is obligated to the most extensive possible form of that duty still inside that range. In other words, the individual would be obligated to a burden that, given the individual's assigned benefit, creates a proportion that falls at the disadvantaged end of the range of permissible proportions in the scheme. (The individual then must benefit from the inequality-generating features of the scheme, as a result of his worst-off position.) These provisions can only be true, we must also note, so long as the burdens of the scheme are divisible and reducible to the level just specified. If it is not possible to pay a lesser amount of the burden, then no individual assigned that burden can be obligated to anything, if and when it exceeds the level permitted under internal distributive justice.

2.3.4

So we conclude that the scheme must assign benefits and burdens, if not in proportions of strict equality, at least in non-arbitrary ways. This means that any benefit quotient that is objectively less desirable than anyone else's must be justified by appealing to the benefit of the least well-off of the scheme. This means the inequality must be necessary for the survival of the scheme, which, as we will see in our section on “subjective worth,” even the
least well-off will prefer to no scheme. Note also that internal distributive justice does not mean that every (or even any) individual must get what he deems a “net beneficial” deal. Say the scheme goes horribly bankrupt, or is abysmally inefficient. That every member receives burdens that, on whatever value system, vastly outweigh their benefits does not violate the condition of internal distributive justice, so long as everyone else’s benefit quotients are equally (or no more than tolerably unequally) bad.

2.4 Subjective Worth

2.4.1

Deeper contemplation about the meaning and purposes of fair play eventually lead us to the conclusion that the awareness and internal distributive justice conditions we have stipulated are not enough to create obligation for the individual. At its essence, fair play is the idea that individuals can become obligated to mutually beneficial cooperative schemes under weaker terms of entry than consent. Intrinsic to this binding relationship is the idea that the scheme is mutually beneficial. (Contrast this with consent-based obligation, whereby an individual remains bound regardless of his resulting welfare.) But fair play aims to achieve something different: namely, the preventing of individuals from benefiting from the cooperative labor of others without doing their fair share. It loses its meaning as a normative principle if the individual in question is not
benefitting from his relationship with the scheme, by which I mean net benefitting, i.e. benefitting after burdens are taken into account.

So we are moved to include the additional stipulation that the net outcome of the individual’s involvement in the scheme must be to his benefit. Thus we are stipulating that given benefit\(_i\) must be greater than given burden\(_i\):

\[
given \text{ benefit}_i > given \text{ burden}_i
\]

But there is a problem with this stipulation: the variables on either side of the equation are not expressed in the same units. In our internal distributive justice requirement, all variables were expressed in terms of the same units of measure across “≈” signs, which allowed us to compare them. Given-benefit-to-given-burden proportions are just percentages, and thus directly comparable. Here, given benefits are being compared to given burdens (e.g. blocks of cheese to goat-hours), which cannot be done coherently. It is apples-to-oranges.

Thus we need a way of expressing the benefit an individual gains from his involvement in a cooperative scheme in language that also makes sense of the burdens he contributes to the scheme. An objective way to accomplish this would be to express everything in terms of its monetary value in dollars. But this is met with a number of insurmountable challenges. For one thing, not every input and output of a cooperative scheme will have a definable monetary value; not every input and output will even be a commodity recognized by the market economy. Moreover, individuals value certain
goods at different rates; expressing their market value through money does not allow for differences in the real value a person gains from having the good.

Thus we must express the value of the benefits and burdens assigned to the individual \textit{subjectively}, by which I mean in terms of the value the individual places on them. It is the subjective value of the received benefits of a scheme, after all, that we think must outweigh the subjective value of the burdens forfeited back to the scheme in return. This matches our understanding of what it means for a cooperative scheme to be “mutually beneficial.” We might think of the method of evaluation, therefore, as a measure of subjective, i.e. “personal,” utility. But there is a less mathematical way to approach it as well. We can simply define the condition as stipulating that, if the individual were faced with the choice of accepting the benefits and burdens assigned to him as a participant in the scheme, he must prefer this position to the status quo position of having neither.\footnote{Klosko and Simmons adopt this principle as a condition for obligation under (what I have called) obtrusively avoidable schemes. My inclusion of it here, however, is based on my own understanding of the essence of fair play as an obligation to contribute to \textit{mutually beneficial} schemes.} To preserve the sense of obligation to \textit{mutually beneficial} cooperative schemes, then, we adopt this subjective net benefit condition.

There is one set of cases, however, that seems to provide an exception to this rule. Cases that I will classify as “investments” or “gambles” seem to not need to comply with the subjective net benefit condition in order to
obligate.\textsuperscript{38} Consider a mutual fund, where a community of investors shares the costs of an investment that will hopefully generate positive returns in the future. This is a case of knowing the burdens at the outset and learning of the benefits later. We would not say, in the event that the investment went south and everyone lost their money, that, because the scheme turned out not to be subjectively net beneficial, everyone was entitled to their money back. So how does my conception account for this?

Just as I said we must remain agnostic about whether the individual needs to know the extent of his future duties at the time he performs the acceptance action, so too must we hold off on answering this question. As we will see in Chapter IV, the timing of the moving parts of fair play (including the individual’s learning of the cooperative scheme, his accepting/receiving the benefit, and his being informed of the extent of his duties) is what ultimately determines whether he can be obligated or not. I ask us to table the issue of investments, therefore, until we have a better sense of timing, as we will acquire in Chapter IV. For now, let us presume that, for obligation from fair play to arise, the subjective net benefit must hold.

\textsuperscript{38} Ibid. 34.
III. Voluntariness as Mere Willful Receipt

Until now, we have considered fair play scenarios involving voluntary acceptance of benefits in the “voluntariness as action” sense. All instances of obligation have, as Rawls stipulates, been brought about by some action on the part of the individual in question, an action that we can classify, following Simmons, as “an action to get the benefit.” We have seen that all cases in which an action to get the benefit is required in order for the benefit to be bestowed are cases in which we might think of the benefits of the scheme as “unobtrusively avoidable,” meaning that their avoidance does not require any action on the part of the individual which he ought not otherwise be required to perform. All cases of voluntariness as action involve unobtrusively avoidable schemes, and all unobtrusively avoidable schemes require voluntariness as action to trigger the bestowal of their goods.

But there are other types of cooperative schemes that secure goods of common interest, and these schemes require a different sort of voluntary acceptance. Schemes that provide what we might think of as “obtrusively avoidable” goods bestow their products upon the individual in question without his having performed any action to get them. Instead, they bestow their products upon everyone within, say, a certain geographic locality, regardless of what actions those people perform. Thus, to avoid receipt of the good, individuals are required to perform an action they ought not be required to perform otherwise, which I have said constitutes a violation of
their moral baseline. Having not performed this avoidance action, the individual will receive the benefit of the scheme. But we have not said anything further about his receipt, other than that it is not triggered by voluntariness as action.

When we think on a more basic level about the connotations associated with the principle of fair play or, equivalently, with the labels of those who violate it (“free rider” being the most common), we recognize that the type of cases for which the principle is most urgently needed are the cases of obtrusively avoidable schemes. This is because they are cases involving goods produced by cooperative labor for the common benefit of all, thus cases where free riding is the most attractive option to most individuals. Free riders are those who benefit from a system of mass cooperation without doing their faire share—a feat they can get away with typically based on the size of the scheme and thus the negligible effect of their non-participation on its efforts. When a scheme is sufficiently large such that the individual’s non-participation is likely to have a negligible effect on the success with which it is able to provide goods, and when the individual would rather receive the goods for free than pay the going price, there is overwhelming incentive for the rational player to elect not to contribute to the scheme. The (purely logistical) issue with this approach to the question of whether to participate, however, is that, if enough individual beneficiaries of the scheme were to think in this way, the scheme would quickly collapse and its benefits would be provided to no one.
But even this consideration does not affect the *individual* in *his* consideration of whether or not to free ride, because cooperative schemes *do* allow for a certain number of defectors with no consequence. Thus the free rider is, as Simmons puts it, effectively “self-selecting” for the privilege of benefitting without contribution\(^{39}\)—he is putting himself ahead of others by pursuing the leisurely course of action he hopes most of the rest do not pursue. It is primarily for these reasons that we should hope to find a coherent conception of the fair play principle that applies to situations of obtrusively avoidable schemes (and, accordingly, to voluntariness as willful receipt). Without such a conception, cooperative efforts to produce benefits for the *common* good will have no recourse against free rider behavior, which seems to contradict some of our intuitions.

In this chapter, I will consider what conditions must be met for the individual to incur an obligation to support the obtrusively avoidable scheme, if such an obligation is possible at all. Beginning with suggestions from Simmons, I will make a case for keeping the awareness, internal distributive justice, and subjective net benefit conditions from voluntariness as action (after slight tweaking). At this point, the two conceptions of voluntary acceptance will be populated with the same list of conditions, except for the fact that no *action* is taken to get the benefits in the case of voluntariness as mere willful receipt. Despite these similarities, I will demonstrate that our intuitions still seem unable to assign obligation to

\(^{39}\)Ibid. 15, pp. 30-1.
good-recipients under this conception. I will ask why this is the case, and I will consider possible claims the individual might possess against the obtrusively avoidable scheme which could explain his non-obligation. Next, I will develop an additional condition to stipulate against treatment that leads to those claims, and I will add that condition (called “presumptive acceptance”) to our list.

