of being accepted by the people whose interests are at stake. But this requirement seems to imply that we must leave intact at least those interests that are central to each person's capacity to recognize and understand moral reason and moral argument (again, his freedom of thought and expression and maybe certain basic interests in material well-being). Otherwise, we are indicating that we do not take seriously the task of justifying our action *to him*. This line of argument has obvious Kantian roots, and reaches back through Kant to some of the more interesting ideas involved in the 'Social Contract' tradition, in particular the idea that social and political arrangements should not be such as to rule out the hypothesis that they were set up by universal consent.[52] With these roots, the argument also has connections with John Rawls's conception of justice and political morality. If the role of a theory of justice is to enable all the members of a society to justify to one another their shared institutions and the basic arrangements for the distribution of benefits and burdens in their society, then maybe we can find the first principles of such a theory in the conditions and presuppositions of the activity of justification itself.[53] These ideas have yet to be elaborated in a fully convincing theory. But it is, I think, in this area rather than in pious lip-service to slogans about human dignity or autonomy that the real importance of theories of rights is to be found.

[52] See *Kant's Political Writings*, ed. Hans Reiss (Cambridge, 1970), pp. 79 ff.; John Locke, *Two Treatises of Civil Government*, ed. Peter Laslett (Cambridge, 1960), II, chs. 9 and 11; Thomas Hobbes, *Leviathan*, ed. C. B. MacPherson (Harmondsworth, 1968), pp. 268–71.

[53] John Rawls, *A Theory of Justice* (Oxford, 1971). For a most useful recent statement of Rawls's conception, see 'Kantian Constructivism in Moral Theory' (The John Dewey Lectures), *Journal of Philosophy*, 77 (1980), esp. pp. 517 ff.

I

NATURAL RIGHTS

MARGARET MACDONALD

DOCTRINES of natural law and natural rights have a long and impressive history from the Stoics and Roman jurists to the Atlantic Charter and Roosevelt's Four Freedoms.[1] That men are entitled to make certain claims by virtue simply of their common humanity has been equally passionately defended and vehemently denied. Punctured by the cool scepticism of Hume; routed by the contempt of Bentham for 'nonsense upon stilts'; submerged by idealist and Marxist philosophers in the destiny of the totalitarian state; the claim to 'natural rights' has never been quite defeated. It tends in some form to be renewed in every crisis in human affairs, when the plain citizen tries to make, or expects his leaders to make, articulate his obscure, but firmly held conviction that he is not a mere pawn in any political game, nor the property of any government or ruler, but the living and protesting individual for whose sake all political games are played and all governments instituted. As one of Cromwell's soldiers expressed it to that dictator: 'Really, sir, I think that the poorest he that is in England hath a life to live as the greatest he.'[2]

It could, perhaps, be proved hedonistically that life for most ordinary citizens is more *comfortable* in a democratic than a totalitarian state. But would an appeal for effort, on this ground, have been sanctioned between 1939 and 1945? However true, it would have been rejected as inefficient because *uninspired*. Who could be moved to endure 'blood and toil, tears and sweat' for the sake of a little extra comfort? What, then, supplied the required inspiration? An appeal to the instinct of national self-preservation? But societies have been known to collapse inexplicably almost without waiting to be physically defeated. No

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[1] Freedom of Speech and Worship; Freedom from Want and Fear of all persons everywhere.

[2] *Clarke Papers*, Vol. I, p. 301.

doubt there are several answers, but at least one, I suggest, was an appeal to the values of freedom and equality among men. An appeal to safeguard and restore, where necessary, the Rights of Man, those ultimate points at which authority and social differences vanish, leaving the solitary individual with his essential human nature, according to one political theory, or a mere social fiction, according to another.

All this sounds very obscure. And the doctrine of natural law and of the natural rights of man is very obscure—which justifies the impatience of its opponents. It seems a strange law which is unwritten, has never been enacted, and may be unobserved without penalty, and peculiar rights which are possessed antecedently to all specific claims within an organized society. Surely, it will be said, the whole story now has only historical interest as an example of social mythology? Nothing is so dead as dead ideology. All this may be true,[3] but nevertheless the doctrine is puzzling. For if it is sheer nonsense why did it have psychological, political, and legal effects? Men do not reflect and act upon collections of meaningless symbols or nonsense rhymes.

