

What Makes Free Riding Wrongful? The Shared Preference View of Fair Play*

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YOU receive a good. You have not consented to receiving and paying for it, but you consume it nevertheless. Do you have an obligation to pay for it? And if you refuse to pay, would you be wronging those who produced it? There are some cases in which failing to pay seems uncontroversially wrong. Think of using public transport without buying a ticket, or failing to do your part in cleaning a shared flat. Other cases are more controversial. If your neighbour mows your lawn without having asked, is it wrong not to pay? What about not paying your taxes for a public service which you benefit from but would rather forgo?

All of these are instances of free riding: of consuming benefits one has not paid for. John Rawls, drawing on H. L. A. Hart,¹ proposed a principle of fairness (or Fair Play) meant to identify the wrongful forms of free riding. The now-familiar principle states that, when a group of people engage in a rule-governed, benefits-producing cooperative activity, third parties who voluntarily internalize these benefits owe it to the producers to do their part in their production.² Famously, Robert Nozick retorted that having to pay for benefits that one has not consented to paying for is tantamount to being held hostage to other people's will.³ Nozick's voluntarist objection has been, and remains, a hurdle for any defence of Fair Play.

The ensuing debate has attempted to spell out the conditions under which there can be Fair Play obligations to pay for unconsented-to benefits. This has

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¹Hart 1955.

²Rawls 1999, p. 301.

³Nozick 1974, pp. 90–5.

been of particular interest to those who have regarded Fair Play as a promising basis for political obligation.⁴ This discussion, however, has proceeded largely through appeal to our intuitions in various cases, as opposed to systematic approaches to uncovering why free riding in certain conditions amounts to acting unfairly. This lack of systematic analysis is partly to blame for widespread scepticism about Fair Play.⁵

This article offers a systematic approach to Fair Play. It provides an account of the conditions that make free riding unfair that are derived from, and justified by reference to, a general understanding of why free riding is unfair when it is unfair. My account draws on Garrett Cullity's discussion of the principle of fairness.⁶ Like Cullity, I believe that unfairness, whenever it occurs, is a failure of appropriate impartiality. The specific form of wrongful partiality involved in free riding is making an unjustified exception of oneself by failing to pay one's share. But in order to know whether, and in what sense, failing to pay one's share amounts to making an exception of oneself, we need to specify the ways in which the free rider and those who produce the benefit are otherwise relevantly similarly situated such that failing to pay *amounts to* unjustifiably making an exception of oneself.

In this article, I develop an account of the normatively relevant similarities that must obtain between the free riders and the contributors for free riding to count as making an exception of oneself. I show how the account of Fair Play that I develop, which I call the Shared Preference View, allows us to shed light on some important features of Fair Play that have so far remained unclear or underexplored, such as the basis for the contributors' claims against free riders and the normative significance of the contributors' intentions. I also show how my understanding of the principle of Fair Play accommodates the Nozickian voluntarist objection. But, contra Nozick, and perhaps surprisingly, my Fair Play account can be put to work in grounding a wide range of fairness obligations, including political obligation.

In Section I, I introduce the Fair Play principle proposed by Rawls and criticize some of the ways in which its scope of application has been defined in the literature. Section II introduces Cullity's notion of fairness as appropriate impartiality, and reviews his proposed wrong-making free-riding conditions. I argue that, while Cullity's account is on the right track, it fails to provide a conclusive way of distinguishing between unfair free riding and unproblematic free riding. In Sections III and IV, I develop my view of what characterizes unfair free riding. In Sections V and VI, I further draw out the features of my account by identifying two types of conditions under which free riding does *not* count as unfair. Section VII provides a brief conclusion.

⁴Rawls 1964; Klosko 1992.

⁵McDermott 2004; Wellman 2005; Normore 2010; Dworkin 2011; Zhu 2015.

⁶Cullity 1995, 2008.

I. FAIR PLAY AND ITS SCOPE OF APPLICATION

Rawls's principle of fairness claims that one has a moral obligation to do one's share in supporting cooperative schemes the benefits of which one has accepted.

The intuitive idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.⁷

According to Nozick, foisting benefits on others without their prior consent can never generate obligations to pay the benefactors, for this would implausibly subject us to other people's will.⁸ It is worth distinguishing this objection, which I call the voluntarist objection, from a closely related one that is often run together with it. The second kind of worry is that, unless Fair Play's scope of application is properly restricted, it would generate implausibly numerous obligations. This concern is distinct from the voluntarist one, because one may still worry that proliferation of obligations will render the principle implausible even if one is not moved by voluntarist concerns. Fair Play theorists have been motivated by the aim of carving out a plausible scope of application for Fair Play, mainly in response to the proliferation worry, and some have also been concerned with the voluntarist worry. In this section I offer a brisk, critical survey of the attempts that have been made at defining the proper scope of the principle. When discussing these views, I focus on those scope-restricting conditions which I consider *prima facie* plausible and which will play some role in my own Fair Play view.

I will argue that all of these views render the principle either over- or under-inclusive. To show this, I appeal to what I consider to be strongly held common-sense intuitions about when free riding is wrong. I assume that these intuitions give us some reason to be sceptical of views that are unable to accommodate them, although this reason is not decisive. Of course, decisive reasons for accepting a Fair Play view should be given by the sort of systematic analysis of unfairness that I offer in Sections III and IV. That said, the capacity to capture strong intuitions about which cases of free riding are unfair represents an advantage for any view and, conversely, the failure to do so represents a disadvantage.

One thing all Fair Play theorists agree upon is that Fair Play's scope of application is restricted to the receipt of public goods. Classic examples of public goods include clean air, the rule of law, and public defence. The most important feature shared by all of these goods is what Cullity calls *jointness in supply*: if the good is available to any member of a group, then it is available to all the other members at no cost to themselves.⁹ It is this sense of receiving a good 'for free',

⁷Rawls 1999, p. 301.

⁸Nozick 1974, pp. 90–5.

