

Moral law and human rights*

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THE purpose of this paper is to examine some of the basic terms in the discussion of the theme of this symposium on 'Ethics and the practice of medicine'. These terms can be grouped under the headings of moral law and human rights; for if these two terms are defined a great many of the principles, whose application to medical practice is in question, will have been examined.

A general paper like this in moral philosophy cannot avoid being controversial. In the positive sciences one might try to set out the general principles, which would then be applied in particular fields; and one would expect to find a general agreement on the principles, coupled possibly with difficulty, or even disagreement, in their application to particular cases. In ethics, on the other hand, the disagreement is most often upon the general principles themselves—and this is more than ever true today. Indeed, of philosophy generally it might be said that disagreement between the experts is upon the very fundamentals. In no other discipline would one expect to find equally eminent practitioners accusing each other of misunderstanding the entire nature of the endeavour they are engaged upon. This disagreement has shocked many. David Hume, in the eighteenth century, expressed his sense of scandal that his contemporaries should still be discussing the problems that perplexed the ancient philosophers; and many before and since Hume have expressed the same disappointment with the lack of progress in philosophy. The English medieval writer John of Salisbury recounts that when he re-visited Paris, 30 years after he had been a student there, he found the professors still discussing the same questions with the same fervour, the only difference being that they were now more firmly entrenched in their own views and less tolerant of the opinions of others. We may feel a little like those Paris professors of the twelfth century, profitlessly exploring the well-trodden ground of moral principles. But the task is inescapable. And in ethics, of all the parts of philosophy, each age must discover for itself and make its own the vital general principles.

Nowadays the main problem is simply stated: Are there any general moral principles at all? We may note the negative answer given to this question by some of the more influential moral philosophies of our day. Existentialism, with its offshoot situation-ethics, at least in its more extreme variants, denies the possibility of general principles and bids us look at each unique and unrepeatable moral situation. This does, indeed, mean the end of any science of morals—for science involves generalization; and it is a consequence that many today seem disposed to accept. I shall argue that we cannot do without moral principles and that to deny principles is to commit ourselves to deciding moral issues on grounds of sentiment or emotion—with disastrous consequences. The same can be said of the consequences of the impasse in much of twentieth century moral philosophy written in English resulting from an obsession with the so-called 'naturalistic fallacy'. If one may never, without logical fallacy, pass from descriptive or 'is' propositions to moral or 'ought' judgments then it looks as though moral principles are impossible. Rather, it is said, moral principles simply express emotion; and moral philosophy

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can hardly be scientific if it be the hallmark of science not to speculate beyond the facts, not to go from 'is' to 'ought'. Here is not the place to try to refute such approaches to moral principles. The aim is rather to explore positively the need for moral principles or standards in the face of such denial.

The Moral Law

What is moral law? At its most fundamental it is the principle that good should be done and evil avoided. This is the formal principle contained in all moral statement; but, as it stands, it gives us no concrete information. Concerning this formal principle it is enough to say that it is universally accepted. All cultures and all periods in human history are at one here; no people, no age has been discovered which does not make a distinction between what may and what may not be done, between right and wrong. This is perfectly consistent with variations of opinion, even the widest variations, concerning what, in the concrete, is good and what is evil. This possibility of variation in the concrete judgment is a vitally important point for current controversy—as we shall see. But variations in moral opinions and moral codes must not blind us to the underlying uniformity—that man has always expected or imposed standards in behaviour—that in human conduct not everything goes—that, in his reflections upon conduct, man has always considered that the standard, what *ought* to be, is more vital than what men actually do, the what *is* of human conduct.

Modern studies in cultural anthropology, in pre-history and history, in psychology, sociology and the social sciences have put us in a better position than our ancestors to appreciate how such standards in human behaviour are established and transmitted. In particular, we may understand the educational mechanisms by which parents transfer to their children their own ideals of conduct; or we may study the operation of psychological mechanisms like the Freudian Superego (which has something in common with the popular notion of conscience). But such studies, while they help to explain the presence of standards, do not explain them away. The question that must be answered remains: Why are standards necessary in human life? And the answer is not provided by suggestions about survival, progress etc.—unless survival and progress can be seen to be good and objects that *ought* to be secured. We are ultimately driven back to the question: What is human life for? Unless we are in a position to say what is the meaning of human life we cannot meaningfully speak about the standards of human conduct.