There seems no doubt that the assertions of certain Greek philosophers about the 'natural' equality of men and their consequent right to freedom caused intelligent contemporaries to become uneasy about the institution of slavery;[4] that doctrines of the primal Rights of Man were significantly connected with the French and American Revolutions. It even seems probable that the Communist Manifesto owed much of its success not to its 'scientific' analysis of capitalist society, but to its denouncement of a wage slavery degrading to human nature and its appeal to all workers to assert their equal brotherhood. A major crime of capitalist society for Marx and Engels was that it had destroyed all ties between men other than naked self-interest and had 'resolved personal worth into exchange value'. Only after the proletarian revolution would *human* history begin and men treat each other as equal human beings, not as exploiter and exploited. The object of the transfer of class power is to end class power and to reveal or restore some essential human nature at present disguised by distorting social relationships.

So even if the theory were dead, the puzzle of its effects would remain, and suggest that it had been introduced to solve a genuine problem of political and social philosophy. And it is interesting, therefore to inquire what the problem was; whether it has found an alternative solution, or is bogus and insoluble.

[3] It is not quite true, for the doctrines of natural law and consequent natural rights flourish in Catholic social philosophy. See e.g., Jacques Maritain, *The Rights of Man and Natural Law* (1944).

[4] Cf. *The Open Society*, by K. Popper; Vol. I, esp. pp. 58–9.

Why should people have supposed, and, as I believe, continue to suppose, in obscure fashion, that they have 'natural' rights, or rights as human beings, independently of the laws and governments of any existing society? It is, surely, partly at least, because no existing social compulsion or relationship is self-justifying. Men may always ask why they should or should not endure it and expect a convincing answer. And, ultimately, it would seem, they may challenge the dictates of all existing governments and the pressures of every society if they find them equally oppressive, i.e. if they deny what the individual considers his fundamental 'right'. But since, *ex hypothesi*, this 'right' is denied by every existing law and authority, it must be a right possessed independently of them and derived from another source. If, for example, the laws of every existing society condemn a human being to be a slave, he, or another on his behalf, may yet hold that he has a 'right' to be free. What sort of proposition is this and how is such a claim to be justified? This seems to be one most important problem which the doctrine of natural rights tried to solve.

I. NATURAL LAW, NATURAL LAWS, AND NATURAL RIGHTS

There are an indefinite number of different types of propositions and other forms of human utterance. I will, for my present purpose, notice three. (1) Tautological or analytical propositions which state rules for the uses of symbols or which follow from such rules within a linguistic or logical system. (2) Empirical or contingent propositions which state matter of fact and existence. Propositions which describe what does or may occur in the world and not the symbolic techniques employed in such description. (3) Assertions or expressions of value. With the help of this classification it may be possible to show that some of the difficulties of the doctrine of natural rights have been due to an attempt to interpret propositions about natural rights as a curious hybrid of types (1) and (2) of the above classification.

For in the theory which conceived of natural rights as guaranteed by a 'natural' law, the position seems to have been considered in the following terms. The 'rights' of a slave, for example, derive from the laws in any society which govern his artificial status as a slave. Yet he has a right to be free. But in virtue of what status and law? Only it seems by his status of being a man like other men. This, however, is a natural status as opposed to one determined by social convention. Every man is human 'by nature'; no human being is 'by nature' a slave of another human being. There must then be an essential human nature which determines this status and a law governing the relations of human

beings as such, independently of the laws of all particular societies concerning their artificial relationships. But essential human nature or human 'essence' is constituted by those properties expressed in the definition of 'human being'. And what is expressed or entailed by a definition is a necessary or analytic proposition. Thus by a logical fusion of the characteristics of two different types of proposition, statements about natural rights tended in this theory to be represented as statements of a necessary natural fact.

But not even statements of actual fact, necessary or contingent. For another element intervened. Though the slave had an actual 'right' to be free, he was not free, because no existing law admitted his right. Because laws were imperfect, he was not free though he 'ought' to be. And this introduces into the situation a further complication. By nature a man must be that which yet he is not. Or, it follows from the definition of 'human being' that every human being is, or must be, free—or possess any other 'natural' right though his freedom is ideal and not real. But the ideal as well as the actual is natural fact.