⁹Cullity 1995.

rather than, say, by stealing, that concerns Fair Play theorists. Public goods usually exhibit other features that have been considered important for Fair Play, such as non-excludability. Goods are non-excludable if it is impossible or excessively costly for the producers to exclude third parties from enjoying them. Jointness in supply often goes together with non-excludability, due to the nature of the good (for example, clean air). But a good can exhibit jointness in supply while also being excludable. Organizers of a concert in a public park could (and may permissibly) exclude those without tickets. If there are no ticket checks in place, anyone passing by could enjoy the concert at no cost to themselves.¹⁰

One important matter of controversy concerning the principle's scope is the role that the benefit-recipients' attitudes and beliefs regarding those goods should play in determining their obligations. Some authors, including Rawls, defend *voluntarist accounts* of Fair Play, according to which free riders can become obligated only if they voluntarily accept the goods in question, rather than regard them as foisted on them against their will.¹¹ By contrast, those who hold *receipt-based views* of Fair Play believe that fairness obligations may arise merely as a result of receiving certain kinds of public goods in certain conditions.¹²

Voluntarist accounts directly address Nozick's worries, for on such views only goods that people *will* to receive in some relevant sense can generate Fair Play obligations. However, this strategy seems to render Fair Play under-inclusive. Anyone who bizarrely thought that crucial goods like physical security or clean air were disvaluable would be exempted from having to pay their share, even if they continued to receive them. This is particularly worrisome given people's tendencies to deceive themselves into thinking they do not want certain goods when this would let them off the hook.¹³

On the other side of the divide, George Klosko argues that it is not people's subjective views, but the value of the benefit that plays the crucial role in restricting Fair Play's application.¹⁴ He distinguishes between presumptively beneficial goods and discretionary goods. Presumptively beneficial goods are indispensable for any minimally decent life, and, as such, can permissibly be presumed to be beneficial for virtually everyone. By contrast, the beneficial character of discretionary goods depends on people's preferences. The mere receipt of presumptively beneficial goods is able to ground fairness obligations, argues Klosko, while the receipt of discretionary goods cannot generate clear obligations, because the disputable value of discretionary benefits often cannot override the liberal presumption in favour of the liberty to choose one's own obligations.¹⁵

¹⁰See *ibid.*, pp. 3–5, 32–4, for an exhaustive review of the features of public goods.

¹¹Lyons 1965; Rawls 1999; Simmons 1979, 2001; Renzo 2014.

¹²Arneson 1982; Klosko 1987, 1992; Cullity 1995.

¹³See Renzo 2014 for an ingenious response to this issue of self-deception.

¹⁴Klosko 1987, 1992.

¹⁵Klosko 1992, pp. 39–44.

An alternative to Klosko's strategy within the receipt-based camp is to say that there are Fair Play obligations to distribute fairly the costs of discharging a shared moral duty. Clean air, clean water, public defence are presumptively beneficial goods (according to Klosko). But, arguably, they are also goods that we all share a moral duty to provide everyone with. So we might think that, if nothing else, fairness requires that we share the costs of providing morally required goods.¹⁶

Both of these strategies have a lot of initial plausibility. They also go some way towards limiting Fair Play's scope by restricting its application to crucial benefits, either because we can presume everyone to benefit from them or because we have a shared duty to produce them. Both strategies, however, face a problem of under-inclusiveness. For it seems that Fair Play obligations may also arise when one receives a benefit that is valuable to her, even if it is not necessary for a minimally decent life, and even if it is not morally required. Imagine a shared flat where all three flatmates strongly prefer a level of cleanliness that goes beyond what may be considered presumptively beneficial or morally required for hygiene reasons (call this case Flat Share). If two of them do their share of upholding this level of cleanliness, it seems, intuitively, that the third person's refusal to do her share of the 'extra' cleaning would make her an unfair free rider.

Of course, the receipt-based strategies above can be read as providing only sufficient conditions for Fair Play to apply. So they might not be bothered by their inability to condemn free riding in cases like Flat Share, being open to the possibility that some other sufficient set of Fair Play conditions might apply to such cases. But I take it that providing a set of necessary and sufficient conditions for Fair Play, with the resources to capture cases of morally required/presumptively beneficial goods, as well as cases of desirable but not morally required goods (like, arguably, public libraries), and even trivial but subjectively valued goods (as in Flat Share), would provide a more complete (and hence, more attractive) defence of Fair Play. This is what I aim to do in Sections III and IV.

Finally, a different set of conditions thought to help limit Fair Play's scope of application regards *the production* of the benefits. All Fair Play defenders agree that contributors must meet some 'burdensome production' condition. That is, only those who produce benefits by incurring a sacrifice have Fair Play claims against free riders. Most commentators agree, further, on an 'intentionality' condition: that claims of fairness may only arise for benefits that the contributors brought about intentionally.¹⁷

The trouble, as others have noted,¹⁸ is that none of these conditions has been adequately explained or defended. It is unclear what constitutes a 'sacrifice' for the purposes of Fair Play, and what makes it necessary for grounding contributors' claims. Similarly, the need for contributors to have certain intentions, and what exactly these should be, also remains underexplored.

¹⁶Casal 1999, pp. 369–70; Arneson 2014, p. 9; Gheaus 2015, pp. 91–5.

¹⁷Simmons 1979, p. 336; Casal and Williams 1995, p. 106; Casal 1999, p. 368.

¹⁸Boran 2006, pp. 105–12; Olsaretti 2013, pp. 242–7; Gheaus 2015, p. 91.

One important reason why such ambiguities still plague the Fair Play literature is that hardly any attempts have been made at approaching Fair Play in a systematic manner. Before attempting to rectify this, let me first turn to the ‘big picture’ notion of fairness that I will draw on, and discuss in some detail the account of Fair Play that has been thought to be supported by it.

II. UNFAIR FREE RIDING AS A FAILURE OF IMPARTIALITY

Garrett Cullity is the only Fair Play supporter who has sought to offer a general view about what unfairness consists in and how the free-riding conditions he picks out as wrong-making contribute to making free riding unfair.¹⁹ At the most abstract level, I join him in thinking that fairness is a matter of appropriate impartiality.²⁰ Fairness requires that we treat people with a particular form of impartiality, suited to the context at hand. In the context of a 100m sprint, fairness as impartiality requires that competitors share the same starting point. In the context of a game, it requires that everyone play by the same rules. It is *unfair* if a contender starts the race from an advanced position, and if some people do not abide by the agreed rules. Free riding, when unfair, is also an instance of a failure of impartiality. The wrongful form of partiality that the unfair free rider is guilty of is allowing herself a privilege, or unjustifiably making an exception of herself, by not paying her share for the benefits she receives.²¹

But when does the failure to pay one’s share actually amount to making an exception of oneself? In this section, I briefly lay out Cullity’s answer. I do not subscribe to all of his claims, but I will not, here, engage critically with them. Instead, my strategy is to offer an internal critique to his account, having accepted all of his claims *arguendo*.