3.1 Simmons’s Endorsement Limitation

3.1.1

Simmons considers the phenomenon of “open” (what I have called “obtrusively avoidable”) benefits and arrives at his own set of conditions necessary for obligation, which he believes is in fact obtainable. To be obligated to an open scheme, Simmons finds that one must accept the (obtrusively avoidable) benefits both “willingly” and “knowingly.”

Accepting a benefit willingly and knowingly, he writes,

...involves a number of restrictions on our attitudes toward and beliefs about the open benefits we receive. We cannot, for instance, regard the benefits as having been forced upon us against our will, or think that the benefits are not worth the price we must pay for them. And taking the benefits ‘knowingly’ seems to involve an understanding of the status of those benefits relative to the party providing them. Thus, in the case of open benefits provided by a cooperative scheme, we must understand that

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40 Ibid. 15, p. 20.
the benefits are provided by the cooperative scheme in order to accept them.\textsuperscript{41}

So we have two requirements that seem to closely resemble stipulations we have previously considered in our discussion of voluntariness as action. The “knowingness” requirement resembles our awareness requirement; the “willingness” requirement resembles our “subjective worth” requirement. Slight asymmetries that exist between each set of conditions, however, may give us leads on how to improve our own conception.

3.1.2

I will start with the “knowingness” requirement. Simmons says that, to be obligated to obtrusively avoidable schemes, we must have some “understanding of the status of [its] benefits relative to the party providing them,” which amounts to knowing that they are the products of the particular cooperative scheme from which they came. Recall what we stipulated in our awareness requirement: “the individual must...recognize that the good he is accepting is the product of cooperative labor.” But notice the following asymmetries between our accounts. Simmons includes the added requirement that we must recognize that the benefits are the product not only of cooperative labor, but of the particular scheme of cooperative labor that provided them. I did not include this in our awareness requirement above, including instead the additional stipulation that the individual must be aware that the cooperators who provided the benefit did not intend to do

\textsuperscript{41} Ibid.
so philanthropically—i.e. that they wished for their benefits to come attached to duties. I think that, indeed, the inclusion of this clause captures most of the normative work intended by Simmons’s requirement that the individual be aware that the benefits have come from the particular scheme that generated them. A major reason this might be important, in other words, is because knowing about the scheme that generated the benefits will likely tell the individual whether the scheme intended for them to be distributed philanthropically or not. But there may be more to Simmons’s requirement that mine does not capture.

So far, the individual need not know who or what the scheme is in order to be obligated. But further reflection on the purpose of the principle of fair play suggests that it is meant to prevent co-cooperators from defecting on their duties while enjoying the benefits. In Simmons words, there must be a “consciousness of cooperation” among those who are to be obligated.42 Otherwise, the cooperative scheme is thought of more as a single body whose goods are “bought” and “sold,” rather than enjoyed as the common fruits of cooperative labor.43 The individual who does not know who or what comprises the cooperative scheme from which the goods he enjoys have come, we can say, feels much less like a co-cooperator than like an independent “customer.” The proper response, therefore, is to add Simmons’s requirement to our awareness requirement structure. To be sufficiently aware, the individual must a.) know that the goods he enjoys are

42 Ibid. 15, p. 38.
43 Simmons shares this worry, described on p. 25.
the products of cooperative labor, b.) know who or what comprises the cooperative scheme that provides these goods, and c.) know that these goods have not been provided philanthropically. As mentioned in Chapter II, we are not ready to make a judgment on whether the individual must be aware of the extent of his duties, or on when this awareness might need to hold.

When I refer to the “awareness requirement” throughout the rest of the paper, therefore, I am referring to the three-part structure listed here.

Next, regarding the scope of the awareness requirement structure, I want to make a stronger claim than the one Simmons makes. Whereas Simmons only considers the awareness requirement in cases of voluntariness as mere willful receipt, it actually applies in cases of voluntariness as action and voluntariness as mere willful receipt alike. In voluntariness as action, we have scenarios like Jones's stumbling upon the well in the middle of town, in which this (most current version of the) awareness requirement is clearly necessary, as we proved in the last chapter.

Then, while Simmons and I agree that the requirement applies in voluntariness as mere willful receipt, we have not yet proven its necessity. Of course, part of the difficulty here is that we have not yet proven whether obligation can exist at all under voluntariness as mere willful receipt. But perhaps we can imagine a scenario of this description in which our primary objection to the idea of the individual’s being obligated is that he was not sufficiently aware—in which case we could conclude that the awareness requirement was a necessary stipulation under voluntariness as mere willful
receipt, as it was under voluntariness as action. Consider the scenario in which Stacy, while at home, hears music coming through her windows. She looks outside to see a large concert set up in a nearby town square, whose audial externalities have reached her ears. She enjoys the music, and happens to entertain the consideration of just how valuable it is to her. In her head, she reaches a certain number amount of money she would pay to hear the music, if required. But she then considers that the concert must be a public work, put on by the town council with funds into which she has already paid through taxes. In any case, they must not expect contributions—at least not from residents whose houses are reached by the sound.

We would certainly conclude that Stacy faces no obligation to contribute to the operations of the concert, and I posit that two of the central reasons for which this is true are the following: first, Stacy is not aware that the cooperative scheme in fact does wish for contributions from the individuals it benefits; second, she is not aware of exactly who is responsible for the concert, thus she has no feeling whatsoever of herself as a co-cooperator, because she does not know alongside whom she would be cooperating. Given this awareness-based objection to Stacy’s being obligated under a scheme of obtrusively avoidable benefits, we can conclude that the awareness requirement (in its new three-part structure) is a necessary stipulation for obligation under both voluntariness as action and as mere
willful receipt (if indeed obligation can exist at all under the latter, which remains to be seen).

3.1.3

The next stipulation to be discussed in the context of voluntariness as mere willful receipt is our “subjective worth” requirement. In Simmons words: "We cannot...regard the benefits as having been forced upon us against our will, or think that the benefits are not worth the price we must pay for them.” Recall our own version of the requirement, which said that the subjective value the individual places on the benefits he receives must outweigh the value he places on the burdens he pays (except in cases of investment or gambling, where this remains to be seen). Again, there are slight asymmetries. Our requirement can be restated as the requirement that the individual must simply think that the benefits are worth the price he must pay for them. But Simmons says something (very slightly) different: that the individual must not think that the benefits are not worth the price he must pay for them. Brushing the strange double negative aside, this iteration of the stipulation conveys a hidden meaning: that the individual who does not regard the value of the benefits in relation to the value of the burdens whatsoever, perhaps due to ignorance, can be obligated. But this difference between our two versions turns out to be easily accounted for. Simmons’s words convey the idea that ignorance of the extent of the relevant duties alone does not excuse an individual from obligation. Again, we are still agnostic as to this point. My subjective worth requirement applies only to
the time *after which* the individual has learned the full extent of his benefits and burdens. *After this* point, the individual must regard the benefits as worth the cost if he is to be obligated. But before that point, Simmons may be right that knowledge of the extent of the duties and benefits is not a necessary condition for obligation.

Nevertheless, we must consider whether the inclusion of the subjective worth requirement as we have substantiated it is appropriate within a context of voluntariness as mere willful receipt. As we did with awareness, I will try to imagine a scenario involving voluntariness as mere willful receipt in which our main objection to the individual’s being obligated is the failure of the benefits and burdens to meet the requirement of subjective worth. I believe this can be accomplished through Nozick’s example of the public address system. Recall that the residents of a neighborhood are all assigned a specific day to operate the public address system that most enjoy, even though many of them never consented to being part of the scheme. The most pressing reason Nozick sees (or at least the first one he gives) for objecting to the non-consenting individual’s being obligated under fair play is that he may well prefer to do without the benefit and keep his day of leisure than to enjoy the benefit and be required to pay into the system.\(^{44}\) Thus we have an example of an instance where subjective benefit seems to be a necessary condition for obligation under obtrusively avoidable schemes. We can therefore conclude that finding the benefits

\(^{44}\) Ibid. 7, pp. 93-5.
subjectively worth the costs is a necessary requirement under voluntariness both as action and as mere willful receipt. Again, however, it remains to be determined whether obligation under the latter can come about at all (i.e. whether we have arrived at a *sufficient* list of conditions for obligation).

### 3.2 Taking Stock

#### 3.2.1

There are two remaining stipulations to consider in our discussion of voluntariness as mere willful receipt. We must: consider whether and to what extent our internal distributive justice requirement comes into play under voluntariness as mere willful receipt; and take stock of the effects of losing the acceptance action condition, considering whether an alternative, *hypothetical* sort of action can be devised to fill its place. I will take up each point in turn.

To what extent, if at all, should our internal distributive justice requirement make its way into our conception of fair play under voluntariness as mere willful receipt? To recap, it stipulates that the individual must receive a benefit-to-burden ratio that fits within an acceptable range of inequality across the scheme, specified by, for example, the difference principle. If this does not hold, we have said that the scheme treats the individual unfairly, on the basis of which he cannot be obligated to it. (He is obligated, to be clear, to fulfill burdens up to the extent that they are still equal based on this stipulation, just no further.) Upon reflection, it is
clear that there exists no reason for which these conditions should cease being necessary under voluntariness as mere willful receipt as opposed to action. When a scheme simply acts so as to give me benefits, I have a perfectly viable objection to my being obligated to contribute if they demand from me an unequal share of the burdens. Fair play, in every case to which it applies, can require no more of the individual than that he do his “fair share.” Assigned shares of a scheme’s burdens can only be fair, as we have understood the term, if the individual is treated by the scheme with equal concern as is shown every other member, meaning he cannot receive an unreasonably “worse deal” than others for arbitrary reasons. This intuition retains every bit of its force under voluntariness as mere willful receipt, a conclusion I see no need to supplement with an example.

