

# The Principle of Fairness, Legal Obligation and the Value of Choice

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Attempts to ground legal obligation<sup>1</sup> with the principle of fairness all face a similar difficulty. The principle of fairness requires that individuals do their fair share in any cooperative scheme that benefits them, and many have tried to show that a system of law is one such beneficial cooperative scheme to which we thereby owe our support.<sup>2</sup> The primary problem with this approach is that it is unclear whether the principle of fairness (a) only binds an individual to do their fair share when they have chosen to participate in a cooperative scheme or (b) can bind an individual regardless of whether they have such a choice. In either case, the results seem troubling. If the choice to participate is necessary for obligation, then the principle of fairness cannot explain our obligations to follow law because we have never made a meaningful choice about whether to participate in a system of law.<sup>3</sup> If the choice to participate is *not* necessary for obligation, then the principle has the potential to obligate individuals to many practices that they ought not be obligated to. It might be to my advantage that the Mountain Club works to improve the nearby trails that I hike, but I do not seem obligated to aid them unless I choose to join the Mountain Club. However, if the principle of fairness did not require choice to create an obligation, then it would require me to help. In this way, the principle of fairness faces a dilemma, either the choice to participate in a practice is a necessary

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<sup>1</sup> I use the term “Legal Obligation” to speak specifically of the moral obligation to act in accordance with the law. In using this term, I mean to differentiate my focus from that of “political obligation” which might refer to a broader set of duties than merely obeying the law. Political obligations can be understood as whatever obligations we have as members of political structure, whereas legal obligation is the specific obligation to act in accordance with the law. I also use the term to refer to the general obligation to act in accordance with the law, and not to any particular obligation that we have because it is specified by a law.

<sup>2</sup> Examples of this approach are found in H.L.A Hart, “Are There any Natural Rights” *The Philosophical Review* Vol. 64, No. 2 (1955); 185; John Rawls, “Legal Obligation and the Duty of Fair Play” *Collected Papers*, ed. Samuel Freeman (Cambridge, MA; Harvard University Press, 1999), 117-129; Arneson, Richard, “The Principle of Fairness and Free-Rider Problems” *Ethics* Vol. 92 No. 4 (1982); 616-633.; George Klosko, *The Principle of Fairness and Political Obligation* (Oxford, UK; Rowman and Littlefield, 1992).

<sup>3</sup> One might here appeal to a notion of tacit consent, as Locke does, but then they would be saddled with defended an adequate account of tacit consent.

condition for obligation and the principle cannot explain legal obligation or choice is not a necessary condition for obligation and the principle leads to unintuitive results.

In this paper, I argue for a revised version of the principle of fairness that grounds legal obligation but does not lead to the typical unintuitive results. I argue that the choice to participate in a cooperative scheme is *not* a necessary condition for being obligated by the principle of fairness, but the condition that the scheme be *sufficiently just* is necessary. To see why these two conditions might be related, we can make a basic distinction between those schemes that are “open to choice” and those that are “closed to choice”. A scheme is *open to choice* when a person is only bound by the rules of a scheme when they have chosen to participate in that scheme. Alternatively, a scheme is *closed to choice* when a person is bound by the rules of a scheme regardless of whether they had a choice to participate. I argue that the vast majority of schemes that are closed to choice will not be sufficiently just, and so they will not satisfy the necessary condition for the principle of fairness to apply. Thus, the rules of cooperative schemes that are closed to choice will *not* typically be obligatory by my revised principle of fairness. For instance, if the rules of the Mountain Club were such that I was bound to help them regardless of whether I choose to join the club, then the club would be unjust and I would not be obligated to the scheme. However, there will be *some* schemes that can be sufficiently just without being open to choice. One such example is a system of law, and one essential rule for any system of law is that citizens act in accordance with the law. Thus, much of my task will be to show how it is possible for a system of law to be both closed to choice and sufficiently just. If this is possible, then the principle of fairness can obligate us to follow the law regardless of whether we have chosen to participate in such a system.

My argument proceeds in four parts. In §1, I give some background on recent attempts to use the principle of fairness to ground legal obligation, which will better situate the dilemma that this essay seeks to address. In §2, I give my core argument for why some schemes can be

just without being open to choice. There I will follow the work of T.M. Scanlon on the “Value of Choice,” and argue that the reasons why most schemes ought be open to choice are also sufficient reason for some schemes to be closed to choice. In §3, I lay out a revised version of the principle of fairness that is sufficiently general across practices that are and are not open to choice. Finally, in §4, I apply this revised principle to show how it can ground our obligation to obey the law. While there will be many nuances to this view that still need to be laid out, the basic account should be clear by that stage. All in all, I aim to better explain why our obligation to obey the law is grounded in the (properly conceived of) principle of fairness.

### §1. A Brief History of the Principle

While there are surely versions of the principle of fairness that predate 1955, most of the contemporary literature identifies its initial formulation in H.L.A. Hart’s article, “Are There any Natural Rights?” In articulating the different types of rights that people generally make reference to, Hart emphasizing a “mutuality of restriction” in which people limit their conduct according to rules on the condition that others do so as well. He writes,

when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions have a right to a similar submission from those who have benefited from their submission.<sup>4</sup>

By this principle, each person who follows the rules of a scheme of cooperation has a right to the conformity of others who benefit from that person’s action . Hart specifically uses legal obligation as an instance of this right and thus recognizes the system of laws as a scheme of cooperation to which individuals have the right to other’s conformity.<sup>5</sup> While Hart does not there develop a full

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<sup>4</sup> Hart (1955); 185.

<sup>5</sup> A view that is thoroughly expanded in Hart’s 1962 work, *The Concept of Law*, (Oxford, UK; The Clarendon Press).

account of how such schemes create rights and obligations, this is the beginning of the idea that has been adapted by many.

John Rawls credits Hart for the original formulation of the duty of fairness, but he adapts and revises the principle over the years in which he uses it. In his article, “Justice as Fairness” Rawls adds two necessary conditions for anyone to be bound by the principle; that (a) each person must have *willingly accepted* the benefits of the scheme and (b) the scheme must be recognized as *fair* for any individual to be bound to it.<sup>6</sup> In this way, Rawls explicitly includes the requirement that there be a voluntary act of “accepting benefits” for an individual to be bound. This general analysis of the principle is used in a self-standing argument for legal obligation in Rawls’s 1964 article “Legal Obligation and the Duty of Fair Play.” Here, Rawls is centrally concerned with how the duty of fairness<sup>7</sup> can solve two apparent paradoxes of legal obligation; first, that we can be obligated to follow a law that we think to be unjust and, second, that we can be obligated to take an action even when it produces less good.<sup>8</sup> He addresses these problems by explaining the way in which the constitution of a society serves as a cooperative scheme. So long as we recognize the constitution as just and we accept the benefits of such a constitution, we are obligated to follow the laws that emerge from valid constitutional procedures. Overall, Rawls’s second use of the principle is the same as in “Justice as Fairness” with the notable exception that the standard for assessing cooperative schemes is now their “justice” rather than their “fairness,” a distinction which will be crucially relevant in §3.

