

## CIVIC RECIPROCITY WITHOUT POLITICAL OBLIGATION

Any decent mechanic does more for society by fixing cars than paying taxes.

David Schmidt, *The Elements of Justice*

Since you have been born and brought up and educated, could you say that you were not our offspring and our slave from the beginning...

Plato, *Crito*

### Section One: The Argument from Reciprocity

Fred owns an auto-dealership. He is kind to children, bakes brownies for his neighbors, and feeds stray cats. He also does not pay his taxes. Fred lives in a well-functioning democracy that respects human rights. His refusal is not an act of protest. He simply wants the money.

It is common to believe Fred acts wrongly *because he disobeys the law*.<sup>1</sup> According to many philosophers, such disobedience fails duties of *reciprocity*. As H.L.A. Hart wrote, “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.”<sup>2</sup>

Much about this claim is controversial. It is, for example, disputed whether citizenship generates all-things-considered benefits, and whether the receipt of benefits genuinely obligates.<sup>3</sup> However, my interest lies downstream of these classic debates. I am concerned with what happens if we accept that citizens have duties of reciprocity to those who comply with the law. Traditionally, this is treated as sufficient to show citizens are obligated to obey. Call this the:

#### Classic Account

1. *Principle of Participation*- When people jointly conduct a burdensome activity that produces significant benefits they have a right to the

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<sup>1</sup> There may be additional grounds for complaint, but I set those aside for our discussion.

<sup>2</sup> Hart, 187.

<sup>3</sup> Some—like Robert Paul Wolff—argue the principle violates citizens’ primary obligation to act autonomously. Others, like Robert Nozick deny the mere receipt of goods generates moral duties, or that citizens meaningfully accept the benefits they enjoy. While few disagree that obedience to the law is burdensome, M.B.E. Smith and others contend that non-compliance is not a failure of reciprocity because it does not add cost. Even many who accept the account in theory reject it as inapplicable to real-world citizenship. A. John Simmons, for example, holds that civic relations, do not rise to the level of a joint activity, while yet others contend voluntary non-state organizations could provide the relevant goods—and of course many like Tommie Shelby hold the distribution of benefits and burdens in extant societies is too unjust to generate such obligations for many citizens.

- participation of those who have benefited, so long as the distribution of benefits and burdens is sufficiently fair.
2. Many citizens jointly engage in the activity of complying with the law.
  3. Complying with the law is burdensome.
  4. The activity of citizens jointly complying with the law provides all residents of a just state with significant benefits.<sup>4</sup>
  5. The distribution of benefits and burdens in such a state is sufficiently fair.

*Therefore:* All residents in a just state are obligated to comply with the law.

In recent years a number of scholars—most notably Loren Lomasky, Geoffrey Brennan, and Jason Brennan—have called this conclusion into question. Working in the context of debates about voting, these scholars accept that duties of reciprocity are real, and are generated by civic acts like voting—but deny reciprocity requires citizens vote in turn. “Citizens,” they argue, “can have exceptional civic virtue despite disengagement with politics. Most ways to exercise civic virtue in contemporary liberal democracies do not involve politics, or even activities on the periphery of politics, such as community-based volunteering or military service.”<sup>5</sup>

The implication for the classic account is clear. If citizens can repay others’ votes without voting, there is every reason to think they can reciprocate others’ obedience without complying. Jianfeng Zhu has recently suggested just that. “The duty of fairness,” he argues, “on its own is incapable of preempting the citizen’s liberty to reciprocate fairly in ways *other* than obeying the law.”<sup>6</sup>

Call this the:

*The Contribution Theory*

Citizens can satisfy their duties of reciprocity by undertaking any action that contributes to the common good.<sup>7</sup>

Advocates argue citizens can satisfy this duty in any number of ways, including simply by owning or working in a for-profit corporation. Fred thus satisfies his duties of reciprocity by operating the auto-dealership.

My aim in this article is to reject both the classic account and its contribution rival. In their place, I will offer an alternative. Reciprocity requires citizens undertake their share of *civic acts*—a class more expansive than

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<sup>4</sup> Either in the form of benefits or in the satisfaction of a moral duty.

<sup>5</sup> Brennan (2012), 44.

<sup>6</sup> Zhu, 23 Though he never specifies how citizens can repay, Zhu’s examples make it clear this includes non-political acts.

<sup>7</sup> Brennan’s account of the common good requires that something promote the interest of most people without harming other’s interests or, if it does harm them, does so without exploiting them.

proponents of the classic account acknowledge, but more limited and distinctively political than advocates of the contribution theory recognize.

## Section 2: The Duty to Cooperate

There are two ways to understand the contribution theory. On one reading, advocates deny the principle of participation. On a second, their concern is with the characterization of the relevant joint activity as that of “complying with the law.”

Zhu clearly endorses the former reading but provides no positive account of citizens’ obligations. Jason Brennan defends a theory of these duties, but never directly consider a practice-based account. Geoffrey Brennan and Lomasky hint at the second reading, but never openly defend it. The first part of our task is thus to flesh out the contribution claim. As we will see, either reading suffices to undermine the classic account, but neither justifies the contribution theory.

Start with the first reading. Classic advocates hold citizens ought to obey the law because they profit from others’ compliance and reciprocity requires beneficiaries participate in joint activities from which they benefit. Jianfeng Zhu suggests the following case disproves this claim:

In a community where John lives, there is a cooperative scheme to clean communal walkways every Saturday afternoon... While John benefits from tidy communal walkways he...explicitly refuses to join the scheme... But soon after the scheme starts to run, John realizes he has been free-riding. He then comes up with the idea that he should make...cakes on Saturday afternoon and put them in the community center for his participating neighbors to enjoy. It turns out his neighbors love his cakes very much.<sup>8</sup>

Zhu contends John acts reciprocally even though he avoids the street-sweeping scheme. It follows that the principle of participation is wrong.