3.2.2

Based on our contemplations on the necessary background conditions under either version of voluntariness (voluntariness as action and as mere willful receipt), we have, at this point, the following picture:
<table>
<thead>
<tr>
<th>Voluntariness as Action</th>
<th>Voluntariness as Mere Willful Receipt</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Unobtrusively Avoidable Scheme</td>
<td>1. Obtrusively Avoidable Scheme</td>
</tr>
<tr>
<td>2. Awareness (at Acceptance Moment)</td>
<td>2. Awareness (at Bestowal Moment)</td>
</tr>
<tr>
<td>3. Acceptance Action</td>
<td>3. ________________</td>
</tr>
<tr>
<td>4. Internal Distributive Justice</td>
<td>4. Internal Distributive Justice</td>
</tr>
<tr>
<td>5. Subjective Worth</td>
<td>5. Subjective Worth</td>
</tr>
</tbody>
</table>

The first point of difference is that voluntariness as action will only apply to unobtrusively avoidable schemes, as the bestowal of benefits and obligations under these schemes is triggered by action; and voluntariness as mere willful receipt will only apply to obtrusively avoidable schemes, as the bestowal of benefits and obligations under these schemes is carried out regardless of any exercise of the individual’s agency. Number 2 denotes the awareness (now in its three-part structure) that must exist at the time the good first comes into the individual’s possession. This awareness, common to both versions of voluntariness, refers to the awareness that the goods in question have come about as the product of the particular cooperative scheme that has provided them, a scheme that the individual knows expects contributions of some sort in return for their goods.

The next thing that happens in the voluntariness as action version is that the individual performs the acceptance action, i.e. an action to get the benefits of the cooperative scheme. After this point, i.e. once he is considered
a member of the scheme, he will be informed of his expected contribution. Now knowing the full extent of his assigned benefits and duties, the individual will come to make a judgment on the net subjective worth he takes from his membership in the scheme. If he finds the scheme net beneficial (and the internal distributive justice and awareness requirements are met), then he will be obligated to complete his assigned duties. In the case of voluntariness as mere willful receipt, sometime after the bestowal moment the individual will be informed of his expected contribution to the scheme. His assigned balance of benefits and burdens must meet the same standards of internal distributive justice as are required under voluntariness as action. At this point, just like in voluntariness as action, he will form an opinion about the net subjective worth of his membership in the scheme. We know that he must find the scheme net beneficial if he is to be obligated. We also recognize that, in voluntariness as mere willful receipt, there is no acceptance action performed to get the benefits; there are only the above conditions. But we have not determined whether these conditions are collectively sufficient to warrant obligation. I use a blank on this side of the chart where an acceptance action is missing in order to denote the possibility of adding to this list if we find other necessary elements.

The conditions we have so far enumerated for voluntariness as mere willful receipt do not, in fact, seem to beget obligation necessarily, at least according to our intuitions, as I understand them (with which Rawls would seem to agree). To show this, I wish to return to Nozick’s neighborhood in
which some residents have implemented a public address system, though I will add details and specific characters to suit our purposes. After laying out this hypothetical I will do three things: first, point out that our intuitions are not in accord with assigning obligation to the individual in question, even though what looks to be a sufficient list of the normatively significant background conditions from voluntariness as action are satisfied; second, look for what I will call “nullifying factors” to explain our unwillingness to assign obligation; third, attempt to devise additional conditions that prevent these nullifying factors from developing so as to find ground on which the individual can be obligated.

Two individuals, Willie and Oscar, are residents of a small neighborhood some other residents of which have worked to implement a public address system.\(^45\) The PA system plays music and talk programs that penetrate every corner of neighborhood; they cannot even be blocked out by shutting the doors and windows of one’s home. To maintain the scheme, each resident of the neighborhood is assigned a day on which to DJ the public address system. These burdens, we can assume, are weighted such that they meet our standards of internal distributive justice. (Note that in this example, unlike other examples we have studied, the benefits of the scheme

\(^45\) The example is an amalgam of hypotheticals from Nozick (93-5) and Simmons (21). I use Nozick’s PA example as a public good that has a direct effect—by which I mean it cannot be avoided even by retreating into one’s home, the deepest core of his private sphere—on everyone within the given geographic locality. Simmons’s example of the beautified neighborhood involves a good that is not quite as intrusive. Nonetheless, his characters, Oscar and Willie, are conceived as having interestingly distinct mental states regarding the scheme. I use them (and their original names) for this reason. The third character, Steve, is my own.
are distributed like a blanket over all the townspeople equally; they are not
distributed as individual slices of different magnitude to each resident. Given
that the benefits of the scheme are uniform, then, each burden must be of
roughly equal size in order to meet our standards of internal distributive
justice, as one person’s having a much greater burden cannot be offset by his
having a greater benefit.\textsuperscript{46} As mentioned, these requirements are in fact
met.)

Now, back to Oscar and Willie, whose preferences regarding the
cooperative scheme differ from one another’s, perhaps consequentially.
Firstly, assume that at the moment both individuals first hear the music of
the PA system, they are aware of who is responsible for organizing the
scheme and that they will be asked to contribute in some capacity, though it
is yet unclear to them what this capacity will be.\textsuperscript{47} When it comes to the
individuals’ preferences, however, there are important differences. Oscar
despises the type of music regularly played from the PA system; they play
lots of oldies and he is more of a death metal kind of guy. He thus finds
himself worse off because of the scheme, and, once asked to contribute his
day of labor, he refuses. Willie, on the other hand, \textit{likes} hearing oldies played
throughout the neighborhood, but not as much as he values the free time he
is eventually asked to give up to work to support the scheme. He would

\textsuperscript{46} That the benefits and burdens meet our standards of internal distributive justice (and
what this implies for the relative sizes of the burdens) is my own addition to the
hypothetical. Something close to it, nonetheless, was probably intended by both Nozick
and Simmons, though they are not explicit.

\textsuperscript{47} This assumption, again, is my addition to the hypothetical. It also seems likely that Nozick
and Simmons would have accepted it, though they do not specify.
rather live without the music and spend his free time as he pleases than hear it and have to give up a day of labor for that end. Willie does not find his assigned benefits and burdens subjectively net beneficial. Even though he is benefitting from the cooperative work of others, he does not contribute his assigned burdens.

Taking stock of the example so far, we realize that some of our conditions for obligation have been met while others have not been. Internal distributive justice and awareness have both been satisfied. For neither resident, however, has subjective worth been satisfied. Our account, therefore, cannot obligate them. Simmons ultimately comes to the same conclusion on the same grounds, though he hesitates briefly, based on Willie’s actual enjoyment of the benefits, which Simmons thinks makes him something of a free rider.\(^48\) Nonetheless, we are ultimately in agreement (as Rawls would be, though for different reasons) that neither Willie nor Oscar can be obligated, based on the subjective worth requirement.

3.2.3

But consider Steve, a third neighborhood resident. Steve’s preference system is such that he does find the benefits of the PA system worth the day of labor he is asked to contribute, exactly in the way that Willie did not find the benefit worth his own day of labor. In other words, if asked, Steve would rather receive the benefits and give his expected contribution than not receive the benefits and keep his free time for himself (though he may not

\(^{48}\) Ibid. 15, p. 21.
recognize this fact about himself, since his benefit is not in fact contingent upon his payment).

Even though Steve meets more requirements than Willie (who we hesitated, albeit briefly, to excuse), we may remain unable to find grounds for obligating him to the cooperative scheme. To recap: the scheme that provides him with goods exhibits internal distributive justice; Steve is aware at the moment he obtains the goods that they are provided by the particular cooperative scheme that in fact does provide them, and that they are not acting philanthropically; and Steve has a preference structure such that the subjective value of the benefits he receives outweighs the costs he is eventually asked to contribute. Every important condition from our list under voluntariness as action—a list we have settled reasons for accepting—is satisfied, except for the condition of the acceptance action itself. This lone fact is the only element we have assigned any normative significance that we find missing in this scenario (and, indeed, it will be missing in all scenarios of voluntariness as mere willful receipt). Our present question, therefore, is whether we can obligate Steve despite its absence.

To determine whether Steve is obligated in this scenario, consider what happens, from Steve’s point of view, when he is approached one day by a representative of the scheme, telling him he is expected to contribute a day of labor as part of the scheme’s effort to maintain the PA system. Steve may have conflicting but coincidental responses to the representative’s request. On the one hand, we have said that, upon his considered judgment about the
benefits and burdens of the scheme, he comes to find that he would gain a net benefit—that he values the goods above the price he is being asked to pay. On the other hand, he feels indignant in some way, perhaps at being expected to contribute to something he never requested. Not only have the cooperators of the scheme not been given Steve’s consent to be governed by the scheme’s rules, they has not been given any signal whatsoever that Steve would like to be so governed. (It is a separate fact entirely that Steve would choose to be governed by the scheme if he was presented with the option.)

We have a fairly strong commitment, therefore, to the impossibility of Steve’s being obligated to the scheme under the current conditions. Given that all the conditions that seemed normatively significant under voluntariness as action have been met, however, this seems paradoxical.