By 1969, Rawls seems to recognize that the duty of fairness account of legal obligation is not sufficient for legal obligation. In “The Justification for Civil Disobedience” Rawls includes *two*

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<sup>6</sup> Rawls, John, “Justice as Fairness,” in *Collected Papers*, ed. Samuel Freeman (Cambridge, MA; Harvard University Press, 1999), 47-72.

<sup>7</sup> At this time, Rawls refers to the principle as the “Duty of Fair Play” rather than the “Duty of Fairness.” He later adopts the term “Duty of Fairness” without trying to differentiate the two. Here, I make no differentiation between the two ideas either.

<sup>8</sup> Rawls, “Legal Obligation and the Duty of Fair Play”.

reasons why we should follow just law. In addition to the duty of fairness, “we have a natural duty not to oppose the establishment of just and efficient institutions (when they do not exist) and to uphold and comply with them (when they do exist).”<sup>9</sup> The reason for including this second reason is because few persons can be said to have accepted the benefits of a legal system. Acceptance requires some meaningful choice, but most citizens are never afforded the opportunity to make such any such meaningful choice. Thus, if fair-play was the only reason to obey the law, then most citizens would not be obligated to the law. By the publication of *Theory of Justice*, Rawls no longer appeals to the duty of fair play to explain the legal obligation of citizens<sup>10</sup> and instead relies solely on the natural duty of justice. While he maintains that the duty of duty of fairness is one of the primary natural duties, it is no longer recognized as the sufficient ground of legal obligation.

In 1974, Robert Nozick published *Anarchy, State and Utopia*, which included a sustained argument against the principle of fairness. Nozick is centrally concerned with the way in which the principle can be used to justify forcing others to act. To combat this, Nozick argues that the principle would have quite unintuitive consequences. He imagines a number of scenarios in which a cooperative scheme is set up in which you are benefited by--but do not consent to--being part of a scheme. In his most famous example, he writes,

Suppose some of the people in your neighborhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainments. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public

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<sup>9</sup> Rawls, John, “The Justification for Civil Disobedience” in *Collected Papers*, ed. Samuel Freeman (Cambridge, MA; Harvard University Press, 1999), 177.

<sup>10</sup> Importantly, Rawls still recognizes that political office holders and those who are well-placed can still be obligated by the principle of fairness to certain political obligations because they have been afforded the opportunity for a meaningful choice (See, Rawls, *Theory of Justice*, 114). Thanks to Doug Weck on this point.

address system...After 138 days on which each person had done his part, you day arrives. Are you obligated to take your turn?...As it stands, surely not.<sup>11</sup>

As Nozick argues, the principle of fairness claims to be able to obligate an individual even when there is no consent. This seems to be an unappealing consequence and Nozick argues that it requires we abandon the principle altogether.

John Simmons picks up this thread of the argument in 1979 in *Moral Principles and Political Obligations*.<sup>12</sup> On behalf of the principle of fairness, Simmons argues that Nozick does not properly apply the Rawlsian condition that one must *accept* the benefits of a cooperative scheme in order to be bound. Rawls is quite explicit in requiring a voluntary act in order for an individual to be obligated and Nozick ignores that. Simmons focuses more clearly on what this condition requires and the ways in which the notion of acceptance overcomes a number of Nozick's worries. In the end, however, Simmons argues that even such an improved account is not sufficient for explaining legal obligation. Once we require acceptance of benefits, we see that most citizens have never accepted the benefits of a legal system in the relevant way. As such, the principle of fairness is inadequate for explaining legal obligation. As Simmons rightly notices, the reason why he argues against the principle of fairness seems to be the same as the reason why Rawls gave up on the explanation.

At this stage of development, the dilemma involved in using the principle of fairness to ground political obligation is apparent. Using a version of the principle of fairness that requires voluntary participation in a cooperative scheme seems to require a choice that never meaningfully occurs for legal obligation. Yet, if voluntary participation is not required for individuals to be bound to a cooperative scheme, then we run into Nozickian counterexamples.

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<sup>11</sup> Nozick, Robert, *Anarchy, State and Utopia* (Cambridge, MA: The Belknap Press, 1968), 93.

<sup>12</sup> Simmons, John, *Moral Principle and Political Obligations* (Princeton; NJ; Princeton University Press, 1979).

In order to avoid this dilemma, both Richard Arneson and George Klosko have tried to articulate a unique a set of circumstances in which the principle of fairness can bind individuals without voluntary participation but which would not face Nozickean counterexamples. Arneson argues that there are some public goods that are worth the cost to each recipient and which it would be impossible to exclude free-riders from receiving through institutional means. In order to avoid free-rider problems, individuals can be obligated to those schemes of cooperation that supply these specific types of public goods.<sup>13</sup> Alternatively, Klosko argues the some public goods are *presumptively beneficial* and individuals can be obligated to those schemes of cooperation that supply presumptively beneficial goods.<sup>14</sup> Both Klosko and Arneson argue that the state provides the relevant type of good, so individuals can have relevant obligations to the state.

For both Klosko and Arneson, however, the primary problem they have set up for themselves seems to be more like grounding our obligation to pay taxes rather than our obligation to follow the law as such. Of course, their perspective seems to be a natural fit when the principle of fairness is seen as the solution to a public goods problem. After all, in order to supply a public good, it is only necessary that the provision of that public good be paid for. If it is government that supplies the public goods, then all we need to determine is how to *pay* for provision of government, and that seems to be taxes. Thus, Klosko and Arneson's focus on the provision of public goods seems to only explain why we have an obligation to pay a fair share of taxes, and it does not explain our obligation to follow the law as such. They need to explain not only why we owe *something* to the political system, but why we are obligated to follow the law. Why would obedience to the law be what we owe for receiving primary goods? While either may have ways of responding to his objection, it is not immediately apparent from their version of the

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<sup>13</sup> Arneson, "The Principle of Fairness and Free-Rider Problems."

<sup>14</sup> Klosko, George, "The Principle of Fairness and Political Obligation" *Ethics* Vol. 97 No. 2 (1987); 353-362. "Presumptive Benefit, Fairness and Political Obligation" *Philosophy and Public Affairs* Vol. 16, No. 3 (1987); 241-359. *The Principle of Fairness and Political Obligation* (Oxford, UK; Rowman and Littlefield, 1992).

principle of fairness. The primary questions of legal obligation are not about paying a fair share, but how the edicts of law can morally bind our actions. As Rawls asked, how we can be obligated to follow a law that we think to be unjust? How can we be obligated to take an action even when it produces less good because it is the law?

In the rest of the paper, I aim to explain specifically why we have a duty to follow the law and why we need not have taken a voluntary act to do so. In this way, I will try to avoid that same dilemma as Klosko and Arneson, but I will do so in a way that obliges us to obey the law and not merely to pay an unspecified fair share to the government.