Thus the Roman lawyers, who gave the earliest authoritative statements of the doctrine of natural law, conceived of natural law as an ideal or standard, not yet completely exemplified in any existing legal code, but also as a standard fixed by nature to be discovered and gradually applied by men. And the good lawyer kept his eye on this standard as the good gardener keeps his eye fixed on the prize rose which he is hoping to reproduce among his own blooms next summer. For the lawyer, said Ulpian, is not merely the interpreter of existing laws but also the priest or guardian of justice, which is the 'fixed and abiding disposition to give every man his right'.[5] This standard was not determined by men, but by nature, or, sometimes, by God. It was fact and not fancy.

The institution of slavery showed that no existing code was perfectly just. Thus natural *law* is only imperfectly realized in positive *laws*. And it is significant that the lawyers and later political theorists who adopted this distinction talked only of natural *law* and the Law of Nature, never of natural laws and laws of nature. But what is most characteristic of legal codes and systems is that they consist of many laws, regulating the different relations of men as debtor and creditor, property owner and thief, employer and employee, husband and wife, etc. But natural law was not conceived of as consisting of ideal regulations corresponding to all positive laws. Indeed, if completely realized, some positive laws would be abolished, e.g. those relating to slave owner

[5] Sabine, *History of Political Theory*, p. 170.

and slave. Natural law was not formulated in natural *laws*. It was neither written nor customary and might even be unknown. But it applies, nevertheless, to all men everywhere whether they are debtors or creditors, masters or servants, bond or free. But how is it discovered?

It seems probable that the concept of natural law influenced the later conception of natural or scientific laws obtained by the observation of natural events. For natural law applies impartially to all men in all circumstances, as the law of gravitation applies to all bodies. But the law of gravitation is obtained by deduction from the observation of bodies in sense perception. Are the Law of Nature and the Rights which it implies known by similar observation of the nature of man? The law of gravitation, like all other laws of nature, states a uniformity exemplified in the actual movements of natural bodies. But no existing society may observe the Law of Nature or guarantee natural rights. These cannot, therefore, have been learned from observation of the actual practice of existing societies.

'Man is born free', said Rousseau, 'and everywhere he is in chains'. What sort of proposition is this? Did Rousseau observe ten or ten million babies immediately after birth and record when the infant limbs were manacled? The law of nature applies to all men equally, said Cicero. For if we had not been corrupted by bad habits and customs 'no one would be so like his own self as all men would be like others'.[6] But since everyone everywhere has been subjected to customs and laws of varying degrees of imperfection, where and when did Cicero observe our uncorrupted nature? How can facts about nature be discovered which have never been observed or confirmed by observation?

The answer lies in the peculiar status given to reason in the theory. Propositions about natural law and natural rights are not generalizations from experience nor deductions from observed facts subsequently confirmed by experience. Yet they are not totally disconnected from natural fact. For they are known as entailed by the intrinsic or essential nature of man. Thus they are known by reason. But they are entailed by the proposition that an essential property of men is that they have reason. The standard of natural law is set by reason and is known because men have reason. But that men have reason, i.e. are able to deduce the ideal from the actual, is a natural fact. And it is by having this specific, and natural, characteristic of being rational that men resemble each other and differ from the brutes. Reason is the great leveller or elevator. According to Sir Frederick Pollock, 'Natural law was conceived to be an ultimate principle of fitness with regard to the

[6] *Laws*, Bk. 1, 10, 28–9 (trans. C. W. Keyes).

the nature of man as a rational and social being which is, or ought to be, the justification of every form of positive law.'[7] 'There is, in fact', said Cicero, 'a true law—namely right reason—which is in accordance with nature, applies to all men and is unchangeable and eternal.'[8] And for Grotius, too, 'The law of nature is dictate of right reason.'[9]

Let it be admitted that all or most human beings are intelligent or rational. And that what is known by reason is certainly true. But, also, what can be known by unaided reason is what *must* be true, and perhaps what *ought* to be but never what *is* true of matter of fact. And statements which are logically certain are tautological or analytic and are neither verified nor falsified by what exists. Statements about what ought to be are of a peculiar type which will be discussed later, but it is certain that they say nothing about what *is*. Because it is confused on these distinctions, the theory of natural law and natural rights constantly confounds reason with right and both with matter of fact and existence. The fact that men do reason is thought to be somehow a natural or empirical confirmation of what is logically deduced by reason as a standard by which to judge the imperfections of what exists.

