

# "THE PRINCIPLE OF FAIRNESS"

(Excerpt from Robert Nozick, *Anarchy, State, and Utopia* (1974), pp. 90-95.)

A principle suggested by Herbert Hart, which (following John Rawls) we shall call the principle of fairness, would be of service here if it were adequate. This principle holds that when a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission. 1 Acceptance of benefits (even when this is not a giving of express or tacit undertaking to cooperate) is enough, according to this principle, to bind one. If one adds to the principle of fairness the claim that the others to whom the obligations are owed or their agents may enforce the obligations arising under this principle (including the obligation to limit one's actions), then groups of people in a state of nature who agree to a procedure to pick those to engage in certain acts will have legitimate rights to prohibit "free riders." Such a right may be crucial to the viability of such agreements. We should scrutinize such a powerful right very carefully, especially as it seems to make unanimous consent to coercive government in a state of nature unnecessary! Yet a further reason to examine it is its plausibility as a counterexample to my claim that no new rights "emerge" at the group level, that individuals in combination cannot create new rights which are not the sum of preexisting ones. A right to enforce others' obligation to limit their conduct in specified ways might stem from some special feature of the obligation or might be thought to follow from some general principle that all obligations owed to others may be enforced. In the absence of argument for the special enforcement-justifying nature of the obligation supposedly arising under the principle of fairness, I shall consider first the principle of the enforceability of all obligations and then turn to the adequacy of the principle of fairness itself. If either of these principles is rejected, the right to enforce the cooperation of others in these situations totters. I shall argue that both of these principles must be rejected.

Herbert Hart's argument for the existence of a natural right 2 depends upon particularizing the principle of the enforceability of all obligations: someone's being under a special obligation to you to do A (which might have arisen, for example, by their promising to you that they would do A) gives you, not only the right that they do A but also the right to force them to do A. Only against a background in which people may not force you to do A or other actions you may promise to do can we understand, says Hart, the point and purpose of special obligations. Since special obligations do have a point and purpose, Hart continues, there is a natural right not to be forced to do something unless certain specified conditions pertain; this natural right is built into the background against which special obligations exist.

This well-known argument of Hart's is puzzling. I may release someone from an obligation not to force me to do A. ("I now release you from the obligation not to force me to do A. You now are free to force me to do A.") Yet so releasing them does not create in me an obligation to them to do A. Since Hart supposes that my being under an obligation to someone to do A gives him (entails that he has) the right to force me to do A, and since we have seen the converse does not hold, we may consider that component of being under an obligation to someone to do something over and above his having the right to force you to do it. (May we suppose there is this distinguishable component without facing the charge of "logical atomism"?) An alternative view which rejects Hart's inclusion of the right to force in the notion of being owed an obligation might hold that this additional component is the *whole* of the content of being obligated to someone to do something. If I don't do it, then (all things being equal) I'm doing something wrong; control over the situation is in his hands; he has the power to release me from the obligation unless he's promised to someone else that he won't, and so on. Perhaps all this looks too ephemeral without the additional presence of rights of enforcement. Yet rights of enforcement are themselves merely rights; that is, permissions to do something and obligations on others not to interfere. True, one has the right to enforce these further obligations, but it is not clear that including rights of enforcing really shores up the whole structure if one assumes it to be insubstantial to begin with. Perhaps one must merely take the moral realm seriously and think one component amounts to something even without a connection to enforcement. (Of course, this is not to say that this component never is connected with enforcement!) On this view, we can explain the point of obligations without bringing in rights of enforcement and hence without supposing a general background of obligation not to force from which this stands out. (Of course, even though Hart's argument does not demonstrate the existence of such an obligation not to force, it may exist nevertheless.)

Apart from these general considerations against the principle of the enforceability of all special obligations, puzzle cases can be produced. For example, if I promise to you that I will not murder someone, this does not *give* you the right to force me not to, you already have this right, though it does create a particular obligation to *you*. Or, if I cautiously insist that you first promise to me that you won't force me to do A before I will make my promise to you to do A, and I do receive this promise from you first, it would be implausible to say that in promising I give you the right to force me to do A. (Though consider the situation which results if I am so foolish as to release you unilaterally from your promise to me.)

If there were cogency to Hart's claim that only against a background of required nonforcing can we understand the point of special rights, then there would seem to be equal cogency to the claim that only against a background of *permitted* forcing can we understand the point of *general* rights. For according to Hart, a person has a general right to do A if and only if for all persons P and Q, Q may not interfere with P's doing A or force him not to do A, unless P has acted to give Q a special right to do this. But not every act can be substituted for "A"; people have general rights to do only particular types of action. So, one might argue, if there is to be a point to having general rights, to having rights to do a particular type of act A, to other's being under an obligation not to force you not to do A, then it must be against a contrasting background, in which there is *no* obligation on people to refrain from forcing you to do, or not to do, things, that is, against a background in which, for actions generally, people do not have a general right to do them. If Hart can argue to a presumption against forcing from there being a point to particular rights, then it seems he can equally well argue to the absence of such a presumption from there being a point to general rights. 3