## §2. Why Some Cooperative Schemes Ought be Closed to Choice

In order to understand why the same principle of fairness can oblige us to both cooperative schemes that are open and closed to choice, it is first important to understand why some cooperative schemes ought be open to choice and others ought to be closed. The relevant difference is most apparent when we compare a relatively mundane scheme to one that is much more fundamental for society. As an example of mundane cooperative scheme, we can start with Nozick's example of the a neighborhood public address system. Suppose that you would benefit from such an system, but you would not voluntarily participate in it. We can even suppose that this is not because you would lose more than gain, but either because you don't think that such a scheme would be proper or you simply do not want to be committed. Nozick argues that if the principle of fairness was not conditional upon voluntary participation, then it would obligate you to contribute to the system. Yet, this seems deeply problematic. How can one be so obligated to such a scheme without a relevant choice to become a participant?



Compare this example to a society that has a particular system of property rights.<sup>15</sup> This too is a cooperative scheme whereby members of society abide by the same rules for recognizing and transferring property and each is also expected to abide by these rules. Suppose that you benefit from such a system, but you would not voluntarily participate in it. We can even suppose that this is not because you lose more than gain in such a system, but merely because you don't think such a system of property to be proper or do not want to be committed. Most seem to think you are obligated by the rules of most systems of property regardless of any voluntary participation. Yet, this does *not* seem to be problematic. How can one be obligated without a relevant choice to become a participant?

Now, I do not doubt the force of Nozick's example. I fully agree with him that it would be wrong to be obligated to the rules of the PA system without one's choice. Yet, I also agree that it would *not* necessarily be wrong to be obligated to the rules of a property system.<sup>16</sup> On what grounds can I object to one cooperative system, but not the other? In this section, I offer an answer. I will not rely on any account of the natural duties or a notion of presumptively beneficial goods, but instead show the way in which *those cooperative schemes that make social cooperation possible ought not be open to choice*. A system of property is one such scheme, and so is a legal system.

## 2.1 The Value of Having a Choice

A cooperative scheme is a system of rules that individuals coordinate their actions in accordance with. When individuals generally act in accordance with these rules, they achieve some benefit from their cooperation. Now, in evaluating these cooperative schemes, we can

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<sup>15</sup> Arneson makes a similar comparison in his article. Even those who think that property rights are natural rather than artificial, it will still be necessary that a cooperative scheme specify the details of these rights and arbitrate disputes.

<sup>16</sup> Thought it would be wrong to be obligated to a system of property that was unjust.

evaluate particular features of the system of rules. We can ask whether the scheme would work better if we changed any of the rules or replaced the scheme with a new one all together. One feature of such rules will be whether they leave options up to participants choices or not. As such, we can sometimes argue that the rules of a practice ought to give participants a choice over some options or they ought not give participants such a choice. When ought the rules of a scheme give individuals choice, and when ought they not do so? In speaking here about the value of choice, I mean to focus only on this narrow question. Why should the rules of scheme leave options open to participants choices?

Since a cooperative scheme is a system of rules, there is an helpful analogy to be drawn between evaluating the rules of a scheme and evaluating the rules of a game. Imagine that you are trying to invent a new game to play with friends. In constructing this game, you would take up the perspective of thinking about what happens when everyone follows the rules. For this reason, you do not suppose that all options should be open to choice. After all, it is only because there are some mandatory rules that the game has enough structure to be played at all. In selecting which options are open to choice and which are mandatory, you would do so for reasons. Would giving players any specific choice allow for strategy or would it be chaotic? Here we are not thinking from the perspective of an individual playing the game, but from a more external perspective of evaluating the game as it is to be played. When we evaluate the rules of cooperative schemes, we take this same external perspective. As such, we do not think of whether having a choice would be valuable from the perspective of individual playing the game (it almost always would) but whether players generally having such a choice would be valuable for the purposes of the game.

Now, obviously games and cooperative schemes are quite different. In the first case, we usually think that individuals only play games when they choose to do so, but there are cooperative schemes for which an individual does not have a choice about whether to

participate at all.<sup>17</sup> Yet, in the case of a cooperative schemes, whether participation is open to choice can be treated as a *rule of that scheme*. Thus, in the same way that we can ask whether participants ought to have a choice in other aspects of scheme or game, we can ask whether participants ought to have a choice about *whether to participate*. I aim to show that there are some cooperative schemes for which participants ought not have this choice about whether to participate. In order to see why, we need to better understand what the value of having choice is.

Oftentimes, the value of having choice is taken for granted. A typical example would be those who hold--what I will call--the “Autonomy-Baseline view.” This view presupposes that having choices is valuable, so participation in all practices ought to be open to choice unless there is some powerful justification for it being closed.<sup>18</sup> Yet, if we are to explain why participation in some schemes ought *not* be open to choice, it is first important to understand *why* choice is valuable. This requires that we move beyond the Autonomy-Baseline view since it merely presupposes the value of having a choice.

In his Tanner Lectures on “The Significance of Choice,”<sup>19</sup> T.M. Scanlon argues for one possible alternative to the Autonomy-Baseline view that he refers to as the “Value of Choice” view. As part of this view, Scanlon introduces three different ways in which choice might be valuable; choices may have “instrumental value,” “demonstrative value” or “symbolic value.” Choice is valuable in the first, *instrumental*, sense when it increases the likelihood of bringing about something else that is valuable. Scanlon uses the example of being able to choose from a menu at a restaurant because one is more likely to enjoy his meal if he is able to choose it from

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<sup>17</sup> In §4, I argue that a system of law is one such scheme.

<sup>18</sup> For this reason, the view is oftentimes associated with liberalism. However, it is not necessary to justify liberalism and I believe that the autonomy-baseline view is the wrong view for liberals to have because it fetishes *having choice* above the important things that choice is for.

<sup>19</sup> “The Significance of Choice,” The Tanner Lectures on Human Values, Volume VIII. Ed. S. McMurrin. (Salt Lake City: University of Utah Press, 1988).

a variety of options. In this case, having a menu is instrumentally valuable in bringing about enjoyment of dinner. Choice is valuable in the second, *demonstrative*, sense when it allows for individuals to express themselves. Two examples of this value are when the choice of a gift expresses one's feelings for the recipient or when the choice of apartment decorations reflects one's sense of style.<sup>20</sup> The final, *symbolic*, value of choice is the judgment that is expressed in giving someone a choice and thus expressing respect for their standing (or their competence) to choose. Here, we might imagine that a teenager is suddenly given the choice of which classes to take when her parents have usually made such decisions for her. The event would have symbolic value in expressing confidence in the teenager's decision-making abilities or status as an adult.