Zhu never clearly describes what reciprocity *does* require, but the case is suggestive. John satisfies his duty because he treats his neighbors *fairly*. The notion fairness grounds reciprocity is widely shared. Rawls, for example, wrote, “We are not to gain from the cooperative labor of others without doing our *fair* share.”<sup>9</sup> John acts fairly by “pay[ing]...for the benefits received from the scheme.”<sup>10</sup> This suggests fairness demands beneficiaries provide benefactors a fitting return. Call this the:

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<sup>8</sup> Zhu, 6.

<sup>9</sup> Rawls (1999), 96. Emphasis added.

<sup>10</sup> Zhu, 6.

*Principle of fitting-return:* When people jointly conduct a burdensome activity that produces significant benefits they have a right to a sufficient return by those who have benefited, so long as the distribution of benefits and burdens is fair.<sup>11</sup>

On this view, John satisfies the duty of reciprocity because his cakes provide his street-sweeping neighbors a sufficient return. Other advocates of the contribution theory endorse this principle. Jason Brennan, for example, writes, “Consider artists, entrepreneurs, small-business owners, venture capitalists, teachers, physicians, intellectuals, stock traders...each...contributes to fostering a worthwhile society...though good governance is a public good...it does not follow that every member of society benefiting from that good must contribute directly to it.”<sup>12</sup>

If you replace the principle of participation with the principle of fitting-return it no longer follows from the fact that citizens owe those who comply with the law that they must obey. What they owe is a *sufficient return*. Since many things are beneficial, we have reason to think citizens can provide such a return without obeying, voting, or engaging in other traditionally recognized political behaviors. Any contribution will do.

### **Section Three: The Case for a Duty to Participate**

Set aside for a moment questions about the content of a sufficient return to consider more closely the case for the principle of fitting-return. The principle is compelling. Fairness is central to our notion of reciprocity, and the intuition that John acts fairly is persuasive. Nonetheless, advocates of the classic account might defend the principle of participation on two grounds. Either they might insist fairness requires cooperation, or they might deny fairness explains citizens’ duties of reciprocity.

#### *A. The Fairness Complaint*

Recall Hart’s claim that citizens who obey “restrict their liberty.” Advocates of the classic account might contend that somebody who fails to join beneficial practices retains an unfair freedom of choice.<sup>13</sup> While participating neighbors commit to sweeping, John decides for himself how he wants to repay

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<sup>11</sup> Jason Brennan argues that paying your debts to society “requires that you provide sufficiently valuable goods and services to society in return.” Brennan (2012) 141.

<sup>12</sup> Brennan (2012), 128.

<sup>13</sup> Scott Lowe (2000) finds it significant the benefits in question entail a loss of liberty. George Klosko also suggests that loss of self-determination when one is required to perform a specific service is significant to accounts of fairness (Klosko, 1998, 65).

their efforts. If he no longer wishes to bake, he can switch to milkshakes, bottles of beer, magazines. John thus enjoys a liberty his neighbors lack.

And so he does. However, this is unfair only if John is similarly situated vis-à-vis his neighbors. He is not. They *chose* to participate in the scheme. John's obligations arise from receiving un-asked for benefits. He is thus in a genuinely different position. Our intuitions about ordinary cases reflect this divergence. If you *agree* to buy Oreos for a dollar, you have to pay in currency, not cigarettes. But if your friend helps you move, you acquire a more flexible debt. While you have to repay, you can choose to do so by babysitting or taking your friend's cat to the vet.<sup>14</sup>

Defenders of the principle of participation might respond that reciprocity requires beneficiaries submit to benefactor's demands. Lawrence Becker, for example, writes, "reciprocity---in returning good for good---can in principle require compliance with the specific demands made by one's benefactors."<sup>15</sup> Paired with the presumption benefactors demand cooperation, this would entail a duty to participate.

While there is reason to think beneficiaries should weigh benefactors' requests, it is improbable they are duty-bound to obey benefactor's commands. If I fly across the country to help you with your chemo treatments, I don't get to order you to break up with your romantic partner, or never wear the color green.

The claim that reciprocity requires acquiescing to such demands would be especially odd coming from proponents of the classic account, who accept that the provision of unrequested benefits triggers moral obligations. Such a claim would create an unjustified disparity. Benefactors create an obligation by providing a benefit the beneficiary did not request and over which they exercised no control but insist their beneficiary reply only in the ways they demand.<sup>16</sup>

#### B. *Critiques from Other Grounds*

This suggests beneficiaries need not join cooperative practices to act fairly. However, some critics deny fairness grounds reciprocity. Becker, for example, writes, "reciprocal exchanges are typically meant to sustain a particular practice or institution rather than productive social life per se...returns that are irrelevant to the special purpose so defined are not fitting, no matter how valuable they may be in general."<sup>17</sup> On these grounds, he concludes that "returns directly to the

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<sup>14</sup> As we will see, this criticism is misleading because those who comply retain equal freedom to choose.

<sup>15</sup> Becker (1980), 415.

<sup>16</sup> Zhu makes a similar point. (Zhu, 8).

<sup>17</sup> Becker (1990), 106. This can be phrased as an issue with fittingness or the content of sufficiency—the reply will be the same.

participants, in lieu of participation, would not be fitting because if generalized, they would undermine the institution.”<sup>18</sup>

This seem a questionable account of reciprocity. Among other things, the duty of reciprocity and the ongoing existence of a practice can pry apart. I owe my caterer a tip, my friend a ride to the grocery store, even when I know I am moving out of town. Yet my motive in such cases is not to *sustain* advantageous relationships.<sup>19</sup> Moreover, this suggests our obligations disappear if the ongoing existence of a practice is guaranteed. That is confusing in this context, since the classic account is motivated by a desire to explain what is wrong with free-riding. Free-riding is a concern only when the outcome is sufficiently secured that non-participation is expected to have no consequences.