3.3 The Case for Non-Obligation

3.3.1

In an effort to unravel this paradox, I will now consider ways we could explain the nullification of Steve’s obligation to the scheme, based on claims he might have against them. I will take as an axiom that, if we can determine that the scheme wrongs Steve in any way, his resulting claim against the scheme is sufficient grounds for his non-obligation to it. Since we have stipulated the conditions of internal distributive justice, awareness, and subjective worth, the wrongs the scheme might commit unto Steve are

\(^{49}\) My initial realization of this intuition is in part thanks to a conversation with Arthur Applbaum.
already limited. Within the remaining realm of possibility I consider two sorts of wrongs: the first claim is based on the scheme’s bringing unjustifiable harm to Steve; the second, third and fourth claims are based on the scheme’s treating him without sufficient respect. If a wrong can be found, a condition that prevents wrongs of that sort from taking place would serve to eliminate that wrong as a nullifying factor and would thus be added to our list, taking us one step closer to obligation under obtrusively avoidable schemes.

In the abstract, we might think that an obvious example of a wrong (and thus an obvious basis for a claim) is the bringing of harm to a person, or the being somehow responsible for a decrease in their welfare. But this cannot be the basis of Steve’s claim, for two reasons: first, because the scheme does not harm him; second, because, even if it did, harm cannot be the basis for wrongdoing.\(^{50}\) I will explain these two reasons in turn. First, we already know that the bestowal of the scheme’s cooperatively produced goods upon Steve does not harm him, since it is already stipulated that he finds the scheme (even accounting for its burdens) net beneficial. Thus having the goods of the scheme is guaranteed to increase rather than decrease Steve’s welfare. But perhaps the scheme’s assigning of a responsibility to Steve, or its expression to him of its expectation that this responsibility be fulfilled, could constitute a harm. But this fails, too, for a scheme’s expressing its expectation for payment to the individual brings no

direct harm upon him. My mere posting a bill to your door (setting issues of trespassing aside) does not by itself constitute a violation of your welfare, even if you do not face an obligation to pay the bill in any way. The same should be said about my telling you that my scheme has “assigned” you a duty. It is only when this assignment is accompanied by force or coercion that there are grounds for a wrong to have been committed based on welfare. So in its bestowal of goods upon Steve and in its expressing expectation of payment to him, the scheme does him no harm *per se*. Steve has no claim against the scheme, therefore, on these grounds.

But there is an additional reason for this conclusion, which is that harm cannot be the basis on which to claim wrongdoing. I will support this claim by evidencing the fact that there are wrongful actions that involve harm, wrongful actions that involve no harm, non-wrongful actions that involve harm, and non-wrongful actions that involve no harm, which proves that harm is inconsequential to claims of wrongdoing. A wrongful action that involves harm is my punching you in the face. A non-wrongful action that involves no harm is my helping you up after you have fallen. A non-wrongful action that involves harm is my opening a convenience store across the street from your convenience store, which has the consequence of lowering your share of the local market.

For an example of a wrongful action that involves no harm, consider an example of what Arthur Ripstein calls a “harmless trespass.”51 There is a

51 Ibid.
hospital patient who, although she is fully conscious, cannot move or express herself in any way. Outwardly, that is, she is in a coma, yet she is fully conscious of what is happening to her. The patient, aware of her surroundings, grows a deep attraction for her nurse, so much that she wishes, more than anything, that she could have sex with him. Of course, she is unable to express this wish to the nurse in any way. Finding the patient, in turn, attractive, the nurse performs sexual acts upon her one night after hours. The patient, of course, is ecstatic at the experience. Nonetheless, there are obvious grounds for classifying the nurse’s behavior as a condemnable mistreatment of the patient: namely that he had no grounds on which to know that the patient wished to have sex with him. He made a decision that concerned the most private item of the patient’s (or anyone’s) property, her body, without being invited to do so and without any grounds for believing that he would be so invited.

3.3.2

So, given these examples, we see that harm cannot be the basis for a claim of wrongdoing. But there may be other ways in which the scheme acts such that Steve comes to have a claim against it, just as the patient has a claim against the nurse. We might classify this wrongdoing as the scheme’s treating Steve without sufficient respect, in some way. There are three distinct branches of this complaint, which I will now flesh out in an effort to substantiate our intuition against Steve’s obligation to the scheme.
First, Steve is treated without respect by the scheme in the sense that the scheme acts so as to bestow the product of its cooperative labor upon him without regard for whether he would accept such treatment if given the choice. In projecting music the avoidance of which would require an action Steve otherwise ought not be required to perform, the scheme, for all it knows, could be treating him in a way he would not otherwise choose to accept. It does not matter that Steve in fact enjoys the music (and thus would likely choose to accept it if given the choice); the relevant point is that the scheme had no grounds on which to assume that Steve valued the effect on his property it brought about. (I say the “effect on his property” because the scheme’s music enters into what we might think of as his otherwise inviolable sphere over which, as Ripstein says, the individual is “sovereign.”)

It is not just that Steve hears the music when he is in his neighbor’s yard, or at the corner deli; he cannot escape it even in his own home. He cannot escape it, that is, without performing an action he ought otherwise not be required to perform: namely, moving to another town.) For all the scheme knew, Steve could have been like Oscar: an individual who disliked the addition of the music and who would never have voluntarily accepted it.

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52 Ibid.
53 In considering voluntariness as mere willful receipt and “obtrusively avoidable” benefits I am only considering schemes whose provision of goods has some effect on the individual’s property — enters his inviolable sphere, we might say. Only schemes of this nature must meet the standards we are in the process of enumerating. Actions that people are entitled to perform concerning their own property that only reach others as externalities — e.g. a neighbor painting his house — do not interest us here. I treat you with no disrespect if I paint my house a color that you despise, even though this may lower your welfare. Thus I only wish to consider the case for limiting the individual’s scope of potential obligation to cases in which the sphere of his property is entered but not without sufficient respect.
Similarly, the nurse had no grounds on which to believe that the patient wished to have intercourse with him.

In line with this objection, we can understand Steve’s experience of the music as a necessary byproduct of the ends of the rest of the scheme members\textsuperscript{54}—the scheme members who prefer the music and cannot secure it only for themselves, due to its obtrusively avoidable nature. If anyone is to obtain the good, everyone must. Thus imposing it on those people whose preferences the scheme members have no way of knowing is a necessary, if unintended, step in carrying out the will of the scheme members. Just as the scheme’s actions took what Steve hears under their own control, the nurse’s actions took the desires of the patient for how she wanted her body to be employed under his. Contrast this with cases of unobtrusively avoidable schemes, where no direct effect is administered on any individual without obvious grounds for knowing that he prefers that effect to the absence of that effect—namely, without his taking the benefits of the scheme. So we have a claim against the scheme on the grounds of insufficient respect, on the basis of which Steve is relieved of obligation.

We can, however, formulate a condition that stipulates against being treated without respect in this way. Let us restate the complaint we raised on Steve’s behalf: One way an individual is treated without respect is in the event that action that overrides the sovereignty he naturally possesses over his own property is taken in order to further the ends of the action-taker

\textsuperscript{54} For this intuition I am indebted to a conversation with James Brandt.
without regard for whether the individual would accept that action. Schemes
that act only upon those individuals who they have grounds for believing
would accept the given treatment, therefore, act permissibly. (Note: This is
not to say that the scheme must have grounds on which to suppose that the
individual would accept his net experience of benefits and burdens under the
scheme. It is only to say that the scheme must have grounds on which to
suppose that the individual would choose to accept the benefits as such, as
the coma patient very well could not have, for all the nurse knew.)

So we require a condition that denies obligation toward any
obtrusively avoidable scheme that bestows goods upon the individual when
the scheme lacks grounds on which to assume that the individual would
accept the bestowal. (Note also that our previously enumerated subjective
net benefit requirement is not sufficient here. Even though Steve’s welfare
increases from the benefits being placed on him [even accounting for the
burdens], he still has a claim of being treated without sufficient regard. Thus
we need a different type of condition from one that considers subjective
welfare levels only.) What is required for a scheme to treat the individuals it
directly affects with sufficient respect is for the scheme to limit the bestowal
of the fruits of its cooperative labor to individuals it has reasons to believe
would in fact accept those fruits as benefits. If the individuals accept those
fruits through voluntariness as action, that is sufficient grounds.

It is also sufficient grounds if, for whatever reason, hypothetical
acceptance of the goods can be presumed. Reasons for which this could hold
include the following. Perhaps all residents of a small town can be presumed to have moved there out of a common interest in some public good, such as the educational system on which that town has always so greatly prided itself. Measures to keep the system worthy of pride, in this case, might adhere to presumptive acceptance. Perhaps more compelling are the reasons for presumptiveness that Klosko points out: that the goods in question are “necessary for an acceptable life for all members of the community,”55 or that they are “things it is supposed that all members of the community want, whatever else they want, regardless of what their rational plans are in detail.”56 Klosko finds “such things as physical security, protection from a hostile environment, and the satisfaction of basic bodily needs” to be relatively uncontroversial examples.57 To tie this proposed condition back to our example, consider a counterfactual in which the PA system was used not for public music, but only for public warnings and announcements in the case of life-threatening emergencies. This is a public good that the scheme, regardless of what else it knows about the recipients of its goods, has reasons to believe would be accepted by everyone.

I must distinguish Klosko’s use of the principle from my own at the onset: he describes presumptive benefit; I describe presumptive acceptance. The evil we initially set out to avoid is the treatment of an individual in a way the “treater” has no reason to believe the “treatee” will accept. This was

55 Ibid. 14, p. 246.
56 Adopted by Klosko from Rawls, A Theory of Justice, p. 92.
57 Ibid. 14, pp. 246-7.
motivated by the understanding that not harm, but disrespect, is the basis for wrongdoing. Klosko wants to prevent harm; I want to prevent disrespect, and I have adopted a tailored principle accordingly.