This brings us to the difficulty in the elaboration of a system of moral standards, the difficulty that is so pointed by the allegations of a 'naturalistic fallacy' in deriving 'ought' propositions from 'is' statements. Our age, in any case, finds it difficult to sustain any moral absolutes, to make assertions in moral matters that can be held to be true, or binding, irrespective of circumstances.

Historically speaking, the elaboration of moral norms or standards has taken many forms. Primitive peoples tend to have hieratic codes, rules thought to have been handed down by the gods, or by great legislators representing the gods. Adherents of religions such as Christianity believe themselves bound by rules of conduct, either directly revealed or thought to be the consequences of the tenets of the religion. But one can argue to standards apart from the question of religion. Here we come to that perennial concept, the natural law.

The idea of a natural moral law is having a bad press in our day. But it can scarcely be denied that it has been one of the most vital conceptions in moral philosophy. It has a long history, going back, in some shape or form, almost to the beginnings of philosophy itself. It has been subjected to the most rigorous criticism; it has had its periods of influence and acceptance as well as its periods of eclipse and rejection; but it has invari-

ably survived to bury its undertakers and demonstrate that the funeral orations have been premature.

We may well ask why the natural law should be so widely rejected in our society, whether the eclipse in our generation is not perhaps the final one. It would be prudent to remember the long vitality of the notion—and to ask whether it is properly understood by those who reject it. It seems to me that what is rejected by many of our contemporaries—and rightly rejected—is an absurd travesty of the natural law, not the genuine concept. Time does not allow the fuller exposition of this argument. But it may be recalled that it was the eighteenth century rationalism that brought the natural law to the point of absurdity, when it could be argued that the international postal system or the Constitution of the Holy Roman Empire were parts of the natural law. If there were nothing more to the natural law than such absurdities it would long have gone the way of the views that the earth was flat or was the centre of the universe. The carry-over of some features of this natural law of the Age of Reason, the product of an excessive confidence in the power of human reason and a naive conception of human nature, has made it too easy for some of our contemporaries to reject the natural law. An example of this is found in the so-called biological argument against contraception. Contraception may be against the natural law; but this is hardly shown by the fact that contraception ‘frustrates a faculty’. The argument requires to be a great deal more sophisticated. And—here is the point—the use of the *simpliste* argument has only had the effect of discrediting the natural law. The law of nature needs to be saved from such friends!

What is the concept of the natural law that is valid today? May I suggest that, at its most general, it is none other than the natural expression of that universal need for standards in human conduct, of which I have been speaking? Let us take a contemporary manifestation of the need for standards by which to judge human conduct—the Nuremberg War Crimes Trials. There has been a great deal of debate about these trials, particularly about their status—Do they or do they not constitute an addition to customary international law? That technical issue is not of interest to us here. What is of interest is the insistence that people accused of crimes against humanity, of crimes against world peace and so on should not go free or be considered innocent on the plea that those actions were sanctioned by the law of the land. Likewise with the Eichmann trial. Whatever the rights and wrongs of the kidnapping of Eichmann and however questionable the jurisdiction of the Israeli courts to try him, what was universally agreed was that his plea that, in exterminating Jews, he was simply carrying out orders could not be allowed. There are some things that one may not do even if ordered to do them by the highest human authority. Indeed, when we reflect upon it, the grossest tyranny has often taken care to don the trappings of legality. To say that this manoeuvre cannot set aside morality, that what is wrong is wrong no matter who orders it to be done, is simply to appeal to a law over and above human law. It is to say that ‘man’ or ‘human nature’ may make demands and set standards; it is tantamount to an appeal to the natural law.

What is this natural law? In a context of theism, where God must be considered as the Supreme Legislator and where human nature, made in God’s image and likeness, has a special dignity, the problem is eased. God the Creator must, under penalty of self-contradiction, will that his creatures, man included, follow out the laws of the nature he has given them. For inanimate and irrational creatures these are the patterns of behaviour we recognize and formulate as the Law of Gravitation, the laws of physics and chemistry, the laws of biological growth and development, the laws of instinctual behaviour etc. The analogous law for human nature is the moral law—by reason of man’s freedom, his capacity to disobey.