Even if we do accept that reciprocity arises from an interest in sustaining practices, it does not follow every citizen has an obligation to take part. It is true that public health and safety would suffer if everyone refused to pay their taxes. But the same is true if we generalized the choice not to be an auto-mechanic, or a trash collector. That does not mean citizens have a standing duty to become all these things. At most, a concern for sustaining beneficial practices gives the benefited a reason to attend to the likelihood that *enough* people take up the practice.

Similar problems afflict claims stemming from other purported grounds. Some suggest duties of reciprocity are based in mutual respect<sup>20</sup> or in a concern for promoting the conditions for mature moral agents.<sup>21</sup> These run up against the same weaknesses. John treats his neighbors as equals who deserve value for the work they have done when he leaves cakes instead of sweeping. For all the reasons just discussed, an interest in creating the conditions of moral agency only provide reason to pay attention to whether enough people comply with the law. None of these grounds justify favoring the principle of participation over some version of the principle of fitting-return.

#### **Section Four: The Currency of Reciprocity**

So much for the classic account. Proving citizens have duties of reciprocity does not prove they have an obligation to obey. It merely shows they have a duty to provide those who do a sufficient return.

But that does not mean contribution theorists are correct that citizens can satisfy their obligations by being auto-mechanics, stock-brokers or small-business owners as the contribution theory holds. Indeed, this does not even tell us citizens

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<sup>18</sup> Becker (1990), 113.

<sup>19</sup> Here I echo Christie Hartley.

<sup>20</sup> Hartley (2014).

<sup>21</sup> Something like this underlays Becker’s virtue-based defense of reciprocity.

can justify disobedience. All it tells us is that citizens do not need to obey *because reciprocity requires they enter beneficial cooperative practices*. To say more, we need to flesh out what constitutes a sufficient return.

Among advocates of the contribution theory, only Jason Brennan explicitly defends an account of sufficiency. He writes, “to pay your debts to society does not always require that you sacrifice your self-interest. It just requires that you provide sufficiently valuable goods and services to society in return.”<sup>22</sup>

Call this the:

*Value-Added account of fitting-return*: A return is sufficient to satisfy a person’s duty of reciprocity when the good the original beneficiary provides the benefactor equals the good the beneficiary received.

Others suggest they endorse this account. David Schmidtz, for example, says, “There is no amount of money that Edison could have paid in taxes that would have begun to compare to what Edison contributed to society when he gave us the light bulb.”<sup>23</sup> Schmidtz’ point is that Edison has paid his contribution to society by developing the lightbulb *because his invention gave society more value than he had received*.

I want to argue this value-added account is a mistake. Instead, reciprocity requires accounting for *burdens* –the degree to which attempting to generate value sets back an actor’s interests.

Call this the:

*Burden account of fitting return*: A return is sufficient to satisfy a person’s duty of reciprocity when the original beneficiary has worked to the benefit of the original benefactor until such point as doing more would set back the interests of the beneficiary more than the burden the benefactor took on to her behalf.

Consider what triggers the intuition a debt is owed. Actions generate obligations of reciprocity *when they come at a cost*. Imagine seeing me laugh makes your day, or you have tickets for a concert you desperately do not want to attend. You will pay a substantial fine if nobody shows up (the band doesn’t want the venue to look empty) and I am the only person who will accept the tickets. It is odd to say I owe you a favor for the good you have done me. Laughing is no burden; taking the tickets leaves you *better* off. By contrast, I owe you if you hire a babysitter and travel across town to bring me my spare keys, even if I realized the

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<sup>22</sup> Brennan (2011), 58. Schmidtz makes much the same claim (2006), 93.

<sup>23</sup> Schmidtz, 91.

door was actually unlocked five minutes before you arrived. Benefits generate no need for reciprocation when they come at no cost, but taking on costs in an effort to benefit requires a response even if no advantage actually ensues.

Intuitions about the extent of debts suggest the same. Imagine you struggle mightily in a wheelchair for hours to bring me my wallet, saving me a minor inconvenience. The value-added approach says I owe you a minor good. But bringing you your wallet from down the block hardly seems a fair return if I am able bodied and the act costs me only a few minutes of easy strolling. The discordance is explained by taking duties of reciprocity to be defined by benefit-oriented *burdens*.

Conversely, imagine somebody provides a significant benefit at little cost. By founding the Carter Center (at no financial risk to himself) Jimmy Carter helped largely eradicate guinea worm, a disease that plagued millions. The value-added approach tells us benefited farmers owe Carter a similar life-saving benefit. But that is entirely beyond their powers. We would thus have to treat the farmers as permanently in debt, or beyond the reach of moral claims. A burden-based offers a more palatable assessment. On that calculation, the recipient of a water filtration device owes Carter a benefit only up until the point where her burden equals that he suffered on her behalf—a small demand.

Opponents might argue the burden account captures individual-level obligations, but not systemic or society-level duties. But that would require an explanation as to why the nature of reciprocity fundamentally changes in these contexts. None is on offer. Indeed, this claim seems ill-fitting in light of the fact that on the classic account citizens' obligations of reciprocity are said to be triggered by the fact that obeying the law is *burdensome*.

Jason Brennan raises three concerns about measuring fitting returns by burdens: it asks too little of the lazy, too much of the cheerful and encourages useless sacrifice.<sup>24</sup> These worries, however, fail to take seriously the people whose efforts are being assessed. The approach does ask more of those who love politics. However, they find the relevant actions *genuinely less burdensome*, just as paying \$10,000 in taxes is easier for a billionaire than a person in poverty. We ought to take psychological handicaps as seriously as physical ones.

This does not let the merely lazy or mal-intending off the hook. It is wrong to cultivate a habit of mind that makes beneficial acts painful so as to avoid having to do work. To do so is to take advantage of those who have done well by you. But not everybody who finds adding value hard has done so. It seems wrong to say a

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<sup>24</sup> Brennan, 2012.

person suffering from severe depression should be faulted for finding it challenging to get out of bed.