While we are on the topic, I should note that Klosko conceives of presumptively beneficial goods in other ways that are not constructive for our purposes as well. He relies for the grounding of his principle on common moral intuitions about the provision of goods deemed essential to the survival of the community. He says, "the indispensability of the goods overrides the outsider’s usual right to choose whether he wishes to cooperate."

This paints the wishes of the recipient (his sovereignty over his own property) as subordinate to the protection (i.e. prevention of harm) of the community. But it is precisely the wishes of the recipient that we mean to prioritize when we stipulate presumptive acceptance. With this stipulation, we prevent decisions that affect the individual from being made without regard for his sovereignty.

Moreover, in his attempt to ground political obligation in fair play, Klosko too quickly jumps to social goods the provision of which "is widely recognized as a central purpose of government." These are the sorts of goods Rawls likely had in mind in his conceptualization of primary social goods—goods that no rational human could be presumed to want to live without. But it is not by the nature of the good itself that we can determine whether or not a scheme’s provision of that good constitutes treating

\[58\] Ibid. 14, p. 247.

\[59\] Ibid.
recipients with disrespect; it is only with respect to the recipients in question that this judgment can be made. Thus Klosko’s list is too limited. A scheme does not treat a recipient with disrespect in the manner specified above if it has a basis of any sort on which to believe that the recipient would value the treatment. That basis, in other words, is not limited to the condition that any human would want the goods in question; it can include other bases relevant to the community of individuals in question, such as the basis of the common purpose for living in a given neighborhood discussed above with the education example.

So we adopt the condition for obligation that all schemes that provide obtrusively avoidable goods must have grounds on which to presume that each recipient of those goods would accept them. I will call this condition “presumptive acceptance.” But there are two more ways in which the recipient could potentially be treated with disrespect, and thus come to possess a claim against the scheme, that we need to evaluate.

3.3.3

Just as the scheme needed to have grounds for believing that the individual would accept the benefits in order for its treatment of him not to constitute insufficient respect, so too might it need to have grounds for believing that he would accept the total package of his assigned benefits and burdens. It may not be sufficient that he finds them net beneficial and in fact would accept them. The scheme may need to have grounds for believing that this would be the case; otherwise, claims of disrespect might still hold.
But the scheme does not in fact treat the individual with insufficient respect when it assigns him a ration of benefits and burdens it has no grounds on which to think he would accept. Consider the *unobtrusively avoidable* scheme. That scheme assigns the individual a ration of burdens which, combined with the benefits he has already accepted through voluntariness as action, constitute a set of terms it has no reason to think he would voluntarily accept, and we have found no problem assigning obligation in this case. The only difference is that the obtrusively avoidable scheme just *gives* the individual a ration of benefits while the unobtrusively avoidable scheme lets him *take* them. But remember that the obtrusively avoidable scheme’s bestowal of benefits is already guaranteed to meet standards of sufficient respect. If the scheme does not treat the individual with disrespect through its bestowal of benefits, and we know that schemes face no general requirement to have grounds on which to presume the net balance of benefits and burdens would be accepted, then neither arm of its treatment of the individual can be objected to on the basis of disrespect. So we need not add any condition stipulating against such treatment.

3.3.4

There is one last potential respect-based objection that we need to account for. We have said that the scheme needs to have grounds for believing that the individual would accept the goods it bestows. But perhaps the individual, in turn, needs to know that the scheme knows that the goods would be accepted. Consider the following scenario: A friend, while over at
your house one day, takes a book from your collection without you noticing and asks your permission later.60 Let us say too that it was always your intention to give him the book, thus you would have accepted his taking it, had you known. Despite this fact, once your friend discloses to you that he took the book, you may feel indignant (as the coma patient would have appropriately felt), on the grounds that your friend took action that directly affected you without any reason for believing that you wanted him to have the book. Our conception classifies this as justified indignation, and denies your friend’s entitlement to the book. But suppose that your friend knew you wanted to give him the book. Say he saw a note on your to-do list while you were not looking: “Give book to Sam.” Now Sam has grounds on which to assume you would accept his coming to possess the book. (This is what our presumptive acceptance condition guarantees.) But still, you did not know that Sam had reason for thinking you wanted him to have the book; the scenario still appears to you that Sam acted without regard for your wishes (even though those wishes were satisfied). So we might think that you would have to know that Sam knew that you wanted him to have the book, at the time of his taking it. And this, moreover, might seem only to be achievable if you in fact gave him the book.

But this account is misleading. You did not need to know, at the time he took the book from you, that Sam knew that you wanted him to have it. For Sam, when he tells you he took the book, can simultaneously inform you that

60 Ibid. 34.
he was acting with a basis for knowing that you wanted him to have it. Thus there is no point at which Sam treats you with insufficient respect; he acted strictly under knowledge of your intentions. (Nor is there any point at which you perceived Sam to have acted disrespectfully.) So too with obtrusively avoidable schemes: that the scheme acted with the individual’s hypothetical acceptance in mind can be explained to him ex post. His signaling knowledge that the scheme is not treating him with disrespect, say via voluntariness as action, is not a necessary condition for the scheme’s not actually treating him with disrespect, and this is the class of behavior we want to prevent if we are to grant obligation.

3.3.5

So, from the four objections we have considered, we have added the necessary condition that the obtrusively avoidable scheme must have grounds to presume that the recipient would accept the goods it bestows upon him, which guarantees that the scheme treats him with sufficient respect. Our updated picture, then, is the following:
<table>
<thead>
<tr>
<th>Voluntariness as Action</th>
<th>Voluntariness as Mere Willful Receipt</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Unobtrusively Avoidable Scheme</td>
<td>1. Obtrusively Avoidable Scheme</td>
</tr>
<tr>
<td>2. Awareness (at Acceptance Moment)</td>
<td>2. Awareness (at Bestowal Moment)</td>
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<tr>
<td>3. Acceptance Action</td>
<td>3. Internal Distributive Justice</td>
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<tr>
<td>4. Internal Distributive Justice</td>
<td>4. Subjective Worth</td>
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<tr>
<td>5. Subjective Worth</td>
<td>5. Presumptive Acceptance</td>
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IV. Obligation Under Obtrusively Avoidable Schemes

Despite our adding the condition of presumptive acceptance so as to prevent the individual's coming to possess a claim against the scheme on the basis of which he would be freed of obligation, our intuitions about fair play are still not likely satisfied when it comes to obtrusively avoidable schemes. Consider the following hypothetical: You come home from work one day in winter to find your driveway completely shoveled with a bill waiting on your door. You learn that the shoveling was provided by a cooperative scheme that assigns financial burdens to its beneficiaries to help cover its costs. The benefits and burdens meet standards of internal distributive justice. You are now aware that the good you enjoy was provided by a cooperative scheme; you know who makes up the scheme; and you know the scheme does not act philanthropically. You find the shoveling job well worth the price written on the bill, such that you would prefer the benefit and the burden to having neither. Finally, since the blizzards had threatened to leave several residences snowed in, and since it can be presumed that not being snowed in is a benefit that everyone would accept, the scheme's benefits meet the condition of presumptive acceptance. But we still resist the idea that you are obligated under fair play to pay the price posted on your door. I offer this assessment without support. To motivate this chapter, I need not explain at the outset why you cannot be so obligated. I simply rely on the common

\[61\] Ibid. 34.
intuition that this is in fact the case. Despite our efforts, we have not yet arrived at a suitable list of conditions for obligation under obtrusively avoidable schemes to hold. We must continue our search.

As a last resort, I turn to Simmons’s account of what precisely constitutes the wrong of free riding on the backs of cooperators under obtrusively avoidable schemes. “The kind of unfairness condemned by the principle is that involved in taking advantage of or exploiting the sacrifices of persons who have freely assumed the burdens associated with maintaining mutually beneficial schemes.”62 This suggests a light in which we have not previously considered fair play. Our efforts to locate obligation in obtrusively avoidable schemes have been met with resistance from intuitions that one cannot be obligated if he simply receives a good by going about his life as he otherwise would. A central question of this chapter, therefore, is whether or not non-action, by which I mean non-deviation from the statistical baseline you would occupy absent the scheme63, can be the basis of obligation. It may be useful to consider these questions through the lens of advantage-taking. If an individual faces a free-standing obligation not to take advantage of others (i.e. not to treat others unfairly), and this can be stretched to include his free riding, under certain conditions, on obtrusively avoidable cooperative schemes, then we may find the grounds for fair play obligation we are after.

62 Ibid. 15, pp. 29–30.
63 The statistical baseline is Wertheimer’s concept for the line of action (or, presumably, non-action) you would pursue were it not for some intervention, which he calls coercion.
I will start this chapter with what seems to me an intuitive definition of advantage-taking. I will show that this definition does not specify that advantage-taking is either inherently wrong or that it necessarily involves another person. I will then show that finding wrongness in advantage-taking based on disrespect (as we based wrongs in the last chapter) is actually problematic when it comes to the individual taking advantage of cooperative schemes. A superior alternative is to consider this action wrong if it fails the test of universalizability, which I take as a free-standing ethical standard. I will then show that the wrongness (based on un-universalizability) of the action of the person who takes advantage of the obtrusively avoidable scheme depends on the further distinction of the order in which the scheme a.) informs the individual of the extent of his assigned burdens and benefits and b.) bestows the burdens upon him. The action of advantage-taking is wrong if and only if the individual is given the opportunity to reflect on his basic preferences regarding the scheme and in fact decides to take advantage, which only arises if b.) follows a.). I will end with a restatement of the surviving conditions for fair play obligation under obtrusively avoidable schemes, which we will finally have grounds for concluding are sufficient.