II. THE SOCIAL CONTRACT

Though the Roman lawyers conceded that man might be entitled by natural law to that which he was denied by every positive law, they do not seem to have related this to any particular doctrine of legal and political authority. But in the seventeenth century the doctrines of natural law and natural rights were directly connected with the contract theory of the State. Because he is rational, Locke emphasized, man is subject to the law of nature even before the establishment of civil society. And he never ceases to be so subject. By right of the law of nature men lived in a state of freedom, equality, and the possession of property 'that with which a man hath mixed his labour'. True, this picture differs from that of Hobbes whose 'natural man' is constantly at war, possesses only the right to preserve his life, if he can, but usually finds it short and nasty. Nevertheless, even Hobbes's unpleasant savages have sufficient sense, or reason, to enable them to escape their 'natural' predicament. Locke's natural individualists are peaceful property-owners who nevertheless sometimes dispute and want an impartial arbitrator. Civil society is formed by compact that natural rights may be better preserved. Man did not enter society, said Paine, to become

[7] The History of the Law of Nature, *Essays in the Law* (1922).
[8] *Republic*, Bk. 3, p. 22 (trans. Sabine and Smith).
[9] Bk. 1, ch. 1, sect. x, 1.

worse than he was before by surrendering his natural rights but only to have them better secured. His natural rights are the foundation of all his civil rights. It was essential for the social contract theorists to deny that all rights are the gift of civil society, since existing societies denied certain rights which they affirmed. In order to claim them, therefore, it was supposed that they had been enjoyed or were such as would be enjoyed by rational creatures in a 'natural' as opposed to an established society. The Declaration of the French Revolutionary Assembly enunciated the Rights of Man and of citizens; the two being distinct.

His 'natural' rights attach, by virtue of his reason, to every man much as do his arms and legs. He carries them about with him from one society to another. He cannot lose them without losing himself. 'Men are born free and equal', said the French Assembly, 'in respect of their *natural* and *imprescriptible* rights of liberty, property, security, and resistance of oppression.' The framers of the American Declaration of Independence declare as self-evident truths that all men are created equal, that they are endowed by their creator with certain inalienable rights, among which are Life, Liberty, and the Pursuit of Happiness, and that governments are instituted to secure these rights.' The free people of Virginia proclaimed that the rights with which men enter society they cannot by any concept deprive themselves or their posterity of.

These were self-evident truths about a state which men might have left or not yet attained but which was 'natural' to them as opposed to accidental or conventional. A person is accidentally a native of England, France, America; a Red Indian, negro, or Jew. His social environment is determined by accident of birth. He may change his family by adoption and his citizenship by naturalization. And he is accidentally, or conventionally, a doctor, soldier, employer, etc. These conventionalities determine his civic and legal rights in a particularly society. But he is not accidentally human. Humanity is his essence or nature. There is no essence of 'being Greek' or 'being English'; of 'being a creditor' or 'being an old-age pensioner', all of which properties, however, might be the basis of civil rights. The nature of man determines his 'natural' rights. And since, though not accidental, it also seemed to be a matter of fact that men exist and are rational, rights claimed on account of this fact seemed also to be natural and to follow from the essence of man, even though they might be denied. But the essence of man is expressed in the definition of the word 'man'. So that the statement 'Men have natural rights' is equivalent to the prepositional function 'x is human entails x has natural rights', which is tautology. Again, the ambiguity inherent in the theory between what is necessary

and what is natural is revealed. It is hard to believe that a barren tautology generated the ardours of that time in which it was good to be alive and to be young was 'very heaven'.[10] But what is meant by the nature or essence of man by 'being rational' or 'having reason'?