Nor does the burden approach value sacrifice for sacrifice's sake. It does not encourage citizens to simply subject themselves to painful experiences. Seeking out more suffering for less benefit would approach the duty from the wrong mindset.<sup>25</sup> The burden is not the goal, it is the limiting condition, the signal that you have done enough to benefit the person who acted to your benefit. Burdens are important because there are things required to bring about goods that simply are costly. We do something special for others when we take up such acts.<sup>26</sup>

### **Section Five: Reconsidering the Classic and Contribution Accounts**

Many actions lauded by advocates of the contribution theory fail to constitute fitting returns when measured against the burden standard. Think of the actor Mark Wahlburg, or the CEO of AIG an international insurance company. People enjoy Wahlburg's movies. He participates in an industry that employs directors, lighting experts, costume designers, makeup artists, and more. The CEO of AIG contributes to economic growth and helps people manage their exposure to risk. But he is paid forty-three million dollars a year for his troubles. Wahlburg earned sixty-eight million last year. Each is *better* off because they took on the work than if another had taken their place.

Obeying the law, and other traditional political activities, are different. Nobody pays you to go to the polls or call your senators. Taxpayers are not returned the money they send to the IRS with interest. Jurors are remunerated at rates that rarely approximate the salary and time they lose.

The contribution theory is thus wrong. Citizens cannot satisfy their duties of reciprocity simply by being investment bankers, guitar manufacturers or video-game developers, is mistaken. Political activities like obeying the law are capable of providing a fitting return for fellow citizens' burdensome compliance in a way these well-remunerated behaviors are not.

However, we must be careful. That the contribution theory proves wrong does not resurrect the classic account it sought to discredit. We have shown that citizens must take on the right amount of burdens to promote common goods. This

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<sup>25</sup> Whether citizens are obligated to do the most good possible is an important question I set aside for now.

<sup>26</sup> In this sense, non-burdensome actions can prove valuable by lightening the burdens required to bring about desired ends. Maurice Hilleman, who invented vaccinations for measles, mumps, hepatitis A and B, and so on did quite well as a result of his innovations, such that his work does not qualify as burdensome. However, the vaccines he produced lessened the burden he and others had to take on to promote public health.

means citizens have a *reason* to obey the law. It does not follow they are *obligated* to do so. Instead, their duty is best characterized as:

*The Civic Works Theory*

1. *Principle of fitting-return*: When people jointly conduct a burdensome activity that produces significant benefits they have a right to a sufficient return by those who have benefited, so long as the distribution of benefits and burdens is fair.<sup>27</sup>
2. *Burden account of fitting return*: A return is sufficient to satisfy a person's duty of reciprocity when the original beneficiary has worked to the benefit of the original benefactor until such point as doing more would set back the interests of the beneficiary more than the burden the benefactor took on to her behalf.
3. Many citizens jointly engage in the activity of complying with the law.
3. Complying with the law is burdensome.
4. The activity of complying with the law provides all citizens of a reasonably just state with significant benefits.
5. The distribution of benefits and burdens in such a state is sufficiently fair.

It follows citizens are obliged to undertake:

*Civic Works*: Actions that contribute to the common good and are burdensome, that is, set back the interests of the person who undertakes the act in comparison to the position she would enjoy were another to take up the act in her place

until such point as doing more would cost them more than complying with the law cost their co-nationals.

Contra to the classic account, lots of things besides complying with the law qualify as civic works, including some that take place in a for-profit context. A founder can organize her business as a profit-passing endeavor that donates all its proceeds to charitable enterprises underfunded by the tax system.<sup>28</sup> A business leader can develop private-regulatory structures that restrict his freedom to act in order to promote health, safety, and environmental protections.<sup>29</sup> And on and on.

Though a full working out of the civic works theory lies beyond our scope, a preliminary pass is enough to discount the conclusion that citizens are reciprocity-bound to comply with the law. Given the number of burdensome ways

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<sup>27</sup> Jason Brennan argues that to pay your debts to society "requires that you provide sufficiently valuable goods and services to society in return." Brennan, 2012, 141.

<sup>28</sup> Paynter, (2017)

<sup>29</sup> McAllister, 293.

citizens can contribute to the common good, it is prima facie plausible a citizen can satisfy her obligations to those who obey without doing so herself.

Both the classic account and the contribution theory thus prove wrong. Advocates of the latter were right to suggest citizens need not comply. But they were wrong to contend citizens can satisfy their obligations by adding value in any form. Selling guitar amps does not a fully-paid up citizen make.

## Section Six: Reconsidering Participation

Perhaps you remain convinced of the principle of participation. You insist beneficiaries have a duty to *participate in the cooperative practice from which they profited*. In the second half of the paper, I want to show you should nonetheless deny citizens have a standing duty to obey the law.

As I suggested earlier, there is a second way to understand the contribution theory. On this account, the issue is not the principle of participation but the contention that the practice citizens must join is properly characterized as “complying with the law.”

Traditionally, it is simply assumed that this is the practice citizens must enter. George Klosko – the most prominent defender of reciprocity-based duties to obey the law – acknowledges as such what he writes that he “treats the question of political obligation as interchangeable with why people should obey the law.”<sup>30</sup> This is what Hart has in mind when he talks of mutuality of restrictions. The contribution theory can be read as arguing for a re-description of this practice, one in which for-profit actions count as part of the same joint activity as legal compliance.

As above, I want to flesh out this view. There is much to be said on its behalf. However, advocates are once again wrong to characterize the practice as one citizens can join merely by contributing to the common good. Instead, the civic works view just described proves the best account of the practice in which citizens are already engaged.

Our interest is in a constructive interpretation of the practice citizens are duty-bound to join according to the classic account. Lots of elements of the nature of practices are up for debate. Fortunately, our focus is limited by the case at hand—one where participants are working together to produce a shared aim. This makes the practice a species of joint-action.

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<sup>30</sup> Klosko (2005), Fn. 1.