Cullity proposes three conditions under which free riding counts as unjustifiably making an exception of oneself. Two of them are fairly uncontroversial: first, that the free riders must receive a net benefit from the benefits-producing scheme they are asked to participate in, and second, that they do not raise legitimate moral objections against it.²²

The third condition, the ‘fair generalization requirement’, states that the refusal to pay for a benefit one receives is unfair only if it is true that the practice of honouring the sorts of demands for payment being made in the case at hand, and in all other similar cases that might arise, would make virtually everyone worse off.²³ This requirement captures the thought that a plausible Fair Play principle

¹⁹Cullity 1995, 2008. Some theorists do say more about the sort of wrongness they believe free riding involves. Arneson (1982) argues that it can be understood as a breach of the producers’ entitlement to the fruits of their labour when they cannot exclude third parties from enjoying them. Tosi (2018) believes that Fair Play is normatively similar to the principle of consent. However, neither explains why a violation of the producers’ entitlement, or of the terms of a contract, amounts to acting unfairly.

²⁰Cullity 2008, pp. 2–5.

²¹Cullity 1995, pp. 22–3.

²²*Ibid.*, pp. 18–19.

²³*Ibid.*, pp. 14–15.

should not generate unreasonable demands. A good hypothetical test for whether a particular demand for payment is unreasonable is to ask what would happen if we had to comply with that kind of demand not just in this particular case, but in all the cases that might potentially arise where producers might make similar demands on us. If having to comply with all the further similar demands that might arise would make virtually everyone worse off, Cullity argues, then the particular demands being tested are unreasonable, and refusing to comply with them is not unfair.

For illustration, Cullity offers the *Enterprising Elves* case, where a band of elves go around repairing the shoes of those who unwittingly leave them out overnight, and then attempt to charge a reasonable price.²⁴ Cullity argues that refusing to pay the elves is not unfair, because their demand for payment does not pass the fair generalization test. If we recognized as legitimate and complied with their demand, then we would also have to honour further requests that we pay ‘for all unsolicited benefits that are worth their cost’, and this would be an inefficient commercial system that would make virtually everyone worse off.²⁵ Various mechanisms would make this so. This system would presumably force us to pay for benefits that were unintended and unforeseen positive externalities of others’ activities. It would also force us to pay for benefits that others foisted upon us with the sole purpose of getting paid in return. Even though each individual benefit might be worth its cost, overall such a system would lead to a harmful proliferation of obligations.

Cullity justifies his three conditions for unfair free riding by reference to his notion of appropriate impartiality. In the case of the fair generalization requirement, refusing to comply with unreasonable demands like the elves’ does not amount to making an exception of oneself, for if those demands fail the fair generalization requirement, everyone has good reason to refuse to comply, including those who are currently complying with them.

Cullity’s view is meant to offer a Fair Play principle that is not only theoretically supported by a general view of fairness, but that also yields a plausible scope of application. It is intended to distinguish cases of ‘predatory demands’ like the elves’ from cases of unfair free riding like Cullity’s *Recalcitrant Fisherman*. In this case, fishermen band together to reduce pollution in the lake they rely on for their livelihood. One fisherman protests that he has not asked for this benefit, and has no intention of participating in the effort.²⁶ The recalcitrant fisherman is an unfair free rider, according to Cullity, because the sort of demand made on him by the fishermen (that is, making ‘a fairly assessed sacrifice’ so as ‘to preserve the livelihood of all’), if allowed to generalize, would not make virtually everyone worse off.²⁷

²⁴Ibid., p. 10.

²⁵Ibid., p. 14.

²⁶Ibid., p. 11.

²⁷Ibid., p. 15.

Cullity's view is on the right track, especially in its attempt to limit our vulnerability to unreasonable Fair Play demands. However, the fair generalization requirement is too vague to be able to distinguish cases of unproblematic free riding from cases of unfair free riding. Whether free riding is unfair turns on how exactly we describe the demands for payment that should be run through the fair generalization test. Yet we have no guidance as to how to determine what the salient features of the demands for payment are that should be tested. To see the problem, consider this case:

The Enterprising Scientists. Everyone in our town runs the risk of contracting a mild chronic illness because the water supply source is tainted with a dangerous chemical. One day, I am delighted to find that the water is safe to drink, thanks to a group of scientists who passed through our town and implemented a water-purifying mechanism overnight. I am less delighted when I receive the (reasonably priced) bill.

Here, it is not clear what the salient features of the scientists' demands for payment are. We might think that their demands are of the same sort as those made by the elves: 'holding everyone liable to pay for all the unsolicited benefits that are worth their cost'. The scientists seem to be engaging in the same sort of 'business' as the elves. They have identified some needs, and met them without the beneficiaries' consent, before attempting to charge a reasonable price. Generalized compliance with this sort of demand, we could argue, would lead to a commercial system that would be unreasonably burdensome for virtually everyone, and that would, therefore, fail the fair generalization test.

We might think, instead, that the demands made by the scientists are more similar to those made by the fishermen. The relevant features of the scientists' demands for payment could be described as follows: the town's inhabitants are asked to help preserve everyone's health by contributing to paying the scientists for their effort. If this description is right, their scheme passes the test because participating in this, and any other potential, future efforts to preserve everyone's health, would not make virtually everyone worse off. Indeed, it might be said on Cullity's behalf that, since the good promoted by the scientists is what Klosko calls presumptively beneficial, this is clearly a salient feature in *Enterprising Scientists*, so the latter's demands for payment are reasonable indeed, as it would make everyone better off to pay their share for securing presumptive goods.

This is true. However, the point was never that the scientists' demands for payment did not share salient features with the fishermen's demands. The point is that they *also* share very important features with the elves' demands for payment. The scientists are not engaged, like the fishermen, in a beneficial cooperative effort which third parties are asked to join. Rather, they are implementing a new technology in a town they are passing through, seeking to get paid. In this respect, what they do is similar to the elves' waiting for people to leave their shoes

out. Thus, some salient features of the scientists' endeavour make it appropriate to describe it as a sort of imposed commercial transaction that, if allowed to generalize, would arguably lead to an inefficient commercial system that would make virtually everyone worse off.