While these three values might not be mutually exhaustive of the value of choice, they do show the range of reasons why options ought be open to choice. Instead of merely supposing that having a choice is valuable, we now have a better perspective from which to judge *why* having a choice is valuable. There is a reason for the rules of a scheme of cooperation to leave options open to choice when one of these three values would be satisfied by doing so.

Now, the Value of Choice view explains why participation in most cooperative schemes ought be open to choice, but it does not take an absolutist view toward the importance of having this choice. Participation in most cooperative schemes ought be open to choice because having such a choice would generally be instrumentally, demonstratively and symbolically useful. For Nozick's PA system example, it would partly be wrong for the individual to be obligated to the scheme without consenting because having the choice over whether to participate is more likely to allow him to be involved in the things that he will enjoy, to express his views about such noisy activity and to respect his status as decision-maker. In this way, the Value of Choice view can explain why we would typically act *as if* the Autonomy-Baseline view

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<sup>20</sup> Such an issue seems to play out in arguments about whether children should be required to wear uniforms in school. One perspective is that a student ought have the ability to express themselves through choice of clothes.

was true; in most cases the two will treat practices similarly. For the vast majority of practice, both views will assume that participation in practices should be open to choice. For the autonomy-baseline view, this assumption is presupposed. For my own view, the assumption is justified by the value of choice. Where the two views differ will be how they can justify practices that are *not* open to choice. The Value of Choice view allows us to better explain why there will be circumstances in which a participation in a scheme ought not be open to choice.

## 2.2 Closed to Choice

There are some cooperative schemes which it does not make sense to leave participation open to choice. For instance, those who drive are obligated to abide by a number of conventions; drive on the right, let the first person who arrived at a stop sign go first, etc. While most of these conventions are backed by law and a licensing system, we can imagine a situation in which they are not. In this case, we would not want to say that a driver is obligated to follow these conventions *only* if he chooses to participate in the driving conventions.<sup>21</sup> It is assumed by all drivers that all other drivers will be obligated to conventional driving rules *regardless* of their choices. Moreover, it is a good thing that all drivers are so obligated regardless of their choices. It is necessary for safe driving that each driver is justified in assuming that all drivers are obligated to the rules of the driving conventions. Likewise, I will argue that it is necessary for social cooperation that every individual is justified in assuming that all strangers in a society are obligated to the rules of *those practices that make social cooperation possible amongst strangers*. As such, there are two questions that arise. First, what practices are those that make social cooperation possible amongst strangers? Second, why ought persons not have the choice to participate in those practices? I will now answer these questions in turn.

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<sup>21</sup> A common response to this might be that he does choose to abide by the conventions *by choosing to drive*. Yet, this can hardly be sufficient because then he would be bound to the rule that “choosing to drive binds you to these conventions of driving” without choosing to be so bound.

Social cooperation can be defined as (a) coordination between individuals in which (b) each shows proper regard to the interests of the other.<sup>22</sup> An analysis of both of these conditions will show why some practices will be necessary for social cooperation to be possible. First, what makes coordination possible is that there are mutually recognized rules that appropriately structure each agent's expectations. It is because persons have a basis for forming expectations of others that make it possible for each to rely on the behavior of others for their plans and thus coordinate with them.<sup>23</sup> The rules of social practices are the basis of these appropriate expectations. As such, social practices make social cooperation possible by forming the basis for the expectations necessary in order to coordinate actions with one another. Second, what makes proper regard for each other's interest possible is the mutual trust that social practices are mutually advantageous. It must be the case that by coordinating my actions in accordance with appropriate institutions, we are both better off than if I did not do so. If we had a strict conflict of interests, there could be no possible social cooperation.<sup>24</sup> As such, what makes social cooperation possible is that *there exist mutually recognized systems of rules that each cooperator trusts to advance their own interests.*

Now, in society there is not merely social cooperation, but social cooperation *amongst strangers*.<sup>25</sup> This presents an additional problem because persons must trust that cooperation

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<sup>22</sup> Rawls articulates social cooperation as involving three features (a) coordination guided by publicly recognized rules that are seen by those who follow them as properly regulating their action, (b) the rules are reasonably acceptable to the cooperators and (c) reference to a conception of each participant's good ("Justice as Fairness: Political not Metaphysical" p. 396-97). In my definition above, I aim to respect these three conditions without presupposing that the proper consideration to others interests involves mutually acceptable rules based on a shared conception of a individual's good. I ultimately agree with Rawls but such a claim is unnecessarily contentious for present purposes. Also, what "proper" regard consists in will surely be open to interpretation according to different ethical theories as I cannot here defend a substantive view on the issue here.

<sup>23</sup> Here I mean to draw on a long tradition of literature that extends from David Lewis (*Convention: A Philosophical Study*, Oxford, UK; Blackwell, 2002) through to Cristina Bicchieri (*The Grammar of Society*, Cambridge, UK; Cambridge University Press, 2006) and on. The debt to Hume is not lost on these theorists.

<sup>24</sup> For more on this point, see Rawls, *Theory of Justice*, §22

<sup>25</sup> For more on this idea, see Paul Seabright's book *In the Company of Strangers; A Natural History of Economic Life* (Princeton, NJ; Princeton University Press, 2010).

will advance their interests even without knowing *anything* about the other cooperators. For this reason, it will be necessary that two conditions hold. First, individuals must trust that the rules that cooperators follow will advance their interests. Second, individuals must trust that strangers will follow those rules. It is the first condition that explains why there is a certain set of practices that are necessary for cooperation and the second condition that explains why participation in those practices ought to be closed to choice. Now, to treat these two issues in turn.

First, in order for individuals to know that the practices will advance their interests, there must be a core set of practices that (when generally followed) will advance the interests of all. These practices will necessarily set up a stable system whereby persons can pursue their life-plans and goals. Now, it would be ideal if I could supply a list of exactly what these core social practices are, but doing so is not a clear-cut enterprise. It would likely require a conception of human nature and extensive social theory. For this reason, the list of core social institutions necessary to advance the interest of all is open to some interpretation. Yet, there are a number of practices that seem to be *prima facie* necessary. First and foremost is some system of property that secures the use of external objects with a stable and reliable system. Second, there must be some rules of exchange between persons that structure the economy. Third, there must be some well-understood family structure that settles expectations for raising children. Finally, there must be some sort of political structure by which the rules of institutions can be changed and new rules become publicly recognized.<sup>26</sup> To look ahead to §4, it is this last type of practice that I take a system of law to be. I will later argue that it because this type of practice is necessary for social cooperation that we can be obligated to generally obey the law without ever choosing to be a member of legal society.

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<sup>26</sup> These basic institutions are what led Rawls to write, “by major institutions, I understand the political constitution and the principle economic and social arrangements. Thus the legal protection of freedom of thought and the liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions” *Theory of Justice*, 7.