An argument for an enforceable obligation has two stages: the first leads to the existence of the obligation, and the second, to its enforceability. Having disposed of the second stage (at least insofar as it is supposed generally to follow from the first), let us turn to the supposed obligation to cooperate in the joint decisions of others to limit their activities. The principle of fairness, as we stated it following Hart and Rawls, is objectionable and unacceptable. Suppose some of the people in your neighborhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? As it stands, surely not. Though you benefit from the arrangement, you may know all along that 364 days of entertainment supplied by others will not be worth your giving up one day. You would rather not have any of it and not give up a day than have it all and spend one of your days at it. Given these preferences, how can it be that you are required to participate when your scheduled time comes? It would be nice to have philosophy readings on the radio to which one could tune in at any time, perhaps late at night when tired. But it may not be nice enough for you to want to give up one whole day of your own as a reader on the program. Whatever you want, can others create an obligation for you to do so by going ahead and starting the program themselves? In this case you can choose to forgo the benefit by not turning on the radio; in other cases the benefits may be unavoidable. If each day a different person on your street sweeps the entire street, must you do so when your time comes? Even if you don't care that much about a clean street? Must you imagine dirt as you traverse the street, so as not to benefit as a free rider? Must you refrain from turning on the radio to hear the philosophy readings? Must you mow your front lawn as often as your neighbors mow theirs?

At the very least one wants to build into the principle of fairness the condition that the benefits to a person from the actions of the others are greater than the costs to him of doing his share. How are we to imagine this? Is the condition satisfied if you do enjoy the daily broadcasts over the PA system in your neighborhood but would prefer a day off hiking, rather than hearing these broadcasts all year? For you to be obligated to give up your day to broadcast mustn't it be true, at least, that there is nothing you could do with a day (with that day, with the increment in any other day by shifting some activities to that day) which you would prefer to hearing broadcasts for the year? If the only way to get the broadcasts was to spend the day participating in the arrangement, in order for the condition that the benefits outweigh the costs to be satisfied, you would have to be willing to spend it on the broadcasts rather than to gain *any* other available thing.

If the principle of fairness were modified so as to contain this very strong condition, it still would be objectionable. The benefits might only barely be worth the costs to you of doing your share, yet others might benefit from this institution much more than you do; they all treasure listening to the public broadcasts. As the person least benefited by the practice, are you obligated to do an equal amount for it? Or perhaps you would prefer that all cooperated in another venture, limiting their conduct and making sacrifices for it. It is true, given that they are not following your plan (and thus limiting what other options are available to you), that the benefits of their venture are worth to you the costs of your cooperation. However, you do not wish to cooperate, as part of your plan to focus their attention on your alternative proposal which they have ignored or not given, in your view at least, its proper due. (You want them, for example, to read the Talmud on the radio instead of the philosophy they are reading.) By lending the institution (their institution) the support of your cooperating in it, you will only make it harder to change or alter. 4

On the face of it, enforcing the principle of fairness is objectionable. You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on. You have, if anything, even less reason to demand payment if your activity that gives me the book also benefits you; suppose that your best way of getting exercise is by throwing books into people's houses, or that some other activity of yours thrusts books into people's houses as an unavoidable side effect. Nor are things changed if your inability to collect money or payments for the books which unavoidably spill over into others' houses makes it inadvisable or too expensive for you to carry on the activity with this side effect. One cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this. If you may not charge and collect for benefits you bestow without prior agreement, you certainly may not do so for benefits whose bestowal costs you nothing, and most certainly people need not repay you for costless-to-provide benefits which yet others provided them. So the fact that we partially are "social products" in that we benefit from current patterns and forms created by the multitudinous actions of a long string of long-forgotten people, forms which include institutions, ways of doing things, and language (whose social nature may involve our current use depending upon Wittgensteinian matching of the speech of others), does not create in us a general floating debt which the current society can collect and use as it will.

Perhaps a modified principle of fairness can be stated which would be free from these and similar difficulties. What seems certain is that any such principle, if possible, would be so complex and involuted that one could not combine it with a special principle legitimating enforcement within a state of nature of the obligations that have arisen under it. Hence, even if the principle could be formulated so that it was no longer open to objection, it would not serve to obviate the need for other persons' consenting to cooperate and limit their own activities.

#### Notes.

1. Herbert Hart, "Are There Any Natural Rights?" *Philosophical Review*, 1955; John Rawls, *A Theory of Justice* (Cambridge, Mass.; Harvard University Press, 1971), sect. 18, My statement of the principle stays close to Rawls'. The argument Rawls offers for this principle constitutes an argument only for the narrower principle of fidelity (bona fide promises are to be kept). Though if there were no way to avoid "can't get started" difficulties about the principle of fidelity (p. 349) other than by appealing to the principle of fairness, it would be an argument for the principle of fairness.

2. Hart, "Are There Any Natural Rights?"

3. I have formulated my remarks in terms of the admittedly vague notion of there being a "point" to certain kinds of rights because this, I think, gives Hart's argument its most plausible construction.

4. I have skirted making the institution one that you didn't get a fair say in setting up or deciding its nature, for here Rawls would object that it doesn't satisfy his two principles of justice. Though Rawls does not require that every microinstitution satisfy his two principles of justice, but only the basic structure of the society, he seems

to hold that a microinstitution must satisfy these two principles if it is to give rise to obligations under the principle of fairness.