Cullity's account thus remains inconclusive with respect to one of his most important goals: to distinguish between unfair free riding and 'predatory demands' for payment. There will be many cases like the Enterprising Scientists, in which it is unclear what the salient features of the demands are, or in which opposing views of the salient features seem defensible. The Fair Play account I propose in the following section takes on board the core of Cullity's view, but is better equipped to carve out a clear and reasonable scope of application for Fair Play.

III. THE SHARED PREFERENCE VIEW

Recall that we are looking for a principle of fairness that condemns free riding as unfair when it is a breach of impartiality and, in particular, when it involves unjustifiably making an exception of oneself. We need a criterion to determine when free riding amounts to making an exception of oneself that applies across different kinds of goods, including discretionary goods as in Flat Share, but without leaving us vulnerable to predatory demands like the Enterprising Elves'.

As a methodological point, I assume that in order to determine when free riding amounts to making an unjustified exception of oneself, we need to spell out the ways in which the free riders and the contributors are relevantly similarly situated. The thought is that when the free riders are similarly situated to the contributors with respect to *all* the relevant facts regarding the receipt and production of a benefit *except for* the free riders' failure to pay their share, their failure to pay cannot be justified on impartial grounds. I argue that the free riders and the producers are similarly situated when *we can justifiably ascribe to both a qualified preference for free riding*. I call this account the Shared Preference View.

There are, I argue below, two such preferences for free riding that we can identify, that correspond to two distinct (but structurally similar) opportunities to free ride, depending on whether the goods in question are 'optional goods' (that is, not morally required) or morally required goods (by which I mean that we have a moral duty to provide people with them). The Shared Preference View distinguishes between the opportunity to free ride *by internalizing a benefit* that others have produced, on the one hand, and the opportunity to free ride *by letting others discharge a collective duty* that applies to one, on the other hand. The first kind of opportunity may arise when either kind of good is being produced, while the latter only arises in cases of morally required goods. In this section, I develop the Shared Preference View as it applies to optional goods, leaving morally required goods for the next section.

I start by positing that the only necessary requirement relating to the nature of the optional goods themselves is that they exhibit jointness in supply (which,

recall, means that if someone in the group receives them, everyone else can do so at no cost to themselves). To signal this minimalist requirement, I will call such goods 'collective' from now on, rather than public goods, to distinguish my view from those on which other typical features of public goods are necessary for Fair Play to apply, such as non-excludability.²⁸

I propose that when a group of people receives a collective good produced by some members of that group, Fair Play obligations arise only between those among the free riders, and those among the contributors, to whom the Free Rider's Preference can be ascribed.

The Free Rider's Preference (FRP). I prefer that others pay for this valuable collective good that I can enjoy for free and for which I would be prepared to pay, in the conditions under which it is offered, if I had to.

As is familiar from the extensive literature on prisoner's dilemmas and collective action problems,²⁹ in contexts where free riding is possible, each person faces the following potential scenarios, ordered from the one that makes her best off to the one that makes her worst off:

1. I receive the benefit without bearing the benefits-producing costs.
2. I receive the benefit and I bear the benefits-producing costs.
3. I do not receive the benefit and I do not bear the benefits-producing costs.
4. I do not receive the benefit despite having borne the benefits-producing costs.

One counts as sharing the FRP when one can be ascribed the two top-ranking preferences in that order.³⁰ And we can ascribe people this ranking of preferences on the basis of two elements: (a) their having a certain pro-attitude to the receipt and payment of the collective good, and (b) an assumption about the kind of beings we are that we may apply to everyone for fairness purposes, namely that we are prudentially rational.

To elaborate: the first condition, (a), that must obtain in order to justifiably ascribe the FRP to someone is that they believe the good they are receiving is worth its cost to them. This condition obtains when the benefit-recipients subjectively value the good enough that they would prefer to pay its attendant cost if they had to (that is, *if free riding was not an effective option*), rather than forgo the good altogether. When this condition obtains, the two scenarios in which the good is

²⁸I here follow Cullity, in contrast to all the other Fair Play defenders, who treat non-excludability as necessary; see e.g. Arneson 1982; Klosko 1992. Recall that, as mentioned in Section I, jointness in supply does not necessarily entail non-excludability.

²⁹Olson 1965; Parfit 1984; Gauthier 1986.

³⁰The ascription of preferences 1 and 2 *in that order* is sufficient for my Fair Play purposes here. By this I mean both that 1 and 2 must rank higher than 3 and 4, and that 1 must rank higher than 2. I mention preferences 3 and 4 for the sake of completeness, as I am borrowing the entire set of options from previous work on collective action problems; the ranking of 3 and 4 relative to each other is not relevant.

produced, either with or without one's own contribution, rank higher than the two scenarios in which the good is not produced at all.

Once the first condition is met, the question is which of the top two scenarios ranks first. On the assumption that (b) spells out, namely that people are prudentially rational, the scenario in which one receives the valued good *for free*, rather than having to pay for it, would come first. The notion of prudential rationality at work here is the familiar technical notion of an individual who would act so as to maximize her own well-being. Receiving for free a good that would be worth its cost to the individual is prudentially better than paying for it, all else equal. For one is then free to direct one's resources to other desirable ends, without losing out on the benefit. Therefore, free riding on the production of a good that is worth its cost would be, in principle, the top-ranking option for any prudentially rational individual.

For illustration, consider the paradigmatic case of unfair free riding, that of, quite literally, riding free on public transport. It is possible to ascribe the FRP both to someone who buys a ticket and to someone who does not, provided only that both in fact believe the benefit is worth paying this price, and assuming it would be to their advantage to get this good for free rather than pay for it. The best scenario for both parties, then, would be the one where they enjoy the benefit for free. The second-best scenario for each is to benefit from the public transport *and* pay, since the benefit of public transport outweighs the price of the ticket by their own lights. And so on down the ranking of preferences.

The important point worth stressing here is that the relevant ranking of preferences applies to the fare-payers regardless of the fact that they do not actually *act in line with* the top-ranking option (that is, the free-riding option), as the free riders do. Someone might wonder how it is possible to ascribe the FRP to the fare-payers. If you pay your fare, doesn't this show you do not actually prefer to free ride? In response, it is important to stress that the Free Rider's 'preference' itself is just a term of art. Its ascription is justified only partially by a person's actually held, subjective preference, namely that identified by condition (a): that people deem the benefit to be worth the cost; and partly by an objective judgement about what is in people's prudential interest.