Now that we have some better sense of *which* practices are necessary for social cooperation, it remains to be seen why participation in these practices *ought not to be open to choice*. In accordance with the second condition for social cooperation, it is necessary that persons be able to trust that strangers will abide by the social practices that persons trust to advance their interests. For this reason, participation in these social practices ought not be open to choice. Strictly by being members of society, individuals are obligated to follow the rules of those practices that are necessary for social cooperation. For instance, one can only feel stable in the use of property when one takes all other members of society to be obligated by the rules of property. If abiding by the rules of property were open to individual choice, no person could trust a stranger without knowing whether they had chosen to abide by the rules of property or not. Since some property system is necessary for social cooperation, social cooperation would then be impossible if participation in the practice of property was open to choice.

As hinted to at the beginning, this argument is similar to an argument for why the driving conventions are obligatory for all drivers. In order for driving to be successful, drivers must be able to trust that all other drivers will follow the conventions of driving, even when they do not know anything about the other drivers. Likewise, in order for social cooperation to be successful, members of society must be able to trust that all other members will follow the practices that are necessary for social cooperation, even when they do not know anything about the other members of society. As such, the fundamental reason why participation in core social practices is not open to choice is because having them be *closed* to choice is a necessary condition on social cooperation with strangers in the first place. We can only cooperate with strangers if we know that they will follow the rules of our basic social practices, and we will only know that they will if we assume that all persons must.



### 2.3 The Value of Choice Objection

Now, this argument might not seem sufficient because it does not address the Value of Choice view. If participation in our schemes of cooperation generally ought to be open to choice because of the value of choice, then ought not participation in those social practices necessary for social cooperation also be open to choice? How can the fact that obligatory participation is necessary for social cooperation override the value of choice?

The response to this objection is that the *same values* that are protected by leaving cooperative schemes *open* to choice are protected by leaving the social practices necessary for cooperation *closed* to choice. This is because the claim that any cooperative scheme ought to be open to choice is a claim against other members of society. Specifically, it is claim that they ought not hold a person to be obligated to a practice unless that person voluntarily participates. That participation in a scheme is open to choice is merely a fact of how other people act toward those who have not chosen to be involved in that scheme. So, in saying that participation in a scheme ought to be open to choice, one says that persons ought to respect the choices of individuals to be involved or not involved in that scheme. Yet, in so coordinating our actions around rules about how choices affect how we can treat others, we are engaged in social cooperation. As such, in order for practices to be open to choice, there must be social cooperation, and therefore those practices that make social cooperation possible must exist. Thus, by obligating individuals to the practices that make social cooperation possible, we are making it possible for practices to be open to choice. As such, the fact that the most basic social practices are *closed* to choice actually respects the Value of Choice by making it possible for persons to cooperate around rules that respect choice.

This can all be recognized in the case of neighborhood PA system for which participation is open to choice. Say one individual, named Rob, chooses to not participate with the PA system, his choice has not only possible metaphysical import but social import. Since he

chooses not to participate, it would be wrong of others to hold Rob to the obligations and expectations that they would hold those who choose to participate. Imagine that Jane, who did choose to participate with the PA system, approaches Rob and blames him for not taking his turn in the PA system; Jane gives Rob disparaging looks and resents his lack of responsibility. In this picture, Jane acts wrongly. She fails to recognize the importance of Rob's choice not to be involved. Insofar as the PA system is open to choice, Jane *ought* to respect Rob's choice. If Jane was not obligated to respect Rob's choice, then Rob wouldn't really have the type of choice that the Value of Choice view aims to protect. Moreover, since it is necessary for social cooperation amongst strangers that some practices not be open to choice, then some practices ought not be open to choice in order for practices to be open to choice.

In advocating that some social practices ought not be open to choice, my position may seem quite radical. What disrespect for individual autonomy I seem to have! The advocate for the autonomy-baseline view would surely reject this order of argument. Yet, it deserves to be pointed out that my position is not that different from those philosophers who are the most celebrated defenders of autonomy. For instance, Kant argues that it is requirement of reason that persons leave the state of nature and enter a rightful condition that specifies property relations.<sup>27</sup> Likewise, Rawls argues that the contractors in the original position agree to which natural duties will oblige persons regardless of their choice.<sup>28</sup> These figures recognize that their concern for autonomy requires that not all options ought be open to choice. While the Autonomy-Baseline view takes any limitation of choice to be a *prima facie* wrong, the Value of Choice view allows us to better explain why some practices ought not to be open to choice. I

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<sup>27</sup> Kant, Immanuel, *The Metaphysics of Morals*, trans. Mary Gregor, (Cambridge, UK; Cambridge University Press, 1996). 6:312. "Hence each may impel the other the other by force to leave this state [of nature] and enter into a rightful condition."

<sup>28</sup> In grounding the natural duty of justice (which bind regardless of choice), Rawls ascribes the following perspectives to contractors in the original position, "there is every reason for the parties to secure the stability of just institutions, and the easiest and most direct way to do this is to accept the requirement to support and comply with them *irrespective of one's voluntary acts*," *Theory of Justice*, 336 (my emphasis).

here only argue that for the sake of what having choices gets us, we ought not be free to choose to be involved in the basic social practices.

As shown in this argument, there is a fundamental difference in how we ought to treat the most basic social practices that are necessary for social cooperation and the more mundane cooperative schemes. The vast majority of practices ought to be open to choice because doing so will generally promote instrumental, demonstrative and symbolic value. Yet, it is only possible for practices to be open to choice (and thus promote these values) within a system of social cooperation. Since social cooperation is both a condition for the social importance of choice and for securing a range of values, closed practices are justified when they are necessary for social cooperation. This difference in how we ought to treat the two cases will be crucial in understanding the asymmetry in application of the principle of fairness that has been the primary impetus to its acceptance. To see how this difference in cases related to the principle, I turn now to arguing for a revised version of the principle of fairness.

### §3. The Revised Principle of Fairness

At this stage, we have the ideas in place to introduce the revised version of the principle of fairness that grounds legal obligation. I want to introduce that principle, but I will pair it with a liberal condition on what cooperative schemes are just. I put these two together because I think the condition explains why the principle is able to correspond with our considered convictions in ways that the principle alone cannot.

**The Principle of Fairness (= PF):**

Any individual is obligated to follow the rules of a cooperative scheme whenever the well-functioning of that scheme is in the individual's interest and the scheme is sufficiently just.<sup>29</sup>

**The Liberal Condition on Justice (= LC):**

No cooperative scheme is just if it does not properly respect the value of choice.

Written in this way, PF only applies to those practices that are both “subjectively valuable” and “objectively justified”. A practice is *subjectively valuable* when the well-functioning of that scheme is in interest of the person who is obligated. A practice is *objectively justified* when the practice is sufficiently just.<sup>30</sup> LC is not itself a part of the principle of fairness, but it places a restriction on which practices will be objectively justified. For this reason, no individual will be obligated to the rules of a practice that does not meet LC.

In this section, I want to defend PF and LC, and in the next section I will use the principle to ground our legal obligations. First, let me say a few words on the liberal condition, then I will highlight the primary advantages of this version of principle of fairness.