But even if there were no God—let us make our own the ‘impious hypothesis’ by

which Hugo Grotius, in the seventeenth century, tried to take natural law out of the sphere of the theological controversies that were, he thought, obscuring its reality—even if there were no God we should still be able to argue to the necessity for moral standards. This is all the more essential in an age which is more consciously atheistic than any preceding one.

Let us consider 'man'. Suppose we say that the standard of human behaviour is 'what is befitting to man', we are using a commonplace phrase and one that may appear uninformative. It does, of course, leave open the concrete question of what, in practice, befits man. That question can be answered only when 'man' or 'human nature' is probed and understood. One would say, for instance, that certain kinds of treatment may be suitable to animals but not to man e.g. the kinds of drug-testing that involve the death of a healthy animal in order to study the effect of a drug. Why would such experimentation be inappropriate in the case of man? Surely because man is of a different nature from animals. It seems that one of the few moral convictions universally held by mankind is just that; that taking a human life is not the same as taking an animal's. This is not to say that taking a human life is never justified; it is not even to say that many have not considered the justification easy; but the justification is different from that appealed to in the case of the slaughter of an animal. If human nature is 'different' in this way we are, in fact, talking about the natural law.

Or let us distinguish between 'reasonable' and 'unreasonable' conduct. This, too, is a criterion that is in common usage. Some kinds of medical treatment we may regard as reasonable, others so unreasonable as to be unlawful. This, also, takes us back to a conception of man. One of the most important ways of describing man is as a 'rational nature'. A rational or reasonable nature demands to be treated as such, to be treated, in fact, as a person and not as a thing. What, in the concrete, is the reasonable way of dealing with man may not be evident or easily discoverable; and what appears at first sight to be reasonable—like the termination of the life of a patient suffering in an incurable disease—may, upon further consideration and taking the long view and after examination of all the implications, turn out to be unreasonable. Such difficulty, which makes mistake possible in our analysis of the demands of reason in a given case, far from encouraging us to abandon the criterion, should have the effect of making us more careful and conscientious in our efforts to apply it.

The admission that our knowledge of the natural law may be imperfect may appear a damaging one—but only if we delude ourselves into thinking that we should know all that is in human nature. That was the error of rationalism. We can have no guarantee that our assessment of a moral situation is the correct one; we are no more infallible in moral than in other matters. And, as in other matters, we should be prepared to revise our views when they are shown to be wrong. Part of the trouble is that we realize that morality is not just like other affairs in life and we are persistently tempted to rely upon some kind of recondite 'moral sense'. But 'moral sense' must, in the last analysis, be a rational judgment. We may well have a 'feel' for morality, as an experienced practitioner may have a 'feel' for diagnosis. But the diagnostic feel, like the moral verdict, is less a genuine feeling than the result of a reasoning which, by long practice and familiarity with the terms involved, is easily, even intuitively, made. Feeling alone is not enough to guarantee a diagnosis; only full and proper assessment of the case will do that. So, too, with our moral judgment. And we may well have a suitable humility when we are faced with the complexity of moral situations—notably, I may say, with those presented by the advances in medical science.

Might I summarize my defence of the natural law as the arbiter of right and wrong in human conduct by trying to meet what many contemporary writers—as well as many in the past—offer as the fatal objection? It is a fact that the most extreme moral variations have been and are observable, throughout history and over the face of the globe.

There is practically no form of human behaviour that has not been accepted, or at least condoned, in some cultural or historical situation—cannibalism, the exposure of infants, abortion, murder, homosexuality, euthanasia—and condemned in other situations as an outrage upon human nature. (It is, of course, a question of variant moral judgments made in good faith and not simply the fact that men behave differently, sometimes observing, sometimes disobeying a moral law that they recognize.) Does all depend, as Pascal said, upon the degrees of latitude and longitude so that what is lawful on one side of the Pyrenees is unlawful on the other? Does all depend upon the culture and the historical epoch into which we are born? Is all in morals relative?