So, some people act on the preference identified by (a), by buying a ticket even when they could ride for free (when there are no ticket checks and enough others are buying tickets anyway). Others, by contrast, choose to free ride when this is possible, even though they *would* pay their fare if ticket controls were in place and/or if the public transport system was in danger of failing due to lack of contributions (so they also share (a), but they do not act in line with it). Despite their different actions, the FRP could be ascribed to both parties, because it is true of each that it would be to their advantage, as prudentially rational people, *for them* to be the ones who get the valued benefit for free. The similarities that matter for the Shared Preference View are (a) that both parties actually value the

good, and (b) that it is true that both would be better off if they enjoyed this good for free. Taken together, these two elements allow us to ascribe the FRP.

Still, one might insist, if the fare-payers would be better off free riding, why don't they? There is a host of reasons why fare-payers might decide to buy their tickets. They might be following the laws and conventions that stipulate that each should pay for a ticket, or they might be more risk-averse than the fare evaders about the possibility of getting caught without a ticket. Or they might recognize the unfairness of free riding and pay their fare for this reason, as many surely do. But to repeat: none of these common reasons challenges the fact that they can be ascribed the FRP. Riding public transport for free would be in each contributor's best interest, just as it is in the best interest of the free riders. In Section VI, I discuss cases in which some reasons why people bear the relevant costs do undermine the ascription of the FRP to them.

We can now single out what it means for free riders to make an unjustified exception of themselves. Among all those who receive a collective good, those who count as *relevantly similarly situated* for fairness purposes are those to whom we can justifiably ascribe the FRP. When some of those who share the FRP nevertheless bear the costs of securing the collective good, those who allow themselves to free ride arrogate to themselves an unjustifiable privilege. They get to act in line with the FRP at the expense of those who, despite sharing it, act in frustration of it.

The Shared Preference View allows us to distinguish cases of unfair free riding on optional goods like Flat Share from cases of 'predatory demands' like Enterprising Elves. The flatmates in Flat Share can all be ascribed the FRP: each of them places high value on enjoying a spotless flat, and each would be better off if the others did the work instead of them. So if one of them refused to do her share of the extra cleaning, she would be acting unfairly. By contrast, the Enterprising Elves are not similarly situated to those who benefit from their services, because the elves themselves do not have an interest in enjoying the same goods as the beneficiaries. They cannot be ascribed the FRP, which, to repeat, states that 'I prefer that others pay for this valuable collective good that I can enjoy for free and for which I would be prepared to pay, in the conditions under which it is offered, if I had to'. The elves are not interested in the benefit of having their shoes repaired. Unlike their clients, what they seem to have an interest in is making a profit, or getting recognition, or something of that sort.

Someone might wonder why it should matter, for the purpose of establishing whether the elves ought to get paid, that they do not have a preference for enjoying the service they are providing themselves. The Shared Preference View conceives of the relevant unfair free-riding situation as one where individuals are at a 'standstill'. Each wants to be a beneficiary of a particular collective good, but each would also be better off by not being a producer of it. When some people do take on the role of producer by contributing their share, thereby breaking this deadlock, the Shared Preference View condemns those who allow themselves

to remain mere beneficiaries. By contrast, Enterprising Elves seems to be a straightforward commercial transaction between those who have no interest in being beneficiaries but do have an interest in acting as producers, and others who occupy the role of beneficiaries of their services. Such transactions are arguably more appropriately governed by explicit consent to receiving and paying for a benefit, not by Fair Play. Fair Play applies, I have argued, to situations that are importantly different from typical transactions: those where individuals are relevantly similarly situated in that they share an interest in benefiting from a collective good themselves, and an interest in not bearing the costs themselves. It is in light of this symmetry that failing to pay one's share amounts to unjustifiably making an exception of oneself.

IV. THE SHARED PREFERENCE VIEW AND MORALLY REQUIRED GOODS

On the Shared Preference View just sketched, fairness obligations are generated between those contributors and those free riders who share the FRP. And we have seen that whether or not a free rider can be attributed the FRP partly depends on whether she subjectively values the benefit enough to prefer to receive and pay for it rather than do neither, which goes some way to meeting Nozick's voluntarist objection.

At this point, however, someone might think we are giving *too much* weight to free riders' subjective views. Think back to Cullity's Recalcitrant Fisherman. In this case, fishermen band together to clean up the polluted lake they rely on for their livelihood. The one fisherman who protests that he has not asked for this benefit and will not participate in the common effort seems very unreasonable indeed. If people claim they would rather do without crucial goods like a clean lake in this case, should they be exempted from paying their share for these goods?³¹

The answer is no. This is because the good of an unpolluted lake is arguably a morally required one in this case, since it is stipulated that everyone's livelihood depends on being able to fish there. As mentioned in the previous section, when such goods are at stake, there exist not one, but two kinds of opportunities to free ride unfairly. One is found in cases of optional collective goods as well, namely the opportunity to internalize a valued good that others have produced. The second arises only in cases of morally required collective goods. It is the opportunity to have a collective duty that applies to one (alongside others) be discharged only by others. Where morally required goods are produced, then, it is possible to be guilty of both forms of unfair free riding (for example, if the recalcitrant fisherman secretly subjectively valued the benefit of a clean lake,

³¹This is an important worry facing any voluntarist view. See e.g. Arneson 1982, p. 632 directing this objection to Simmons's view.

he would be both internalizing a valued good for free *and* allowing others to discharge a collective duty that applies to him too). But it is also possible to be guilty only of the latter sort of unfair free riding, as the recalcitrant fisherman arguably is if he truly believes that having a clean lake is disvaluable or not worth the cost. And in this case, as we shall soon see, his subjective views do not exempt him from having Fair Play obligations. In the rest of this section I explain how the Shared Preference View can make sense of this second kind of opportunity to free ride.

Let me start by clarifying what is meant by the collective duty to produce certain goods. Think of goods like safe drinking water. Most of us would agree that safe water is a morally required good in the sense that there is a moral duty to ensure that people have access to it. This is arguably a general, agent-neutral duty that, in political communities like ours, usually falls on the state as a collective agent to discharge. No particular citizen has any more responsibility than any other to discharge it, all else equal. Moreover, it is a duty for which it is usually not practically or morally required that every member of our community act so as to discharge it, as it can be effectively discharged by only *some* people's bearing the relevant costs.