While many details of joint-actions are divisive, it is widely believed such actions are characterized by (at least) two features.<sup>31</sup> First, participants *aim* to bring about some end. Second, they have *plans*. Participants intend to together bring about those aims by mutually regulating their behavior towards the pursuit of their shared goal. Mattias Risse and Aaron James, for instance, hold that a social practice exists, “if the behavior of two or more agents is regulated over time, the coordination is maintained by generally or universally understood expectations, and these expectations are governed, if only in a decentralized way, and adjusted according to a shared organizational purpose.”<sup>32</sup> Because our goal is to define a practice citizens are said to be morally bound to enter, there is a third interpretive constraint, *justifiability*. We should understand the practice in such a way that it could generate moral duties.

One point of agreement in the debate between the classic theory and the contribution theory is that citizens participate in the relevant practice when they comply with the law. This serves as our starting point. Our interest is in reconstructing the practice in which citizens are engaged when they comply with the law.

#### A. *Analyzing our Practice*

We seek equilibrium between: the aims of those who comply with the law, their plans for the achievement of that aim, and the justifiability of those plans in light of their aim. Our interpretation is reconstructive in that it takes participants’ existing self-understanding and behavior as a starting point, but is open to revision.

Traditional debates about political obligation focus on the aims of the law, and the justifiability of obligating people to advance these aims. Those who hold reciprocity demands citizens obey the law contend the *aim* of law is the production of public goods like security, health, and a clean environment. The practice is thus *justifiable* to all because these goods are presumptively beneficial.

Let’s take these as a given. At issue is the plan by which this aim is to be achieved. A plan consists in an understanding of the actions that will be taken to bring about the aim and the role each party will play in doing so, as well as a meta-understanding about how these actions and roles should be revised if necessary. For our purposes an action will count as part of the plan if (a) it is undertaken with the intention of advancing the aim by aligning with the actions of others to this end, (b) participants explicitly expect others will take the action and plan their own behavior accordingly as they seek to advance the aim, or (c) participants implicitly expect others will do so as evidenced by developing

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<sup>31</sup> For example, these features are shared by the otherwise distinct accounts of joint action advanced by Michael Bratman, Margaret Gilbert, and Scott Shapiro.

<sup>32</sup> James, 37-38.

subplans for the achievement of the aim that rely on their doing so, or (d) the action reliably plays a part in generating the relevant outcome such that participants should orient their behavior around it given their commitments.

(i.)

Here's one way to understand the plan: citizens comply with the law. This is implicit in the classic account's narrow focus.

This is clearly an under-description.<sup>33</sup> There are many actions that advance public goods around which participants explicitly and implicitly plan.

Proponents of the contribution theory point to several. Janitors, venture capitalists, television executives, and pharmaceutical companies all expand access to health, security, economic and cultural opportunities. Each of us acts in expectation of their behavior—we anticipate medications will be available if we go to the drugstore, look to the news to learn about new health advancements. We would behave quite differently if we did not believe this to be the case.

But that is only the start. Consider the New York Stock Exchange (which, has been self-regulating since 1934), the North American Electric Reliability Corporation (which establishes standards for the power grid,) the Marine Stewardship Corporation (which develops guidelines for global fishing stocks), the American Society for Testing and Materials, the Financial Industry Regulatory Authority (which regulates brokerage firms and exchange markets), the Joint Commission (which accredits healthcare organizations) or the World Wide Web Consortium (which sets standards for HTML CSS and DML). Or take journalists who report on outbreaks or uncover scandals, or experts who choose to work on federal advisory commissions.

These actions are legally discretionary. They also play a significant part in promoting public goods—a part on which other participants rely. Consider what the Supreme Court says of the American Society of Mechanical Engineers:

ASME wields great power in the Nation's economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry...ASME can be said to

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<sup>33</sup> Even if we narrow our vision to non-elected officials, as I do here.

be “in reality an extra- governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.”<sup>34</sup>

To give just one example of the group’s impact, in 1884 there were 10,000 boiler explosions in the United States, to serious effect; in the second half of the twentieth century, there were almost none. Many historians attribute these differences to ASME-developed codes.<sup>35</sup>

Even the value of the law depends on legally discretionary behavior. There are over 1065 formal federal advisory committees, covering topics as broad as the census and as specific as wild burros. These groups provide invaluable expertise and field-specific awareness. The FDA, for example, has over 50 advisory boards, addressing everything from radiation-emissions to transmittable spongiform encephalopathy. The USDA depends on 4,000 such advisors. If these experts did not step up, law-obedience would often fail to advance public goods, since the laws would not be successfully designed to do so.

Ordinary citizens routinely promote the common good in legally discretionary ways. They pressure others to act accordingly.<sup>36</sup> They choose to work at non-profits because they believe those groups will help homelessness, reduce disease, or improve the environment. They devote their lives to research because they think understanding climate change or disease transmission will make a positive impact. They pay for newspapers they could read for free. They canvass. They call their Senators. They found non-profits when they think extant efforts are incomplete, and so on.

Popular discourse suggests any relationship between the production of public goods and corporate action is fortunate coincidence. Adam Smith, for example, writes, “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.”<sup>37</sup> But evidence suggests plenty of those who undertake legally discretionary actions that advance public goods *aim* to do so.

This is as true of persons acting within private standard-setting organizations or corporations as it is of NGOs or think tanks. As Edward Elgar writes, corporate ethics codes and private groups often represent, “recognition of

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<sup>34</sup> Am. Soc. of M.E.’s v. Hydrolveel Corp., 466 U.S. 556, 570 (1982).

<sup>35</sup> Centennial Standards Symposium (2002)

<sup>36</sup> “When standards are not legalized, we would expect accountability to operate chiefly through reputation and peer pressures, rather than in more formal ways.” Grant & Keohane (2005, 35) The past 15 years have witnessed a steady series of creative and often well-funded public campaigns that have sought to “name and shame” highly visible firms in North America and Europe through media exposes, demonstrations, and ‘ threatened or actual boycotts (e.g., Bartley 2003, 2005; Bendell 2004; Sasser et al. 2006; O’Rourke 2005).