4.1 The Concept of Advantage-Taking

4.1.1

I want to posit the following definition of advantage-taking: An individual takes advantage when he performs an act that, if just one fact
about the world were different, would be morally permissible but that statistically he would not perform. The individual must not be responsible for the existence of the fact in any way. It must be true that said act is performed for the end of personal benefit, and that the “performance-of-said-act-so-as-to-attain-more-benefits” action\(^\text{64}\) is only made possible by the existence of that fact.\(^\text{65}\)

There are two points about this conception I would like to make at the outset: first, it is not inherently normative (that is, it does not necessarily describe a prohibited sort of behavior); second, it is not limited to the advantage-taking of persons (that is, it includes behavior that takes advantage of situations only). I will draw these distinctions by illustrating two examples: the first, we should conclude, is permissible and situational; the second, we should conclude, is impermissible and personal. Both, we should be equally willing to conclude, constitute what we commonly think of as “taking advantage.” We will likely find it plausible that the impermissibility of an advantage-taking behavior lies to some extent in the involvement of other persons. I will make a brief comment to this effect, but

\(^{64}\) This is the first of several Kantian structures I will adopt in this chapter. Here, as I will explain shortly, I take the Kantian conception of the action: “act-for-the-sake-of-an-end,” as expounded on pp. 8-12 of Korsgaard, Christine M. Self-Constiution: Agency, Identity, and Integrity. (Oxford University Press, 2009). Print. See further explanation of my reasons for adopting the Kantian conception of action in Section 4.2.1.

\(^{65}\) I arrived at this definition of advantage-taking from contemplation on the illustrative example Simmons give on pg. 30. His use of the phrase “self-selecting” to supplement the concept of advantage-taking was also very helpful to my understanding. I take my definition to be free-standing, as working with the definition throughout the chapter will hopefully reinforce.
our analysis will not hinge on it. The only conclusions about our conception I wish to draw in this preliminary section are the two mentioned above.

My first example of advantage-taking does not involve (let alone mistreat) any other person, nor does it constitute a moral wrong. A tree on the far edge of a primitive village falls down in a storm, conveniently unearthing a patch of soil rich in valuable minerals. An individual may take advantage, in the way I have described, of the situation. The act he performs is walking across the village to the tree. Absent the fact of the tree’s falling and unearthing the minerals (a fact for which he can in no way take credit), this act would be morally permissible but statistically would not happen (assume he would otherwise have no reason to venture to that area of the village). The act is performed for the sake of attaining more benefits, and the performance of the act only results in the attaining of those benefits because of the existence of the fact that the tree fell in the storm. In other words, the walking-to-the-tree-to-get-the-minerals is a complete action only made available to the individual by the existence of the fact (again, for which he cannot take credit). Now, this (type of) behavior is obviously morally permissible (provided restrictions on his use of the minerals, such as the Lockean proviso, if we prefer, are honored). We would say the individual “took advantage” of the opportunity afforded to him by the fallen tree, but we would not say this in any morally loaded—and certainly not in an accusatory—sense.
For an *impermissible* and *person-involving* example, imagine the following: Individual A wants to have sex with Individual B, who is heavily intoxicated. A tries to seduce B, an act that would be morally permissible on its own, but which A would never perform were it not for B’s intoxication (assume A knows that B does not wish to sleep with A, and that B would only do so if he/she were intoxicated). Assume A was not responsible for B’s becoming intoxicated. A’s seduction of B is performed for the sake of A’s getting more benefits (having sex with B). And the performance of that act only results in the attaining of those benefits because of the existence of the fact that B is intoxicated (B’s will is not to sleep with A; A’s seduction of B is only successful because B is intoxicated). This (type of) behavior is clearly impermissible. We would say A “took advantage” of an opportunity to override the will of B in order to achieve personal gain.

4.1.2

Of course, we have reasons to believe that the wrongness of the type of advantage-taking just described lies to some extent in its treatment of other persons. Chief among these reasons, perhaps, is that taking advantage of other persons seems naturally to involve some level of disrespect, which we concluded to be morally blameworthy in the last chapter. In the last example, A disrespected B by intruding on B’s property (his/her body) without grounds on which to believe that B would endorse that intrusion (in fact having *grounds* to believe he/she would *object* to it).
But basing the wronging of a person on the violating of their property is in its own sense problematic, because we should be just as ready to say that an individual can take advantage of a scheme (which is, at its essence, a group of persons), despite the fact that what counts as the scheme’s property is a cloudy concept. Does everything the scheme produces count as its property? Recalling that schemes can produce obtrusively avoidable goods such as cleaner air, we should hesitate to think so. But it remains intuitive that a scheme could be taken advantage of, just as an individual person can. So we should hesitate to conclude that the concept of wrongful advantage-taking (of schemes especially) necessarily involves disrespect via the ungrounded violation of property; we should hold out for more stable grounds on which to make this type of accusation.

4.2 Obligation Grounded in Un-Universalizability

4.2.1

A very strong candidate for such grounds is the following type of objection to the individual’s taking advantage of the scheme: that such behavior cannot possibly be willed as a universal maxim throughout the scheme.\(^{66}\) The first step in seeing this objection is to understand the individual's behavior as a Kantian action, as specified by Christine Korsgaard.

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\(^{66}\) As I mentioned in the introductory chapter, my objective here is to determine whether using universalizability as the ethical standard can lead us to grounds for obligation under obtrusively avoidable schemes. I treat this standard as free-standing. I do not adopt any larger version of Kantian ethics. My conclusion, therefore, will not be that, when my final list of conditions are met, individuals are definitely obligated to obtrusively avoidable schemes. It will be, rather, that, under the standard of universalizability, they are obligated. It is thus a contingent, not an absolute, conclusion.
On this view, the complete action is taken as the act performed for the sake of its end. The act and the end are virtually inseparable; one does not make sense in the other’s absence. Additionally, Korsgaard tell us, “any difference in the situation that is actually relevant to the decision properly belongs in our maxim,” which is true because the “object of [our] choice is the whole action,” which includes what we do as well as how, when, and why we do it.

We therefore have reason to include in our description of the individual’s complete action all the relevant facts of the case we know to hold because of the satisfaction of the background conditions we have thus far established. We only need to consider cases in which these conditions are satisfied because we are trying to find grounds for obligation, and we know that, under obtrusively avoidable schemes, obligation is automatically thrown out if any of these conditions are unsatisfied. My plan, therefore, is first to lay out two ways in which one might take advantage of an obtrusively avoidable cooperative scheme, and second to use the principle of universalizability to ground the case for the advantage-taker’s wrongdoing, which is unsuccessful in the first case and successful in the second.

Say that I am a beneficiary of an obtrusively avoidable scheme and that the scenario meets all the criteria for obligation we have so far established: internal distributive justice, awareness, subjective net benefit, and presumptive acceptance. To solidify the example, say that the

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68 Ibid. 73.
69 Ibid. 10.
cooperative scheme was established to provide *air purification* throughout a large city (which is presumptively acceptable on the grounds that many residents were having difficulty breathing under the worsening air quality, and because everyone can be presumed to want basic means to physical health). The scheme consists of assignments for each individual to lower carbon emissions from their cars, and the common benefit is cleaner air for all that is healthier and easier to breathe.

The first sense in which I could take advantage of this scheme is the following: Consider the act of bottling up some (now clean) air for personal benefit beyond the benefit received merely by breathing regularly—benefit stemming from the opportunity to sell or use that clean air at a later date. This fits our definition of advantage-taking: Absent one fact about the world (the existence of the air-purifying scheme), the *act* (my bottling) of the action (my bottling-for-the-sake-of-personal-benefit), though morally permissible, would statistically not be performed (I would have no reason to bottle the dirty air normally occupying the city). The advantage-taker must not be responsible for the existence of that fact (I am a mere bystander-beneficiary, not an organizer or a voluntary participant in the scheme). And the total action must be made possible by the existence of that fact; the fact of the scheme’s effects on the quality of the air is what causes my act of bottling to result in benefits for me. This is a clear-cut example of a Kantian action to be classified as advantage-taking.
Can we raise an objection to the individual’s treatment of the scheme based on its failure of the universalizability test? To determine this, we ask whether the individual could possibly will that his action should become a universal maxim, including in the description of his action all relevant facts. These include his act (the bottling) and the end of his act (having clear air for future sale). It appears that if everyone in the city bottled the newly cleaned air for the benefit of future sale, there would be no logical or practical contradiction. So long as the air has already been cleaned (through the mutual reduction of carbon emissions), the city’s residents are free to bottle it without risk of the scheme’s collapse. So the test of universalizability provides us with no grounds for objection to the individual’s taking advantage of the scheme in this way, and thus no grounds for finding him obligated to contribute.