### 3.1. The Liberal Condition

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<sup>29</sup> As I've argued elsewhere, this form of the principle of fairness stresses the way in which schemes of cooperation give rise to *obligations*, but there is a correlate of this principle that stresses the way in which schemes of cooperation give rise to *claim rights*. The correlate of the above principle might be summarized as “when any individual acts in accordance with the rules of a sufficiently just scheme of cooperation, he has a valid claim against those others (for whom the scheme of cooperation is in their interest) to likewise follow these rules.”

<sup>30</sup> One question that arises in regards to such a principle is how to determine which cooperative schemes we ought to follow the rules of. This is a well-recognized problem for the literature on the natural duty of justice. Unsurprisingly, I address these worry by recognizing the way in which such concerns are related to the justice of scheme. I take it that we are only obligated to those cooperative schemes that are sufficiently just, and we would not be obligated to those schemes that claim to obligate unless their claim to obligate us was part of a sufficiently just practice. In this way, as a US citizen, I am not obligated to pay taxes to France merely on the basis that they claim I am. A cooperative scheme that bound me to France's laws would not be a sufficiently just scheme because I would have no basis to be obligated.

On its own, PF does not address which schemes of cooperation are just, it merely obligates persons to follow the rules of whichever practices are just. As such, many different conceptions of justice are compatible with the principle. LC is one possible condition used to determine which schemes are just. Thus, if the liberal condition is a correct condition on a conception of justice, then persons will not be obligated to follow the rules of those practices that do not respect the value of choice. It is this condition that explains why persons will not be obligated to abide by most schemes that they do not voluntarily participate in (such as Nozick's PA system). For this reason, it is important to now better explain this condition.

First, LC is only a condition on the justice of *schemes of cooperation*. Whatever else might be judged to be just or unjust (actions, characters, individual laws, etc) need not necessarily meet this condition. As such, it is only meant to express a condition for assessing certain practices. The perspective we take in using a conception of justice for this purpose is like the perspective of the person designing a game and choosing the rules of that game. As we assess practices in society, we recognize that these practices must respect the value of choice. In this way, LC has a limited scope.

Second, I do not mean to suppose that LC is the *only* liberal condition on justice or somehow the most significant liberal condition. Instead, I only mean to suppose that this is *a* liberal condition on justice. It is labeled as liberal because liberals typically take the value of choice to be of foremost importance.<sup>31</sup> Likewise, those who do not have liberal commitments are less likely to care about the value of choice in their conception of justice and will tend to stress other values, say religious perfection or equality. Insofar as liberals typically advocate for liberties, it is no surprise that their conceptions of justice typically respect the value of choice.

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<sup>31</sup>The classical liberals (Smith, Hayek, Ricardo) may stress the instrumental value of choice whereas the high liberals (Kant, Mill, Rawls) may stress the demonstrative value of choice, but both traditions recognize the liberal condition on justice. Interestingly, it seems that libertarians (generally) do not make appeal to the value of choice because they merely hold the autonomy-baseline view as obvious. (For a thorough comparison of High Liberalism with Classical Liberalism, see Samuel Freeman, "Capitalism in The Classical and High Liberalism Traditions" *Social Philosophy and Policy* Vol. 28, No. 2 (2011); 19-55).

Third, it might be thought that the notion of “respect” in LC is too vague and thus necessarily appeals to intuition for its efficacy. This is surely true, but it is only because different liberal conceptions will have to fill in what it means to respect the value of choice. There are different ways in which to reconcile the value of choice with other values, and I cannot defend a particular view here. So, while there is wide latitude of interpretation in what would satisfy the LC, I see no reason why this would be problematic for present purposes.

The LC is important because it is what allows us to address the Nozick-style counterexamples to PF. According to the revised principle of fairness, one can be obligated to both those cooperative scheme for which participation is open to choice and those for which participation is not open to choice. As such, it might seem like this principle would obligate us to the rules of many schemes that we would not choose participate in. Now, what addresses this problem is not changing the principle of fairness (as it usually done) but recognizing that we are not obligated to the rules of *unjust* practices.<sup>32</sup> Using Nozick’s example, we are not obligated to help with the PA system because if such a system were not open to choice it would be an unjust practice, and we are not obligated to follow the rules of unjust practices. What the LC does is to set a clear requirement on schemes of cooperation; they must respect the value of choice. The PA system is unjust because having participation be closed to choice is not just by the terms of the LC, thus individual have no obligation to the rules of the scheme. In this way, it is not the principle of fairness on its own that explains why we do not have intuitively implausible obligations, but a conception of justice.

### 3.2 The Generality of the Principle

The primary advantage of this version of the principle of fairness is that it is fully general across all practices, regardless of whether participation in them is open or closed to choice. In this

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<sup>32</sup> Most others who have used the principle of fairness already recognize that fairness or justice is a condition for us to be obligated, but they have not limited what schemes are just by anything like the LC.

way, the revised PF captures the way in which the principle of fairness was meant to explain our more basic obligations in accordance with common moral convictions, and it does so while overcoming the difficulty that Rawls and Simmons identify. So long as a practice is subjectively valuable and objectively justified, persons will be obligated to its rules. Yet, to show that this principle is truly general, I need to explain how it adequately covers four types of cases. First, I need to explain why it does not obligate persons to those cooperative schemes for which participation is *closed* to choice and which the principle (intuitively) ought *not* obligate them to. Second, I need to explain how it can obligate persons to those schemes for which participation is *closed* to choice and that the principle *ought* to obligate them to. Third, I need to explain why it does not obligate those persons to those schemes for which practice is *open* to choice and which it ought *not* obligate them to. Fourth, I need to explain how it can obligate persons to those schemes for which participation is *open* to choice and which it *ought* obligate them to.<sup>33</sup>

As such, I need to make sure the principle can cover each of the cases in the matrix below:

	Ought not be Obligatory	Ought be Obligatory
Closed to Choice	1	2
Open to Choice	3	4

(1) The LC explains the first type of case; we ought not be obligated to those practices that do not meet the Liberal Condition on justice. If a practice does not respect the value of choice, then it is not just, and thus its rules are not obligatory. There will undoubtedly be many other reasons why a practice might fail to be objectively justified, but the LC articulates one generally recognizable standard.

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<sup>33</sup> In this cases, the person has freely chosen to participate in cooperative scheme and is then obligated by the rules of that scheme.