That an invariable moral law is not inconsistent with such variations may be seen when due weight is given to the following three considerations. 1. As we have already seen, there is no reason for assuming that men are infallible in their moral judgments; and if individuals can be wrong so, too, can whole peoples. 2. Moral judgments cannot be made with the same sort of detachment as other judgments; they tend to be emotionally-loaded precisely because in our conduct we must accept or reject them. Prejudice, self-interest and a host of other non-rational factors easily make us see the situation differently; and if we are candid with ourselves we will recognize our great capacity for self-deception in moral situations. Perhaps it might be more succinctly expressed as 'feeling compounding the fallibility of our judgment'. The feelings are not necessarily disreputable—as they would be in the case of the man who rationalizes his dishonesty. They are frequently laudable. How many actions have been justified because of a wish to avoid suffering for others, for instance? But how disastrous when the moral judgment about what may be done to relieve suffering is based solely upon feeling and runs against principle? 3. There is, in moral situations, an in-built contingency. No situation ever exactly repeats itself—this is the facet of truth fixed upon by situation-ethics, and it is an insight that cannot be denied. There are typical situations, that is, situations that differ from each other only in trivial and morally irrelevant circumstances; and about such situations the kind of generalization that is necessary if ethics is to be scientific is possible. But the universal generalizations of speculative and positive science are not possible in morals. Aristotle long ago pointed out that it is a sign of lack of education to accept probable reasoning from a mathematician or to demand from a rhetorician (add, from a moralist) scientific proofs (*Nicomachean Ethics*, I, 3). Circumstances do not alter the truth that the angles of a triangle are together equal to two right angles; but circumstances may alter the judgment that we should return goods held in trust (the goods may be a sword and the owner may be out of his mind—the example is one of the oldest in the history of moral philosophy). This difference must be reflected in the moralist's judgment. But it does not mean that he cannot make a judgment that is valid and invariable as long as circumstances remain the same.

Human rights

The second part of my subject can be dealt with more briefly than the first, not because the notion of human rights is easier than that of moral law but because it is so closely connected with natural law that I have had, perforce, to anticipate much of what I want to say of human rights.

A right is a moral claim, a power to demand of others or of society an act or a forbearance. It is a moral power; for we clearly distinguish between might and right saying that Might is not Right. The fact that a person is defenceless, for example, confers no right upon the stronger to take his life; the fact that I may be physically unable to resist attacks upon my property in no way justifies the thief or the burglar. Right has, as its correlative, duty. If I have the right to life this must imply that others have a duty to refrain from attacks upon my life; if a doctor has a right to his fee the patient

must have a duty to pay it; if a patient has a right to treatment, the doctor has a duty to provide it. Right has no meaning unless the corresponding acts or forbearances are duties; and conversely. If someone kills me justifiably that is another way of saying that I have forfeited my right to life—by being a condemned criminal, for example, in a state which exacts capital punishment for my crime.

Right (and duty) is connected with law. Our citizen rights, for instance, can usually be related to a particular law, like the right to vote given by the electoral law. But do we not have more fundamental rights, not now merely as citizens but as men? Or, to put the matter in the kind of terminology we have been using, does not the natural law confer rights (and impose duties) in virtue of the fact that we are human, that we are individuals of 'human nature'?

This is the aspect of the natural law that has most appeal for our age. It can be argued very strongly that the doctrine of human rights, from its first modern formulations in the writings of John Locke, of Jean-Jacques Rousseau, of Tom Paine and others, a formulation that found its way into such signal documents as the American Declaration of Independence, the American Constitution, the French Revolutionary Declaration of the Rights of Man, is really the natural law in another guise; for the function of the doctrine of natural rights, that of putting a curb on the power of princes and governments, is the traditional function of the natural law. Our age, too, has needed a curb to put on tyranny—we have seen the example of the War Crimes trials. One might say that it was the reaction against the abuses of human rights that made possible the United Nations' Universal Declaration of Human Rights of 1948 and other declarations that stem from it. But despite declarations human rights are still being violated. The campaigns against apartheid, against the exploitation of the American negro, the civil rights movements nearer home, take their justification from a conception of human nature and human personality.