<sup>37</sup> Smith, Book 1 Chapter 2.

the need to fill the regulatory vacuum.”<sup>38</sup> The ASME, for example, was founded in response to a 1910 boiler explosion that killed 58 people and injured over a hundred others.<sup>39</sup>

Of course, some organizations and corporations undertake self-regulation to avoid more stringent regulations or promote self-serving policies, just as some people obey the law to avoid fines or vote self-interestedly.<sup>40</sup> But empirical research suggests businesses regularly advance socially valuable causes (or what they believe to be such) in ways they do not expect to redound to their own benefit.<sup>41</sup> Those who do so *intend to advance the shared aim of producing public goods*.

Moreover, all these legally discretionary actions are things *around which other citizens prepare* in advancing public goods. Even lawmakers rely on these legally discretionary behaviors. The majority of regulatory standards, for example, are developed privately and incorporated into law by direct reference.<sup>42</sup> Indeed, the National Technology Transfer Advancement Act of 1995 requires federal agencies use standards adopted by voluntary consensus bodies absent a specific finding of inadequacy.<sup>43</sup>

In turn many private individuals and groups act because they believe lawmakers are not sufficiently able to generate public goods. Robert Steward notes, “because of limitations of budget, personnel, time and working experience, regulators cannot hope to develop in-house all the information and specialized expertise needed to make effective regulatory judgments in a timely fashion.”<sup>44</sup> The same is true of enforcement. In 2007, for example, the Consumer Product Safety Administration had one inspector to monitor over 15 million containers entering the United States through the Los Angeles ports, leaving the agency heavily dependent on manufacturers’ monitoring.<sup>45</sup> Studies show in any given year forty-five percent of the members of the National Association of Securities Dealers are inspected by the association, while only five and a half percent of non-members are inspected by the SEC.<sup>46</sup> Private actors step in because they believe the law are inadequate to ensure public goods---and lawmakers rely on their doing so.

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<sup>38</sup> Corporate ethics codes represent “recognition of the need to fill the regulatory vacuum.” Cragg (2005).

<sup>39</sup> Grant (2001).

<sup>40</sup> Kiessling et al., (2016).

<sup>41</sup> As Levy & Kaplan (2008) observe, it is surprising how readily large, multinational corporations (MNCs) have adopted CSR standards and reporting mechanisms, considering the lack of financial incentives or regulatory coercion.” Corporations who chose to divest from South Africa believed they would suffer negative market reactions, and did so. (Vogel, 2007).

<sup>42</sup> See Hamilton (1982) (noting that a study demonstrated that most regulatory standards were developed privately and made mandatory by incorporation by reference.)

<sup>43</sup> Strauss (2013).

<sup>44</sup> <https://www.epa.gov/laws-regulations/summary-national-technology-transfer-and-advancement-act>

<sup>45</sup> Balleisen, 455.

<sup>46</sup> See Braithwaite (1982).

It follows the plan for generating public goods is not best understood as “lawmakers make laws with which citizens comply.” Instead, our plan for promoting health, security, and other goods consists in:

a set of negotiated relationships...policy making, implementation and enforcement is dynamic, nonhierarchical and decentralized, envisioning give and take among public and private actors. Information, expertise, and influence flow downward, from agency and private actors; upward, from private actor to agency; and horizontally among private and public actors...these exchanges are simultaneous and ongoing.<sup>47</sup>

(ii.)

This speaks against the classic account. Nonetheless, it does not disprove that account’s conclusion that full participation requires citizens comply with the law. Even if the plan does not *consist* in citizens complying, it would still follow participation requires obedience if the plan requires everybody do so.

Here is one reason to think otherwise. Lawmakers don’t anticipate full obedience. Speeding laws are devised for eighty-five percent compliance.<sup>48</sup> Material-safety laws are calculated so that goods like elevators can handle loads several times more than the legal limits.<sup>49</sup> Environmental regulatory impact analyses accounts for expected non-compliance.<sup>50</sup> Perhaps the clearest evidence is that expenditure on policing and incarceration in the United States totals over \$180 billion a year.<sup>51</sup> This makes apparent the expectation that many people will be *made* to act as the law demands, not merely comply. Sociology speaking, our plan does not presume near-universal obedience.

Of course, compliance could still be a mandatory part of *good* participation. That lots of people cheat at Monopoly doesn’t make it consistent with the game.

More tellingly for our purposes, deviations are often treated as non-criticizable or even *desirable*. They are incorporated into the plan rather than treated as a failure that must be grudgingly accepted.

Consider, courts and other services are routinely funded by fines. Full compliance threatens their operation.<sup>52</sup> It is illegal in New York City for

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<sup>47</sup> Freeman (2000)

<sup>48</sup> Procedures for Establishing Speed Zones, Texas Department of Transportation (2015).

<sup>49</sup> Landmark Elevators, Inc. (2016)

<sup>50</sup> See for example Regulatory Impact Analysis Proposed National Emission Standards for Hazardous Air Pollutants for Mercury Emissions from Mercury Cell Chlor Alkali Plants.

<sup>51</sup> McCarthy (2017) In many cities this constitutes a large percentage of their total expenditure.

<sup>52</sup> Ford (2015).

pedestrians to cross streets unless the walk signal is active. However, the planned timing does not permit pedestrians to fully cross. Effective transit rests on pedestrians reasonably but illegally leaving the curb early.<sup>53</sup> Laws protecting endangered species are routinely designed in expectation of a degree of persistent poaching, such that unexpectedly high compliance creates problematic population growth.<sup>54</sup> Though jurors are told nullification is illegal, it is actively desired they do so on occasion. Roscoe Pound wrote, "Jury lawlessness is the great corrective of law in its actual administration."<sup>55</sup> Supreme Court Justice Abe Fortas declared, "Jurors are not computers; sometimes they do come in with a verdict of innocence when a computer would say that the facts add up to guilt and that the defendant should be punished. We recognize and tolerate this as a worthwhile anomaly in the rule of law."<sup>56</sup>

Certain types of non-obedience thus appear to be part of the plan for the achievement of public goods. Other types of disobedience are not part of our efforts, but are consistent with their success. Among these are likely to be just the sort of actions under discussion in debates about reciprocity.