Even though the *universalizability test* cannot provide grounds for the individual’s obligation, however, there are other reasons for which he is in fact, ultimately, obligated. We know that the scheme provides obtrusively avoidable goods, since, to avoid consuming the clean air, our individual would have to move away from the city. But the only goods that are obtrusively avoidable are those he consumes as a result of his going about his business in a normal fashion—those he consumes while adhering to his statistical baseline. *The goods he consumes through his act of bottling, conversely, are not obtrusively avoidable.* Recall that taking advantage requires an act that, if it were not for one crucial fact about the world, would
be both morally permissible and statistically not performed. His bottling of
the clean air, therefore, is a positive act—a violation of the statistical baseline
he would possess if it were not for the scheme. As such, his bottling of the air
that is beyond what he would otherwise consume constitutes his voluntary
acceptance through voluntariness as action. He accepts what he breathes
naturally through voluntariness as mere willful receipt; he accepts what he
bottles through voluntariness as action. As such, the additional air the
individual bottles ceases to be obtrusively avoidable; it is unobtrusively
avoidable. The individual could avoid bottling that air at no cost to his moral
baseline. He is thus obligated to contribute to the scheme in return for his
acceptance of that air, because the situation meets our standards for
obligation under voluntariness as action. Thus we come to a conclusion that
might at first seem paradoxical: An individual can be obligated to a scheme
that provides obtrusively avoidable goods on the basis of advantage-taking.
This happens when the individual takes advantage of the scheme through
voluntariness as action, by taking more of the scheme's benefits than would
naturally fall upon him.

The next example requires more strain to see the advantage-taking as
a Kantian action. Say the same scheme manifests around me. Could my non-
contribution (i.e. not lowering my carbon emissions) ever constitute
advantage-taking? The complete Kantian action would be “non-contribution-
so-as-to-net-benefit-even-more-from-the-cooperative-scheme.” The act
would be not lowering my emissions. The important fact is the fact about the
scheme that receipt of its benefits is not contingent upon the payment of its burdens (that it is non-exclusive, in other words). I am in no way responsible for this fact. Absent this fact (thus, in the event that my receipt of the scheme's benefits was in fact contingent upon my payment of the burdens, as is the case in an exclusive scheme), my act of not lowering my emissions would be morally permissible but statistically would not happen. This is the crucial point: I recognize that, if my receipt of the scheme's benefits were contingent upon my payment of its costs, I would in fact pay the costs, since I know that I gain a subjective net benefit from the deal the scheme proposes. Finally, the total action of non-contribution-for-the-sake-of-free-benefit is made possible only by the existence of this fact about the scheme. For, in the absence of the fact, my non-contribution would not result in free benefit; it would result in no benefit at all. Here it appears that I have taken advantage of the obtrusively avoidable scheme.

Now, the obvious counterpoint to this objection (the “strain” I mentioned above) is that non-participation for the sake of free benefit cannot be understood as a Kantian action, since it does not adhere to the format of *act-for-the-sake-of-its-end*, which is true on the basis that “non-participation” is not an *act*. We might think that acts are positive things, and that refusal to act is a non-act, which has no place in the formula of *act-for-the-sake-of-its-end*. This would be problematic for our objection to the free rider’s behavior on the grounds that it is un-universalizable, since, under the standard of
universalizability we have adopted, the subject of maxims are complete actions.

All that is needed in order to rebut this counterpoint is to show that some non-act can appropriately be plugged into the formula for complete action and consequently evaluated as a maxim. The individual whose friends have all begged him to come out, but who decides instead to stay in and rest performs a non-act: staying where he is (in his home) and doing nothing. This non-act, however, can perfectly well be plugged into the formula for complete action and evaluated as a maxim. The individual asks himself whether he can will that the maxim of staying-in-so-as-to-rest should become a universal maxim (probably concluding that he can). Or consider the individual who comes across a drowning man who he could very easily save.\(^70\) He considers the act of doing nothing. He considers whether he can will that the complete action of doing-nothing-so-as-to-let-the-man-drown should become a universal maxim (probably concluding that he cannot). In both cases, non-acts fit just as well into the formula for a complete action as acts do, and they can just as well be evaluated for universalizability.

4.2.2

That objection aside, let us see if we can distill the relevant facts from the advantage-taker's situation under the obtrusively avoidable scheme. We know the following: that the individual received the benefits of the scheme without requesting them; that the benefits are presumptively beneficial; that

\(^70\) Ibid. 54.
the individual is sufficiently aware of the nature of the scheme at the time of bestowal; that the benefits and burdens satisfy the standards of internal distributive justice; that, once the scheme informs the individual of his assigned duty, he finds his balance of benefits and assigned duties subjectively beneficial; and that choosing non-contribution does not threaten his receipt of the benefits, since his receipt is not contingent upon his payment of the burdens—a fact for which he is not responsible.

We also know that the individual has the following preferences: firstly, to benefit freely; second, to benefit at the cost of contribution; third, to neither receive the benefits nor pay the burdens. We know the individual prefers benefitting at the cost above neither benefitting nor paying, since his assigned balance of benefits and burdens is subjectively net beneficial. More importantly, it is necessarily true that he knows that this is the ordering of his three preferences. We know this because he is aware of the extent of his assigned benefits and burdens: he has already received the benefits (because his receipt of the benefits was what began the process we are considering), and he is now contemplating paying or not paying the costs. Aware of the extent of both, he comes to a conclusion about how he values the proposal, in fact finding it net beneficial compared to the status quo. What would land him an even greater subjective net benefit, of course, would be to benefit without contributing. He thus recognizes that (what I will call) his basic preference structure is the one specified above: to benefit freely; then to benefit at the cost; then to neither benefit nor contribute.
The final piece the individual is able to recognize is that, *if his receipt of the benefits were contingent upon his payment of the costs*, he would pay. Now, not *every* individual who finds a scheme’s benefits and burdens subjectively beneficial will necessarily come to this conclusion. Subjective benefit does not equal hypothetical action. But *some* certainly will, and it is their recognition of subjective net benefit that allows them to conclude as such. I am therefore assuming that the individual we have in mind recognizes the fact about himself that he would contribute if his receipt of the benefits were contingent upon his payment of the costs.

*Given,* however, that his receipt of the benefit is not in fact contingent upon his payment of the burdens, the free rider is able to choose non-contribution while maintaining his basic preference structure. Here is what I mean: The free rider (who we can call Karl) is able to choose an *act* (non-contribution) for the sake of an *end* (getting a higher basic preference than he would have otherwise—i.e. getting his first preference of free benefit instead of his second preference of benefit at the cost). His complete action is thus non-contribution-for-the-sake-of-gaining-a-higher-basic-preference. The fact that his receipt of the benefits is not contingent upon his payment of the costs (i.e. that the scheme is not *exclusive*) is in no way Karl’s responsibility. Yet it is what allows him to perform the Kantian action at all. If his receipt of the benefit was instead contingent upon his payment of the cost, his Kantian action would be impossible—his non-contribution would result in non-benefit. We thus say that, if the fact of the contingency were not in place, his
non-contribution would be morally permissible but statistically would not be performed. He would always choose (and he recognizes that he would choose) to benefit at the cost over non-benefit and non-contribution. So we have a textbook example of advantage-taking.

So the complete action is non-contribution-for-the-sake-of-gaining-a-higher-basic-preference. We have to ask whether the individual can possibly will that his maxim should become a universal law. The answer, as I will now show, depends on further facts about the individual’s position relative to the scheme. We will arrive at a different conclusion for someone in Karl’s position than for someone situated slightly differently within the scheme.

4.3 The Condition of Proper Ordering

4.3.1

Karl’s maxim in fact can be universalized throughout the scheme, and this truth is based on how the scheme interacts with him, or the order in which he experiences the several moving parts of the scheme. Recall Karl’s experience in the air purification example: the benefits of clean air fall upon him; (the benefits and, eventually, the burdens of the scheme all meet standards of internal distributive justice and presumptive benefit, although Karl need not be aware of this); Karl is sufficiently aware of the scheme; Karl is then approached by a representative of the scheme telling him of his expected contribution; Karl considers the benefits and burdens of the scheme subjectively net beneficial; he therefore comes to recognize his following
order of preferences—to benefit freely, to benefit at the cost, and to neither benefit nor pay. According to our universalizability standard, Karl then must ask, in his consideration of whether to pay or not to pay, whether he could will that any maxim involving his non-payment should be universalized (or, in other words, carried out by all members of the scheme in his same position as him).

Thus the object of his consideration is the maxim of "having received the benefit, not-contributing-for-the-sake-of-gaining-a-higher-basic-preference." In fact, this maxim is universalizable. Every person in Karl's position could enact it without compromising the scheme, thus without gaining a lower basic preference (which would be the logical contradiction). This is because, if a number of people have already received the benefits, as Karl has, then they are in no threat of losing the benefits in the event of mass non-contribution. They have already received the benefits. The only logical contradiction would be if they gained a lower basic preference with the universalization of the maxim than they would have without it. But all individuals who received the benefits first could just as well not contribute and still have their benefits—in fact, they would achieve their goal of gaining their highest basic preference of free benefit. An action is only wrong if its maxim cannot be universalized for all persons facing a similar situation without a logical contradiction. All people in Karl's position in the scheme could perform his action and their ends would all still be achieved.