(2) As argued in the previous section, a practice can respect the value of choice and participation can be closed to choice when that practice is necessary for social cooperation.<sup>34</sup> As argued above, for practices to be open to choice it is necessary that there be a practice of respecting choice, and social cooperation is necessary for this practice to exist. Therefore the practices that are necessary for social cooperation are necessary in order for practices more generally to be open to choice. For this reason, if participation in a practice that is necessary for social cooperation is not open to choice, that practice does not disrespect the value of choice. In fact, it is partly *because* we respect the value of choice that the practices necessary for social cooperation ought *not* be open to choice. In order for us to live in a society in which our choices are to be generally respected, it is necessary that persons are obligated to those practice that make a society possibly in which choices are generally respected. In this way, we have achieved what seems ridiculous on its face; we have shown why respect for the value of choice can give reason for the basic social practices to be closed to choice. Such practices will both be closed to choice and obligatory by PF. Thus, we can explain how the revised principle of fairness can explain obligation to those practices that are closed to choice while still maintaining the liberal condition on justice.

(3-4) Now, to show the way in which the principle of fairness can explain when we are obligated to practices that are open to choice and when we are not, I want to appeal to a distinction that Rawls made in his early work between the ideal of justice and the ideal of fairness. In “Justice as Reciprocity” he writes,

“Now, in ordinary speech, the concepts of justice and fairness are distinguished roughly in this way: Fairness applies to practices where persons are cooperating with or competing against one another and which allow a choice whether or not to do so....On the other hand, justice applies to practices in which there is no choice

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<sup>34</sup> While there might be other practices that are also closed to choice and just besides these, I do not need to take a position on the issue.



whether or not to participate. It applies to those institutions which are either so pervasive that people find themselves enmeshing in them and made to conduct their affairs as they specify, as with systems of property and forms of government; or to those practice which...nevertheless give no option to those caught in them, such as slavery or serfdom” (209)

Now, while we might dispute the claim that this is how the terms of “justice” and “fairness” are used in ordinary speech, there is an important distinction here that I will continue to maintain. That distinction is that justice is a value that applies to practices that are not open to choice and fairness applies to practices that are open to choice. Now, I support this distinction and my recognition of it was a primary impetus to the view espoused here.

While I will follow Rawls in using justice to apply to practices that are closed to choice and fairness to practices that are open, I will add an additional element that relates this two ideals. I maintain that any *fair* scheme is also *just* so long as participation is open to choice and the scheme treats non-members appropriately. At this stage, this is merely a conceptual relation between justice and fairness because I have not argued for either any particular conception of justice or of fairness. The point in making this stipulation is merely to show the ways in which those practices that are (a) fair, (b) open to choice and (c) treat non-members appropriately *are just*. Due to this relationship between justice and fairness, PF is able to extend to those practices that are open to choice and differentiate those that we are obligated to and those that we are not. Specifically, due to this relationship PF obligates persons both to the practices that are just (box 2) and practices that are fair, open to choice and treat non-members appropriately (box 4). Those practices that are open to choice but are not either fair or treat non-members appropriate will not be just. It is for this reason that unfair practices are not obligatory (box 3).

This system suggests the following approach for how to apply the principle of fairness. For any relevant practice, we first determine whether that practice is open to choice. If the practice is *not* open to choice, the question is whether that practice is just. If the practice is just,

then the rules of that practice are obligatory (so long as the practice is subjectively valuable). If the practice is not just, then the rules are not obligatory. If the practice is open to choice, then the question is whether the practice is both fair and treats non-members appropriately. If so, then the rules of that practice are obligatory to those who chose to be involved in the practice. If not, the the rules are not obligatory. As such, the principle of fairness is fully general across the cases as follows:

	Ought not be Obligated	Ought be Obligated
Closed to Choice	Not obligated when the practice is unjust (perhaps due to liberal condition)	Obligated when the practice is just
Open to Choice	Not obligated when the practice is either unfair or does not treat non-members appropriately	Obligated when the practice is both fair and treats non-members appropriately

With this framework, the revised principle of fairness is able to be fully general across both practices that are open and closed to choice, and it is able to specify the conditions under which persons are and are not obligated to the rules of a practice. As such, this framework is able to maintain the use of the principle of fairness for practices for which participation is open to choice (as Rawls uses it in *Theory*) and has the possibility to extend to those practice like a system of law for which participation is not open to choice (as Rawls and Simmons suggest it could not). In the next section, I will turn directly to the obligation to obey the law to show how this project might be feasible.

#### §4. Legal Obligation

Now, at this point, I want to explain how PF can be used to ground legal obligation. However, I cannot, in this paper alone, give a fully sufficient account of how the revised principle of fairness would do so. The topic is itself too complex to treat its nuances with full attention, but I will give the outlines for how such a full account would proceed. To do so, I argue that following the law is a rule required by the cooperative scheme of a system of law. Thus, insofar as (a) the well-functioning of a system of law is in an individual's interest and (b) the system is sufficiently just, then that individual will be obligated to follow the law.

In order to show this, I will be concerned with arguing for four points. First, that a system of law can be considered a cooperative scheme. Second, that one of the essential rules of that scheme is that members of society ought to follow the recognized laws. Third, that the well-functioning of a system of law is likely to be in each individual's interests. Fourth, that a system of law will satisfy the liberal condition of justice despite the fact that participation in a system of law is not open to choice. I will argue for the first two points in §4.1, and the last two points in §4.2.

##### 4.1 A System of Law as a Social Practice

In analyzing a system of law as a cooperative scheme, I follow Hart's analysis in his famous work, *The Concept of Law*.<sup>35</sup> Hart argues that the rules of practices can be of two types. First, *primary rules* constitute the various disparate practices of social life. In constituting practices, these rules give rise to obligations and powers as persons are bound by the rules of the practice. Yet, by themselves a system of primary rules would be uncertain, static and inefficient because the rules would be taken as unspecified and unchangeable. For this reason, societies develop a

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<sup>35</sup> As noted above, Hart himself seems to recognize that legal obligation can be explained as our obligation to a cooperative scheme since he cites legal obligation as the example of an obligation implied by the principle of fairness in "Are There any Natural Rights?"

system of *secondary rules* that confer the power to change primary rules. For Hart, a legal system is the union between these primary rules and secondary rules; a dynamic framework that is able to recognize and revise the various practices that exist in society.

While some argue that Hart's project is a failure, others argue that it merely needs subtle refinements to successfully explain law as a cooperative scheme. I am firmly in the latter camp. While I cannot here go into what the fundamental problems for Hart are and how they can be resolved, I will here assume the possibility of some resolution.<sup>36</sup> I need not be committed to all of the nuances of Hart's views, but only the core commitments that a system of law can be understood as a specific social practice constituted by rules that make it possible to change the rules of other social practices.