(iii)

Compliance as such would still qualify as a necessary component of the practice if failing to obey proved inconsistent with taking the production of public goods as regulative. Actions that are expected and planned around, can still be inconsistent with the aim of activity. It is *expected* a few players will kick the soccer ball into their own team's goal (I did—I was a terrible player.) Doing so is even *permitted* by the game's formal rules. But knowingly kicking the ball into your goal is inconsistent with soccer's aim. If doing so is part of your plan, you are participating in some other activity that merely superficially resembles soccer.<sup>57</sup> That your colleagues plan around it does not make your doing so an instance of good participation.

The same would be true of disobedience if it were incompatible with taking advancing public goods as a regulative aim. This would be true, for example, if non-compliance prevented laws from playing their part in the plan. But it does not. A citizen can fail to comply and still take herself to be working to advance public goods without disrupting the role the law is playing in that

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<sup>53</sup> Aaron and Fried (2015). Also, transit expert Chris Panganillion (in private communication, June 15, 2018)

<sup>54</sup> Schulman (2006).

<sup>55</sup> Pound, in Frank (1949).

<sup>56</sup> Fortas, in Schefflin and Van Dyke (1980).

<sup>57</sup> Something like this underlies Dworkin's account of the law. The law is understood as the best reading of the society's shared aims, as exemplified by their texts, precedent, shared norms, and moral claims.

process. Indeed, she can grant the achievement of public goods the same weight in her decision-making as her complying compatriots.

Laws play three functions in advancing public goods: information, assurance, and coordination. Neither requires full compliance.

Laws are *informational* when they provide practically relevant data. Learning that heroin is illegal suggests it is more dangerous than Tylenol. Hearing a military draft has been implemented tells me there is need for people in the military, and so forth. When lawmakers have superior knowledge and reasonable incentives to truth-track, their directives inform citizens about reasons that apply to them.

It is clearly not part of our existing plan that citizens will do whatever they know best advances public goods. Reciprocal citizenship does not require you be a climate scientist just because you would be good at it, or not have children because it would help the environment. Thus the mere fact a citizen who disobeys might not do what most advances public goods does not entail she fails to grant that aim a regulative informational function in her decision-making.

Nor does her disobedience undermine the law's credibility as a source of information. High rates of non-compliance challenge this in two circumstances: when the content is about what citizens will do (which we will consider momentarily); and when non-compliance plausibly suggests many people are doubt lawmakers' knowledge. Much non-compliance signals no such thing. That people refuse to use double-entry bookkeeping because they want to hide theft does not lower the credibility of the law-embedded claim that the method reliably identifies accounting errors. Conversely, individuals can threaten the law's credibility while obeying by suggesting lawmakers are ill-informed or mal-intentioned.

Laws provide *assurance* when they ensure enough others join our efforts. Thomas Nagel writes of distributive justice, "[s]eparate individuals, however attached to [the elimination of morally arbitrary inequalities] have no motive or even opportunity, to conform to such patterns or institutions on their own without the assurance that their conduct will in fact be part of a reliable and effective system. The only way to provide that assurance is through some form of law, with centralized authority to determine the rules and a centralized monopoly of the power of enforcement."<sup>58</sup>

Such assurance requires *enough* people comply. But that doesn't make it inconsistent for a *given* individual to disobey. Citizens need merely attend to whether a sufficient number comply. Moreover, as Nagel suggests, the law has

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<sup>58</sup> Nagel, 115.

coercive force on its side. If too few people obey, lawmakers can force others to do so, or encourage them to do so out of fear of punishment.

*Coordination* is the law's most famous role, and the one that attracts the most attention from proponents of political obligation. George Klosko, for example, writes, "because the goods in question require large-scale, complex coordination, it cannot be assumed that people will organize themselves spontaneously. A general plan or planning agency must be able to issue commands and to assure compliance, if need be through coercion."<sup>59</sup>

Most discussions of coordination are about what we can call *simple coordination*. The classic example is traffic laws. In the case of public goods, however, the trick is not simply selecting one among obviously equivalent options. Instead, the challenge is knowing what features must align to produce a desired outcome, and what combinations are possible. Good healthcare requires nurse training align with high school preparation, emergency room machinery, the staffing systems of clinics, the support needs of doctors, reimbursement procedures, research in preventative care, the skills of physicians' assistants and more. It demands accurate responses to rapidly changing conditions. As the German general Helmuth von Moltke noted, "no battle plan survives first contact with the enemy." Other public goods are no different.

Success at such *complex coordination* doesn't just require authority. It demands expertise, awareness of numerous details, and the ability to update. As we learned earlier, lawmakers cannot do this on their own. Indeed, the ability is beyond the realistic power of any single centralized authority. As economists Ian Ayres and John Braithwaite note, "The empirical foundation for... analysis of what is good regulatory policy is acceptance of the inevitability of some sort of symbiosis between state regulation and self-regulation."<sup>60</sup> This is because "total control models of state activity fail to deliver desired outcomes."<sup>61</sup> As sociologists and legal professors Scott Burris, Peter Drahos, and Clifford Shearing write:

The venerable and conveniently simple notion that governance is the province of the independent state and its subdivisions operating through formally established, universal and reasonably stable legal modes is plainly insufficient to deal with the practical and conceptual tasks associated with good governance.<sup>62</sup>

The "plan" that must be followed to achieve the coordination that sustains public goods is thus not "the law." Rather, it is a dynamic scheme, ongoingly negotiated by a decentralized set of actors. The law is merely a sub-plan. It is thus

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<sup>59</sup> Klosko (2005), 24.