But are rights absolute? Are they inalienable? The right to life is not lost simply because one's skin is black. Nor is it lost because one is defenceless. But suppose one is unborn? Or likely to be deformed? Or a burden to oneself and to others? These are some of the matters already raised in the first part of this paper. It can be seen that the problems are the same, whether viewed from the standpoint of natural law or from that of human rights; and it can also be seen that emotion must not be allowed to decide such issues—the principles must be set out as clearly as possible and the difficulties in applying them squarely faced.

Medicine has presented modern man with clusters of problems involving moral law and human rights. Sir Peter Medawar, in an article in *Encounter*, pointed out that medical science provides the information about what can be done and what results may be foreseen from what is done; but the *decision* about what is to be done is a matter for the moralist. And, as Rostand said, science has made us gods before we were worthy to be men. One can easily be frightened by the divorce between the enormous technical possibilities of today and the moral rules that should govern all human activity, the power put into our hands without any automatic guarantee that it will be put to moral uses. Here surely the need for sound moral principles is underlined.

It must, however, be confessed that the principles elaborated by the moralist often look rather abstract; it is frequently easily said of them that they fail to meet the case. Here, it seems to me, there are two things that need to be said. Firstly, it simply will not do to say that we must follow our conscience. Of course we must follow our conscience, do what seems right to us in the situation. Conscience is our only guide. But—here I draw a consequence from what has already been said—conscience, as a judgment of right and wrong, is not infallible. The thug, whose conscience tells him that he must strangle people as a religious duty, is surely wrong. He may be blameless; but that is

another matter. We can no more accept his judgment as an objective statement of right and wrong than we can accept the remedies and superstitions of a quack as medical science. The moralist, like the medical scientist, is concerned with the objective truth, with the question of principle, and only indirectly with the possibility of the mistaken application of principle. Secondly, it seems clear that moral principles must be set out in an understandable way in order that the individual may apply them to the situation that confronts him. It is understood that the application will take account of the extreme complexity of the situation—no moral situation is altogether simple. But the principles, being generalizations, may indeed appear simple, or abstract, or unreal or academic. I think of some of the principles, although it is doubtful if that is the best term to use of them, that are called into play in medico-moral situations e.g., the Principle of the Double Effect, the Principle of Totality, the Principle of Proportionality and the rest. These principles, together with certain capital distinctions such as those between ordinary and extraordinary means (of preserving life) or between formal and material cooperation (in wrongdoing), are sort of moral summaries or check-lists, for use in certain kinds of situation, to aid a conscience in coming to its decision about the rightness or wrongness of certain lines of action. To take some examples—we cannot say offhand whether abortion is good or evil until we have made sundry distinctions between the spontaneous and the procured, the direct and the indirect abortion. The difference between the directly produced abortion and that resulting from surgery or treatment for, say, carcinoma or hypertension, must be evident. Apropos of the direct abortion the moralist should be detached from the emotional situation—the trauma, for instance, of the unmarried pregnant girl—and concern himself with the basic question of whether the termination of foetal life is consistent with the respect demanded for human life. It is assumed that the foetus is a life and not simply an appendage of the mother. And it may well be that the *only* effective guarantee for respect for human life is the absolute prohibition of the direct taking of innocent life. Again, one may consider the case of euthanasia. The distressing and sympathetic circumstances are easily envisaged. But the point at issue, which cannot be decided upon emotional or sentimental grounds, is whether it is right for a sufferer to choose his own death or for another, the doctor, to provide it. Here, again, the only guarantee for respect for human life may well be the absolute prohibition of the taking of life. And so, too, with a host of other thorny moral issues in medicine—the principles must be present and must be objectively applied if there is to be any scientific moral evaluation of what is to be done.

In conclusion we may reflect that the word ‘casuistry’ has often gathered unpleasant connotations. But there is an acceptable meaning for casuistry—the rational application of moral principles to cases. In this sense it is inescapable. Every moral agent is a casuist in this sense; and the medical practitioner more than most needs to be aware of his principles and conscientious in their application.