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There is a type of individual with a *different* position in the scheme, however, that does not have this luxury. Suppose the air purification scheme treated the individual (Lucy) like this: a representative of the scheme approaches Lucy asking her to lower her car's emissions by a certain amount, explaining to her that he represents a collective effort to purify the air of the city; Lucy thus knows *the extent of her benefit and expected contribution before she receives the benefit*; all the standards of the benefits and burdens—Lucy's awareness, subjective benefit, and presumptive benefit—are met; Lucy recognizes her preference structure as free benefit, benefit at the cost, neither benefit nor contribution. She considers the action of non-contribution-for-the-sake-of-gaining-a-higher-basic-preference. She must then ask herself whether this represents a maxim universalizable throughout all individuals in her same position. And she of course realizes that if all individuals like her were to adopt the maxim, the scheme would collapse and all would get their lowest preference. For if everyone who was told of the *coming* benefits and asked to contribute decided to benefit freely, the benefit would ultimately not be provided. Their individual efforts to gain a higher basic preference (free benefit) would, if universalized, result in a *lower* basic preference (non-benefit and non-contribution) for all.

We are thus moved to stipulate that no individual can be obligated to any obtrusively avoidable scheme that begins its treatment of the individual by bestowing benefits upon him unprovoked. Obtrusively avoidable schemes must first inform the individual whom they wish to recruit of his assigned
duties and benefits, thereby affording him the opportunity to reflect upon the choices open to him. In this case (and assuming our previously enumerated background conditions hold), the individual of this description will be obligated based on the un-universalizable nature of his non-contribution.

4.3.2

There is an obvious objection to finding a moral obligation under the universalizability standard that we must take into account. You are considering going to the grocery store to buy a can of tomato soup. But if everyone went to the grocery store to buy a can of tomato soup, there would be excessive demand, people might not be able to get into the store, and most people would wind up soup-less, perhaps you included. Thus your maxim appears un-universalizable. But we need not grant this. An important fact about your considered maxim is that you have reason to believe that not everyone will go to the store for soup at this moment. Most people, for example, only consume tomato soup every so often, thus the likelihood of everyone needing a refill at the exact same time is virtually negligible. So this fact must be included; your maxim becomes: “knowing that, at most, a tolerable number of people will be reloading on tomato soup at the same time, I will go to the store to purchase a can myself.” This maxim, of course, is universalizable, thus everyone who shares it in fact acts permissibly.

So Lucy’s dilemma, in other words, is in one sense a coordination problem: her action is permissible if she has reason to believe that a

\[\text{Ibid. 54.}\]
sufficiently low number of people like her will choose non-contribution to the scheme. This point is well taken, and we should consider stipulating that, in order to face obligation, the individual must not have sufficient reason to believe that others like her will instead choose to contribute. Thus in the air purification example, if Lucy knew that the majority of her city’s population planned to reduce its carbon emissions as part of the scheme, she could have no obligation to do so based on the standard of universalizability. But I maintain that circumstances allowing for knowledge like this are rare, nearly to the point of nonexistent. For if Lucy can easily recognize others’ willingness to contribute, it seems that some number of persons other than Lucy could recognize this, too. And once a large enough percentage of a community's residents, having recognized this, begin choosing non-contribution, still others begin to catch on and question their own decision. This infectious attitude eventually dooms the scheme.

This is not to say that Lucy could never have grounds on which to believe that others will contribute regardless of her action. Nor do I intend to enter a full-scale game theoretical analysis on this point. But the point remains that Lucy's grounds must be very well supported and stable, which in turn likely requires an advantaged perspective on the situation that sets Lucy apart from the rest of the scheme. And accounting for this possibility requires a condition I am not willing to add to our ultimate account of fair play. For the principle we are after aims to obligate individual recipients of a
collective, cooperative scheme, the basic equality of whom counts as a reason for, not against, their obligation.

4.3.3

There is a second objection to my analysis of Lucy’s situation, which is that the basis of her obligation might resemble consent more than it does fair play. But this is not the case. I will take this occasion to finalize our distinction between the two concepts. In Lucy’s case, we have discounted the possibility of her relationship with the scheme being initiated by her receipt of the benefits, leaving only the possibility of her being informed of (and consequently considering) the burdens and costs as the starting point. Unlike under consent, her eventual receipt is not contingent upon her acceptance of the terms ahead of time.

So here we can finally conclude that, in order to be obligated under fair play, the individual must be aware of the extent of her duties in addition to her awareness merely that she will have duties, based on the new condition that schemes must inform the individual of her future assigned benefits and burdens before they simply bestow the benefits upon her. Thus we have the final piece to the puzzle of differentiating consent and fair play: for consent, one must know, at the acceptance moment, both that she will be obligated and the extent of her obligation; for fair play, one must know before she receives the benefit both that she will face an expectation of payment and the extent of this expectation.
With one of our two outstanding questions from Chapter II answered, I will now wrap up the second. Since the only way the maxim of non-contribution-for-the-sake-of-gaining-a-higher-basic-preference can fail the test of universalizability (and thus the only way an individual can be obligated to an obtrusively avoidable scheme) is for the individual to know the extent of his assigned benefits and burdens before the benefits are bestowed upon him, he cannot be obligated under fair play to investment- or gambling-related schemes whose future payouts are unknown at the time the costs are initially paid. Obligation only arises when the individual is given the opportunity to reflect on his next action (contribution or non-contribution) under full knowledge of the extent of his benefits and burdens, on the basis of which he can form his basic preference structure. Thus we can feel safe (as we did not in Chapter II) asserting the necessity of the subjective net benefit condition in all cases.

There is, of course, one exception to the incompatibility of the investment or gamble with the condition of subjective net benefit, and thus to the impossibility of being obligated to the investment/gambling scheme. If the individual considers the experience of the gamble a value in and of itself, then it could be said that, regardless of how bad the returns on the scheme turn out to be, he knows he will benefit from the experience as such, and that this subjective benefit, to him, will definitively outweigh the costs he puts up at the beginning. In this case, subjective net benefit holds, and the individual can be obligated. (But the value of a gamble or investment is more likely to
be held in the extent of its future payout, which makes this exception fairly obsolete.)

4.3.4

Finally, one might ask whether my distinction between Karl and Lucy’s situation is worth making—whether the order of ways in which the scheme treats the individual is relevant to the universalizability of his or her maxim. After all, the subject of a maxim is an action, and I have said that actions are composed of acts-for-the-sake-of-their-ends. So we might be moved to think that Karl and Lucy are considering the same thing: non-contribution-for-the-sake-of-gaining-a-higher-basic-preference. But this is the wrong thought to have. Recall Korsgaard’s advice: “In Kant’s theory, any difference in the situation that is actually relevant to the decision properly belongs in our maxim.”72 Thus Karl’s consideration—whether, after having received the benefits, his preferences can be threatened by the universalization of his action—is quite different from Lucy’s—whether, not yet having received the benefits, her preferences can be threatened by the universalization of her action. The answer to Karl’s question is no and the answer to Lucy’s is yes. So it is correct to distinguish between the two cases based on the relative timing of the bestowal of the goods, the scheme’s expression of its expectation for payment, and Lucy’s contemplation of her ensuing action.

4.3.5

72 Ibid. 67, p. 73.
Now that the appropriateness of the Karl-Lucy distinction and the condition of proper ordering are agreed upon, there is one last essential conclusion to draw. Recall our basis for the decision to stipulate the condition of presumptive acceptance: the individual should not be obligated to the scheme if he has a claim that it has disrespected him through its bestowal of certain benefits it lacked grounds on which to assume he would accept. But note in Lucy's case that the basis of obligation—her contemplation of the advantage-taking action at her disposal, under full knowledge of the extent of her assigned duties and burdens—necessarily comes before the scheme bestows the goods. Thus Lucy is either obligated or not obligated to contribute before she receives the goods. Thus the subjective worth requirement becomes futuristic: it is not that Lucy must not find herself in a situation she finds unbeneﬁcial; it is that the future situation she contemplates must be beneﬁcial. (It must be net beneﬁcial.) And if this must be the case (and, since she is contemplating it, she recognizes that it would be the case and forms a preference of having the goods alongside the burdens over having neither) then the scheme’s bestowal of goods must necessarily be something she would accept anyway. So the worry about the scheme’s treating Lucy without respect is already taken care of by our other conditions. And if we can drop the presumptive acceptance condition for Lucy, and Karl already cannot be obligated based on the condition of proper ordering, then we have grounds to drop the presumptive acceptance condition entirely. Our updated picture, therefore, looks like this:
4.4 Conclusion

4.4.1

It is worth noting that this final condition (which we might call the “condition of proper ordering”) singlehandedly alleviates the concern Nozick raised so convincingly: that “one cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this.” But neither is Nozick correct to conclude that, without the act of giving people benefits and then demanding payment, the fair play principle ceases to exist. For we have found an instance (Lucy’s situation) in which this treatment by the scheme does not occur and yet she faces a fair play obligation. We have successfully limited the scope of fair play to individuals who are given the opportunity to form their basic preferences regarding a scheme and to reflect on how the action of advantage-taking would affect those preferences, which only occurs when
the individual is given knowledge of the extent of his assigned duties and benefits before the benefits are actually bestowed upon him.

To Nozick’s defiant assertion that the individual could “surely not” be obligated to pay his assigned contribution in the PA example, we have the following retort: He cannot be obligated to the scheme in return for all the benefits he received up until he learned of his expected contribution, for those benefits constitute a failure of the condition of proper ordering. However, once he adds knowledge of the extent of his expected contribution to his already-held knowledge of the extent of his benefit under the scheme (and provided that our standard of subjective worth regarding his future enjoyment of the benefits is met), the individual comes to reflect on the maxim of free riding and is thereby obligated to support the scheme’s provision of goods into the future. This obligation remains as long as our conditions herein specified continue to hold, based on the un-universalizability of his considered maxim of free riding for the sake of securing a higher basic preference.
BIBLIOGRAPHY