I propose that, out of a group of people who are all under a collective duty to produce a certain good, Fair Play obligations arise between those who act so as to discharge it and those who do not, and who can be said to share the Free Rider's Collective Duty Preference.

The Free Rider's Collective Duty Preference (CDP). I prefer that others discharge the collective duty that also applies to me.

Think of Recalcitrant Fisherman. The duty to collectively avoid dangerous lake pollution can be discharged even if some fishermen do not participate in the effort. This gives rise to a hierarchy of preferences that the free riders and the contributors share:

1. The collective duty is discharged without my contribution.
2. The collective duty is discharged and I contribute.
3. The collective duty is not discharged and I do not contribute.
4. The collective duty is not discharged despite my contribution.

One can be ascribed the CDP when one can be said to share the two top-ranking preferences in that order. And we can ascribe this ranking of preferences to anyone who falls under the scope of a collective duty, on the basis of the following two assumptions about the kinds of beings we are: (a*) that we are appropriate subjects of moral evaluation, and (b*) that we are prudentially rational.

Condition (a*) assumes that we are appropriate subjects of moral evaluation in the sense that we have a moral interest in seeing the moral duties and obligations

that apply to us discharged. Assuming we can conceive of individuals this way, the two scenarios in which the collective duty is fulfilled, with or without our contribution, are superior, from the point of view of morality, to the ones in which it is not.

Condition (b*) assumes we are prudentially rational. As before, this is just to say that, for fairness purposes, we can conceive of ourselves as the kinds of beings who would act so as to maximize our well-being. This makes it the case that, out of the top two scenarios, the one in which the collective duty is discharged *without our own contribution* is superior, from the point of view of prudence, to the one where we contribute; then, we are free to invest our resources elsewhere, while still seeing the demands of morality that apply to us satisfied.

Who exactly the obligation-bound free riders are depends on the particular collective duty at stake. The particularities of how we pick out the individuals on whom the duty falls in the first place are important, but this can be left aside for now. Once the appropriate scope of the collective duty has been established, free riders falling under it can be ascribed the CDP automatically. For the CDP, like the FRP, is not an actually held preference. Unlike the FRP, the ascription of the CDP to free riders does not rely on any subjective views held by them, not even in part. For we ought not to allow people's subjective preferences to play any role in determining the general duties they are held to. From the point of view of morality, it is better for each person that the duty that applies to them be discharged rather than not. And from the point of view of prudence, it is better for each that *others* discharge it rather than them. For the latter judgement we need not conceive of people as wanting to shirk their responsibilities. The collective duty simply requires that a particular outcome be secured, but says nothing about who exactly should secure it, so there is no obvious wrongdoing in failing to contribute if the outcome could well be secured by others.

This view, then, allows us to condemn the recalcitrant fisherman despite his negative appraisal of the value of having an unpolluted lake. His subjective views may prevent us from ascribing the FRP to him, for we ought to allow people the freedom to decide for themselves which goods they consider beneficial, and which benefits they wish to receive and pay for. However, we ought not to allow people's subjective views to affect the general duties they are held to. So, assuming the CDP can be ascribed to both the recalcitrant fisherman and to the other fishermen, he is bound by Fair Play to do his part in discharging the collective duty of avoiding dangerous lake pollution.

The Shared Preference View has the advantage of capturing all the cases of presumptively beneficial goods that Klosko is interested in (as I take it that presumptively beneficial goods are also morally required), without relying on the paternalistic claim that they are beneficial even for those who sincerely believe they are not and would be prepared to forgo them. For on the Shared Preference View we can fall back on the opportunity to unfairly free ride constituted by *the failure to share the costs of discharging a shared duty*. To denounce this sort of

unfair free riding there is no need to establish that the free riders *themselves* are benefited by the goods being produced. All we need to establish is that there is a collective duty to produce a good (for the benefit of *others*, if not also for one's own benefit), and that the relevant parties share the CDP.

This view, then, can also serve to ground political obligation, as theorists like Rawls and Klosko have argued, since governments normally provide a range of morally required goods like public defence or the rule of law. Even those who deny the value (for themselves) of such benefits may be enjoined to pay their share if they can be attributed the CDP. It is worth mentioning that, in reality, the obligation to pay for the morally required goods provided by the state is often overdetermined. More often than not, those who fall under a collective duty to participate in securing them also consider themselves benefited by them and can be said to share the FRP in addition to the CDP. However, if states provide goods that are desirable but not morally required (like, perhaps, public libraries), they can only appeal to Fair Play reasons to extract taxes from those who subjectively value the opportunity to use them, but not from those who sincerely believe themselves to be worse off by having this benefit available to them and having to pay for it compared to doing neither.

The Shared Preference View as it applies to morally required goods can also be understood to offer the normative explanation underpinning the view that authors such as Arneson, Casal, and Gheaus have espoused, according to which free riding is unfair at least when the goods at stake are morally required.³² This explanation, moreover, is integrated into the wider approach I have taken for identifying the wrongness of free riding as a matter of unjustifiably making an exception of oneself. In the previous section we saw how taking this wider approach can offer an explanation of why free riding in cases of discretionary goods can be wrong. In the next two sections we will see how it allows us to explain the cases in which free riding is not wrong.

Before that, consider a final illustration of the Shared Preference View. Recall the case of Enterprising Scientists, in which a group of scientists passing through town implement a water-purifying mechanism that saves the town's inhabitants from the risk of a mild chronic illness, and then seek to charge a reasonable price for their service. I argued that Cullity's view of unfair free riding would be unable to generate a clear answer in this case, because it is not obvious, on his view, which features of this situation should be salient for fairness purposes. On the Shared Preference View, one feature, in particular, makes all the difference: the fact that the scientists are providing a morally required good. Had they not implemented their technology, the townspeople would have been morally required to find some other way to ensure water safety. Here the question that I bracketed earlier becomes important, namely who can be said to fall under the relevant collective duty in the first place. Provided that the scientists fall under the

³²See Section I.

duty as well, the CDP can be ascribed to both the scientists and the beneficiaries of their technology. And since, by hypothesis, the scientists charge a fair price for their effort, the townspeople have Fair Play obligations to compensate the scientists for having discharged a collective duty for them.