<sup>60</sup> Ayres and Braithwaite, 3.

<sup>61</sup>Scott, 455.

<sup>62</sup> Burris, 31.

possible for a person to take this scheme as their guiding aim when they act in alignment with its non-law related features.

For disobeying to be inconsistent with the law's role in coordination, full-compliance would have to be required for the coordinated outcome to succeed. But we have already seen that is not the case. The question of why citizens obey is a puzzle precisely because an individual's non-action won't change the outcome.

Nor is there a reason to think the law always picks out actions which require special levels of compliance. Among the bills President Trump signed in his first year of office were HR 2519, "requiring the department of the Treasury to mint and issue gold, silver, and half-dollar clad commemorative coins in recognition and celebration of the 100<sup>th</sup> anniversary of the American legion," and S. 1617 renaming a border control checkpoint in Arita, Texas after Javier Vega, Jr. It is hard to believe the failure to abide by these commands undermines public goods.

(iv).

At first glance, this supports the contribution theory. It suggests the practice in which citizens engage should be characterized as one of "advancing public goods" or perhaps "advancing public goods while remaining aware of and responsive to the actions of others doing the same." On that account, those who contribute to public goods fully participate.

That forgets the final element of our reconstruction—*justifiability*. Imagine the perspective of a citizen who complies with the law, pays her taxes, leaves her family and shows up when drafted. Imagine the CEO of AIG declared he need do no such thing because he expanded the economy. She might note it was *unfair* that she was burdened by participating in the practice, while he was advantaged. And she would be right. As our earlier discussion showed, fairness requires she receive a fitting return, as measured by the burden-account.

The contribution theory thus fails because it permits an unfair distribution of labor. Indeed, it fails at capturing features of our existing practice for just that reason—for example, the widespread belief that military families should be given special advantages in virtue of the special burdens they have taken up.

We might solve this problem by describing our practice as one where each citizen must both comply with the law *and* then do an equal share of other common good promoting work. However, since we lack a further explanation for why full compliance is required, this also proves unjustifiable. It demands citizens take up unnecessary, costly work.

It follows the classic and contribution accounts both poorly describe our existing practice. They inadequately capture how citizens behave, fail to capture what our aims require, and prove morally unjustified.

In contrast, citizens really do take on burdens to promote public goods. Their work really is necessary if we are to achieve our aims. That each does her share of that labor is only fair. “Doing your share of civic works” thus better meets our interpretive standards. If the principle of participation is correct, *this* is the practice citizens are obligated to join.

### **Section Seven: Objections**

Critics challenge public goods would fail if disobedience were generalized. And so they would. For those who accept the principle of fitting return, nothing follows. A return can be fitting without sustaining the practice from which obligation arose. I am obliged to take my turn washing dishes—and only my turn—even if we are to cease living together tomorrow. I am not obliged to remain your roommate.

Proponents of the principle of participation accept citizens should regulate their behavior to advance public goods. But as we have seen, it doesn’t follow citizens must do or avoid doing anything that would undermine the practice if universalized. They don’t need to become trash collectors, they simply to make sure *enough* people are doing so.

Critics might worry this is too epistemically challenging. How can citizens know if enough people are complying? But notice, this worry is non-unique. How can we know if enough people are setting up water-monitoring NGOs or funding the development of solar energy? If epistemic uncertainty generates a standing obligation to comply with the law, it creates a duty to undertake all legally discretionary civic work. That is not just undesirable, it is untenable. If we trust well-motivated citizens to assess whether they are obligated to be pollution monitors or design rules for the board of trade, we can trust them to sufficiently assess whether they are obliged to comply.

The challenge is easily over-weighted. Public goods include feedback loops that lower the epistemic demand. As Klosko writes, “National Defense is not provided for everyone once and for all. It results from *ongoing, long-term* patterns of cooperative activity.”<sup>63</sup> The law itself provides feedback in its informational role. If too few people obey, the risk of fines or jail increase. This warns citizens compliance levels are low. If anything, the epistemic difficulty involved is lower than deciding whether reciprocity requires you take up other form of civic works.

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<sup>63</sup> Klosko, (1987), 42.

## Conclusion

Theodore Roosevelt declared, “the first requisite of a good citizen...is that he shall be able and willing to pull his weight.”<sup>64</sup> Think back to Fred, the tax-avoiding car dealer. On the classic account, he acts wrongly. He ought to obey the law. On the contribution approach, he is doing just fine. By contrast, on civic works account, his status remains unknown. Did Fred choose only to sell cars that meet high environmental standards at a cost to his profit? Is he spending the rest of his time promoting public goods at a cost to himself? The right assessment of his civic debts rests on questions like these.

This discovery makes three contributions. First, it reveals an internal challenge for the claim that citizens have a duty to obey the law, one that persists even if advocates of the reciprocity view overcome long-standing concerns about the nature of reciprocity and its application to political communities.

Second, the view opens up new avenues for investigation that might permit theories of good citizenship to provide more concrete guidance. What constitutes an individual citizen’s’ share of civic work? What kinds of actions qualify? Such discussions promise to advance debates that have long appeared intractable. The question whether citizens have a duty to vote, for example has long been stuck between two unappealing positions—that citizens have a duty even though their vote will make no difference, or that they have no obligation to act at all. The civic works approach suggests a more compelling alternative. While *some* citizens may satisfy their duties of reciprocity by voting—indeed, may even be obligated to do so depending on how we flesh out the view—nobody *must* vote when it is clear their vote will do nothing. Those who opt not to vote still have responsibilities. They must take up their share of civic works in other forms.

Finally, the view is more responsive to the reality of political life. Typical accounts of good citizenship are incapable of accounting for the complexity of real regulatory processes. The civic works approach is flexible and nuanced enough to acknowledge the actual structure of political life, and can adapt to the non-ideal features of different political communities.

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<sup>64</sup> Huizenga (2011).

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