Now the rules that together constitute the legal system are obviously quite complex. There will different rules that apply to different roles in that system; rules for judges as interpreters, rules for legislators as enactors, rules for executives as enforcers, and even rules for members of society. My present concern will be specifically with these rules for members of society. Recall that Hart's analysis of law is as system by which to revise and introduce social practices in a society. Now, if this is the primary role of a system of law, then for it to be a well-functioning system of law, it must be *able to revise and introduce social practices*. To do this, it must be able to change the patterns of behavior and expectations of members of society. After all, only when individuals change their behavior will the social practices change. As such, a system of law functions well only when law has the *capacity* to change individuals' behavior. Now, a system of law will only this *capacity* when persons respect it *as authoritative*. Thus, for a

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<sup>36</sup> Andrei Marmor's recent defense Hart's project articulates the most important aspect. He argues that Hart's rules of recognition should not be understood as rules that merely solve coordination problems, but as a set of rules that together *constitute* a practice. Without recognizing this aspect of rules of recognition, it is difficult to explain how legal rules can be normative. However, once we see how they constitute a practice, their normativity it no more difficult to explain than the rules a chess. Our reasons for following the rules of chess arise because we have reason engage in the activity of chess, and likewise are reasons for following legal rules arises from our reasons to engage with the legal system. See Andrei Marmor, *Social Conventions: From Language to Law*, Princeton, NJ; Princeton University Press, 2009. Ch. 9; and "How the Law is Like Chess," *Legal Theory* Vol. 12, No. 4 (2006); 347-371.

system of law to function well, it is necessary that persons respect the law as authoritative. For this to be the case, persons generally ought to follow the law.<sup>37</sup> As such, in order for a system of law to function well it is necessary the persons generally follow the law.<sup>38</sup>

So, while a system of law will consist of many complex rules for different roles, it is necessary that one such rule be that persons generally obey the law. We typically view legislators as claiming some *legitimate authority* to bind persons to actions whenever laws are legitimately formed and recognized as valid. The present point explains that authority as arising from the cooperative scheme of a system of law. It is because the rules of that system require that participants follow an authority-granting rule (and because the rules of that system are followed) that legislators have such authority. There is no need for there to be an explicit law that persons act in accordance with the law because it the rule itself constitutes the authority of the law. What it is for a system of law to have the requisite authority to change social practice is that persons treat the law as something which citizens ought generally act in accordance with. Thus, it should not be surprising that a system of law includes the rule that “members of society ought generally follow the law” among its essential elements.

If we now leverage this understanding of law as a cooperative scheme, we can see how the PF will ground legal obligation. A system of law is a cooperative scheme that consists partly in the rule that persons ought obey (what is recognized as) the law. The principle of fairness requires that individual abide by the rules of a cooperative scheme so long as that practice is (a) in their interest and (b) sufficiently just. As such, so long as a system of law meets these two conditions, individuals will be bound by the rules of this practice. Since the scheme

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<sup>37</sup> While my arguments here are too brief, a more complete argument for the conclusions similar to these first two points, see Andrei Marmor, “An Institutional Conception of Authority” in *Philosophy and Public Affairs* Vol. 23, No. 3 (2001); 238-261.

<sup>38</sup> Importantly, it is only necessary that persons *generally* obey the law because a system of law need change the behavior of all members of society to change a practice. This will give individuals some latitude in determining when they ought obey the law, but it does not free anyone from this obligation.

includes the rule that members of society ought obey they law, and these individuals are members of society, they ought to generally obey the law.

It is important to stress that this explanation is able to address the problem faced by Klosko and Arneson. Their accounts use the principle of fairness to argue that persons owe a fair contribution to the government because of the way it supplies individuals with public goods. While these arguments do well to show that persons have a duty to pay a fair share of taxes, they do not sufficiently explain why persons have an obligation to obey the law as it demands. Arneson and Klosko do not explain how the fact that a law requires an action can give sufficient reason to take that action even when an alternative action would do more good or one believes the law to be unjust. The argument above is specifically meant to address these cases and explain why we have a *legal obligation* in particular; we have an obligation to obey the law rather than merely a debt of fair contribution because the cooperative scheme of a system of law consists of the essential rules that citizens ought generally obey the law. This explanation is potentially able to address the two problems that Rawls poses for any account of legal obligation. First, our moral obligation to obey the law is an obligation to the other members of society who cooperative in the system of law. Thus, our obligations to others can potentially give us moral reason to take an action that we otherwise ought not take. Second, since our legal obligation arises from following the rules of the legal system as a whole, we might be obligated to obey particular laws that we believe to be unjust so long as those laws emerge from a legal system that is sufficiently just as whole.

#### 4.2 Conditions on Legal Obligation

Above, I argued that the principle of fairness can ground legal obligation so long as (a) the well-functioning of that system of law is in an individual's interests and (b) the particular system of law is sufficiently just. Now, it might be near impossible to articulate a full set of

standards that could determine when these two conditions are met. Instead of doing so, I will here only explain why a system of law is likely to be in a person's interest and why a system of law that is not open to choice does not violate the liberal condition on justice.

What makes this task easier is that the reason why the well-functioning of a system of law is in a person's interest is the same reason why the system of law need not be open to choice to satisfy the liberal condition. This shared reason is that *a system of law is necessary for social cooperation*. First, since participating in society is in an individual's interest, a well-functioning system of law will be in an individual's interest. Second, I argued in §2 that those practices that are necessary for social cooperation need not be open to choice in order to respect the value of choice. As such, in order to show that a system of law is likely to meet the two conditions of PF, I only need to show that a system of law is necessary for social cooperation.

While it is surely true that a legal system like those of contemporary states is not necessary for social cooperation, there needs to be *some* legal system that can be the authoritative interpreter and promulgator for the rules of social practices. As argued above, cooperation can only occur when individuals coordinate their activity in accordance with shared rules. A system of law is necessary as the legitimate authority that determines these shared rules, so (some form of) a system of law is necessary for social cooperation. For instance, a practice of property rights seems to be necessary for social cooperation, but there must be some legitimate authority that determines and specifies the details of a system of property. There might be loose conventional rules that specify who owes what and the extent of such ownership, but these loose rules will not be sufficient to settle conflicts or disputed claims. For this reason, there needs to be some legitimate arbitrator who promulgates the legitimate

rules of property and who can interpret those rules when need be.<sup>39</sup> A system of law fulfills this role for a practice of property as well as for any other social practices that come under similar conflict.

There are many other reasons besides the Liberal Condition why a system of law might not be sufficiently just, so we should not suppose that all (or even most) systems of law would be sufficiently just. Likewise, there are many ways in which a system of law might not be in an individual's interest even if systems of law are generally in persons interests. As such, there will be much more to say in order to evaluate whether any particular system of law gives rise to legal obligation. What is most important for present purposes, however, is that it is possible for legal obligation to be grounded by the revised principle of fairness. I have shown that a system of law is likely to be in individuals' interests and can be sufficiently just while participation is not open to choice. Thus, for any system of law that is sufficiently just the revised principle of fairness can ground individuals' obligation to follow the law.

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<sup>39</sup> Similarly, Samuel Freeman writes, "Some political framework is needed in any (non-primitive) society for making, revising and applying the social rules that make cooperation possible, and for adjudicating disputes arising under them. Otherwise, a social group is governed by static customs and in unable to effectively respond to changing circumstances and necessities." in "The Basic Structure of Society as First Subject of Justice" in *Blackwell Guide to Rawls* [?] (forthcoming).