Note that even though the scientists do not have an interest in enjoying the benefit of safe water themselves (because they are only passing through), here this fact does not undermine their Fair Play claims, as it did for the Enterprising Elves. For what matters here is whether there is a collective duty that both the producers (the scientists) and the free riders (the townspeople) fall under. Assuming that there is, Fair Play kicks in.

To take stock, I have provided a framework for identifying the morally relevant similarities between those who do their part in securing an optional collective good, or in discharging a collective duty, and those who do not, such that the failure of the free riders to do their part amounts to making an unjustified exception of themselves. Out of all the individuals of a group that receives a collective good, or that sees a collective duty satisfied, only those individuals who share the FRP, or the CDP, have fairness obligations to contribute to the production of the good. What the two contexts have in common is that not everyone who can be ascribed the relevant preference can satisfy it compatibly with everyone else's doing the same. If some people act in a way that frustrates their FRP or their CDP, thereby enabling others (the free riders) to act in line with *theirs*, then free riders ought to similarly frustrate that preference. Otherwise, they count as allowing themselves an unjustifiable privilege.

V. BENEFITS RECIPIENTS WHO LACK FAIR PLAY OBLIGATIONS

In the previous section we saw that free riders' subjective views play no role in whether we can ascribe the CDP to them. If others discharge a collective duty that applies to them too, it does not matter whether they believe they stand to gain from the goods being produced or whether they see the value of the duty being discharged. They will be bound to do their share regardless.

But now return to the version of the Shared Preference View that applies to the provision of optional collective goods. We may be unable to ascribe the FRP to some free riders because (i) the good is disvaluable to them; (ii) the price they have to pay exceeds the benefit; (iii) they have alternative sources for enjoying the same benefit, which they prefer; (iv) they prefer to forgo this benefit altogether in order to invest their resources into other projects; finally, (v) they raise legitimate moral objections against the benefit-producing arrangement. Those of whom any of (i)–(v) is true would have a complaint against being held to a Fair Play obligation.

These cases of 'innocent' free riding have often been acknowledged in the literature in some form or another.³³ The Shared Preference View offers a unified

³³ Arneson 1982, pp. 620–1; Simmons 2001, p. 20.

explanation for why they are all cases in which free riding is not wrong. For they are all cases in which the free riders' hierarchy of preferences is different from the one shared by the contributors and the unfair free riders.

Recall the top-ranking options in the hierarchy of preferences shared by the contributors and the unfair free riders:

1. I receive the benefit without bearing the benefits-producing costs.
2. I receive the benefit and I bear the benefits-producing costs.

If free riders sincerely raise complaint (i) or (v), their top-ranking preference presumably is:

1. I do not receive the benefit and I do not bear the benefits-producing costs.

Why? If my flatmates institute a scheme whereby each should take turns buying and playing jazz records in our flat, but I hate jazz, I am made worse off by having to listen to it even if I do not buy any records myself. Alternatively, if a good is provided through some form of injustice (say, its production infringes on some people's rights), I may not want any part in it. In either of these cases, I cannot be ascribed the FRP because my top preference is not to receive the good at all.³⁴

If the free riders sincerely raise complaints (ii)–(iv), their top-ranking preferences presumably are:

1. I receive the benefit without bearing the benefits-producing costs.
2. I do not receive the benefit and I do not bear the benefits-producing costs.

As illustration, think of Nozick's famous public address (PA) system example,³⁵ which Nozick tried to use to discredit the fairness principle altogether. Imagine a neighbourhood where some residents set up a PA system for entertainment. Each resident is expected to contribute by being in charge of it for a day per year, during which they can play records, make announcements, and so on. Many authors have agreed with Nozick that there is no moral obligation to do one's share in supporting this entertainment scheme, even if one voluntarily enjoys it, say, by opening one's window from time to time.

On the Shared Preference View there *can* be fairness obligations to participate in this entertainment scheme, but only for the free riders who can be ascribed the FRP. As a matter of fact, when such trivial, discretionary goods are at stake, it is often the case that the FRP cannot be ascribed to many who free ride, because condition (a) is not true of them: that is, they do not think the benefit is worth

³⁴Note that, in cases of benefits produced by unjust means, the Shared Preference View can support the view that Fair Play obligations do not arise in the first place, even when recipients prefer to receive them. This would be the case if there were a collective duty to oppose unjust benefits-producing schemes. I believe this to be the case, and that it would prevent Fair Play obligations from arising from such schemes, but I will not argue for this here. I thank an anonymous referee for this journal for bringing this point to my attention.

³⁵Nozick 1974, p. 93.

its cost, typically for the reasons given by (ii)–(iv). Since, unlike the contributors, they would be prepared to forgo the good of the PA scheme rather than pay for it, such dissenters do not share the relevant ranking of preferences, which means they do not share the FRP.

VI. BENEFITS PRODUCERS WHO LACK FAIR PLAY CLAIMS

I mentioned in Section I that Fair Play defenders have maintained that only those who produce a public good through some sacrifice, or net burden, have claims against the free riders. Yet it remains unclear what the relevant sacrifice or burden is. Similarly unclear is whether the intentions that contributors exhibit matter, and if so, what kinds of intentions they must be. The Shared Preference View allows us to shed light on both these issues and, thereby, to also identify those cases in which, although contributors benefit others who do not pay for those benefits, they lack Fair Play claims.

Consider the Flat Share case again, and a variation on it. In Flat Share, all three flatmates happen to prefer a high level of cleanliness in the common area enough that they would be prepared to do what was required to maintain this level if free riding was not an effective option (for example, if each lived alone and there was no one else around on whom they could rely to do the cleaning). I am assuming that for some reason they cannot make a cleaning agreement that all can trust will be respected. Two of the flatmates nevertheless do their share of maintaining the high level of cleanliness that all prefer. One does not. As a variation on this case, we can think of Flat Share II: this is the same as before, except here the cleanliness is maintained thanks to the fact that two flatmates enjoy exercising around the house with a duster, as their preferred way of staying in shape.

I submit that only the flatmates in the original Flat Share have Fair Play claims against the free rider, for reasons related to their intentions in bearing the costs of cleaning. I share this opinion with Casal and Williams, who claim that contributors have fairness claims only when they ‘bear costs, that they would not otherwise bear, *in order to* produce the good.’³⁶ They do not spend a lot of time explicating or justifying this claim, however. The Shared Preference View enables us to do just that.

First, to clarify the *object* of the requisite intention: contributors must be motivated by wanting to produce the relevant outcome (here, a very clean flat). They need not intend to benefit others by producing this outcome. They may only care about benefiting themselves by enjoying a clean flat. Second, *its place in the motivational structure* of the contributors: contributors must have the production of the collective good as their necessary motivating reason for action.

³⁶Casal and Williams 1995, p. 106. It is worth noting that, by contrast to my view, a necessary condition for Fair Play for Casal and Williams is that the goods be produced within an established cooperative scheme. So, for them, it is important not only that the contributors produce a benefit intentionally, but that they do so by purposefully following the rules of a benefits-producing cooperative scheme; *ibid.*

We can use the following counterfactual intentionality test for determining whether contributors aim for the relevant collective good in the sense just described. We can imagine asking contributors ‘If you came to believe that the costs you are bearing were not contributing to the production of the relevant collective good, would you still be willing to bear them?’. If the answer is no, this shows that contributors regard the production of the relevant good as a necessary motivating reason for bearing the relevant costs. Something like this test seems to be implied by Casal and Williams’s contention that producers do not have claims unless they bear costs they would not otherwise bear but for the production of the benefit.

The contributors in Flat Share pass the counterfactual intentionality test. If they came to believe that the burdens they are bearing would not lead to maintaining a spotless flat, they would cease to bear them. By contrast, the contributors in Flat Share II would presumably continue exercising with the duster regardless. This is a natural consequence of the fact that cleaning the flat was not their reason for acting in the first place.

Why must contributors exhibit this sort of intention in order to have Fair Play claims? The intentionality requirement as described is a necessary condition for the ascription of the FRP, which is to say, it is necessary for the ascription of the top two preferences in this order:

1. I receive the benefit without bearing the benefits-producing costs.
2. I receive the benefit and I bear the benefits-producing costs.

Contributors in Flat Share can be ascribed this hierarchy of preferences. They are bearing costs they are not prepared to bear *but for* wanting to maintain the flat clean. This involves investing, or indeed ‘redirecting’ time and resources from their usual activities towards producing the relevant outcome. But since the desired outcome is collective in nature, and since there are others around who also desire it and could produce it, each of these contributors could enjoy the benefit at no cost to themselves. As prudentially rational persons, they can then be ascribed the preference *not to divert resources from their usual pursuits towards producing an outcome that they may get anyway*. This is to say, they can be ascribed the preference to free ride.

By contrast, contributors in Flat Share II cannot be ascribed that hierarchy of preferences. Failing the counterfactual intentionality test means they would bear the benefits-producing costs anyway, in light of their other ends (here, a fitness aim). Their hierarchy of preferences, then, is this:

1. I receive the benefit and I bear the benefits-producing costs.
2. I receive the benefit without bearing the benefits-producing costs.

We can now explain what the relevant burden, or sacrifice, is, in virtue of which contributors have Fair Play claims against free riders. I submit that the relevant burden is the contributors’ acting against their free-riding preference.

Fair Play as I understand it applies in situations where it is not possible for each person to pursue their ambitions, in the way they want to pursue them, compatibly with everyone else pursuing *their* ambitions, and without this leading to a collectively suboptimal outcome. So, if the suboptimal outcome is to be avoided, some people must modify their ambitions, or divert resources away from them, as needed to produce the beneficial outcome. But since the desired outcome is collective in nature, each has the possibility to free ride. All else equal, it is in each person's prudential interest to take advantage of this possibility, since this means pursuing one's ambitions as usual while also getting the collective benefit. This is true of contributors who pass the counterfactual intentionality test: if their necessary reason for incurring the relevant costs is to produce a collective outcome that others could produce instead, it is plain it would be even better for the contributors if others did produce it instead. The relevant sacrifice that contributors incur in these conditions is acting in frustration of their FRP.

In contexts like Flat Share II, where there are enough people willing to bear the benefits-producing costs in light of their other ends (and who, therefore, fail the intentionality test), it is possible for each to pursue their ambitions compatibly with everyone else pursuing their own, and still avoid the collectively suboptimal outcome. The contributors in Flat Share II enjoy the same 'privilege' that free riders enjoy, which is to pursue their ambitions as normal, without losing out on the collective benefit.

So far I have argued that the FRP can be ascribed to contributors who are motivated only by wanting to contribute to the relevant beneficial outcome, but not to those who are motivated only by wanting to achieve unrelated ends they would pursue anyway. Now, the question is what we should think of contributors with mixed motivations, namely those who want to produce the relevant collective good, as well as to get some private benefit. We can imagine the flatmates to be aiming both at maintaining a clean flat and at other benefits at the same time, like being considered virtuous by the others, or getting some exercise. Can they still be ascribed the preference not to bear the costs of cleaning themselves?

If they pass the counterfactual intentionality test, the answer is yes. If it is true that, even factoring in these other benefits (or incentives), they would not bear the benefits-producing costs if they came to believe they were not needed to produce the relevant collective good, we can still ascribe the FRP to them. They still count as making some necessary changes to how they use their time and resources in order to enable themselves to bear the collective benefit-producing costs. They might change the means by which they pursue their usual ambitions (perhaps, if left to their own devices, they would rather jog instead of cleaning the flat for exercise), or they might acquire new aims and preferences which they consider conducive to producing the collective good (like acquiring a new fitness goal which could be well served by cleaning the house). Once again, these are changes that others could undertake instead of them. Once again, they could enjoy the collectively beneficial outcome without having to modify their preferences and

ambitions in any way, provided that enough others did instead. Insofar as they would not be willing to bear the costs of cleaning (even with private incentives available) unless they believed they were conducive to producing the relevant collective outcome, they still pass the counterfactual intentionality test, and hence they count as acting against the free riding preference when they do bear the costs.

VII. CONCLUSION

I have put forth a principle of Fair Play that is, first, justified by a systematic account of what makes free riding wrongful when it is wrongful; second, that takes seriously the voluntarist objection pressed by Nozick; third, that carves out a plausible scope of application that does not lead to implausible proliferation of obligations, and that is, finally, capable of condemning the intuitive unfairness of free riding across a range of benefits, both optional and morally required.

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