III. RIGHTS AND REASON

'"Man" equals "rational animal" Df.' is the fossil preserved in logic textbooks since Aristotle. It was never accompanied by any adequate account of the meaning of 'rational', which was, however, generally assumed to include the capacity to abstract and generalize by the use of symbols in speech and writing; to formulate and understand general propositions and laws and to perceive necessary or logical connections between propositions. It is true that Aristotle himself used the term 'reason' more widely to include the practical intelligence manifested in various skills and the appropriate behaviour of the well-trained character in various moral situations. But usually reason is conceived to be the capacity by which men understand abstractions. This was certainly Kant's view. To be rational is to be able to think abstractly. And the most characteristic activities of men, including living in societies, are due to this capacity to use reason. It is peculiar to men and shared by no other animal. Hence the basis of the equality of men for the exponents of natural law, and of their intrinsic worth for Kant is the fact that they all have reason. Men share all other characteristics with the brutes and might themselves have them in varying degrees, but reason was alike in all men, it was man's defining characteristic. Hence it is the foundation, too, of his natural rights, as a human being.

It is probable that other animals do not abstract and generalize for they do not use symbols. But neither is it true that all men do this with equal skill. Reason, in this sense, is no less or no more invariable among human beings than sense perception, and the rights of man might as well depend upon eyesight as upon rationality. But if the term reason is to be used more widely to include non-verbal manifestations of intelligence, knowing-how as well as knowing-that,[11] then intelligence does not set an unbridgeable gulf between men and other living creatures. For in many activities, those, i.e. of hunting, building, fighting, and even social organization, other creatures display skill, adaptability of means to ends, and other characteristics which are evidence of intelligence in men. And as for social life, ants use tools, domesticate other insects, and live a highly organized social life. Bees and wasps manage

[10] Wordsworth in *The French Revolution*.

[11] See Presidential Address to the Aristotelian Society by Professor G. Ryle, 1945, and *The Concept of Mind* (1948), ch. 11.

their affairs by a complicated system of government. Moreover, many of the characteristic human activities depend very little on abstract thought or use of symbols, e.g. cooking, sewing, knitting, carpentry. And at a higher level the excellence of pictures, sculptures, symphonies, is not due to their expression of abstract thought. But where in this variety are we to find the constant factor by which to determine human rights? What passport will admit to the Kingdom of Ends?

What may be agreed is that only at a certain level of intellectual development do men claim natural rights. Savages do not dream of life, liberty, and the pursuit of happiness. For they do not question what is customary. Neither do the very depressed and downtrodden. It was not the slaves who acclaimed their right to be free but the philosophers and lawyers. Marx and Engels were not themselves wage slaves of the industrial system. It is generally agreed that the doctrines of natural rights, natural law, and the social contract, are individualistic. To claim rights as an individual independently of society, a man must have reached a level of self-consciousness which enables him to isolate himself in thought from his social environment. This presupposes a considerable capacity for abstraction. To this extent natural rights, or the ability to claim natural rights, depends on reason. But it does not follow from this that reason alone constitutes the specific nature of man or that the worth of human beings is determined solely by their IQs. Reason is only one human excellence.

But the Aristotelian dream of fixed natures pursuing common ends dies hard. It reappears in M. Maritain's account of the Rights of Man cited earlier. He says, for example,

> . . . there is a human nature and this human nature is the same in all men . . . and possessed of a nature, constituted in a given determinate fashion, man obviously possesses ends which correspond to his natural constitution and which are the same for all—as all pianos, for instance, whatever their particular type and in whatever spot they may be, have as their end the production of certain attuned sounds. If they do not produce these sounds, they must be attuned or discarded as worthless . . . since man has intelligence and can determine his ends, it is up to him to put himself in tune with the ends necessarily demanded by his nature.[12]

And men's rights depend upon this common nature and end by which they are subject to the natural or 'unwritten' law. But this seems to me a complete mistake. Human beings are not like exactly similar bottles of whisky each marked 'for export only' or some device

[12] loc. cit., p. 35.

indicating a common destination or end. Men do not share a fixed nature, nor, therefore, are there any ends which they must necessarily pursue in fulfilment of such nature. There is no definition of 'man'. There is a more or less vague set of properties which characterize in varying degrees and proportions those creatures which are called 'human'. These determine for each individual human being what he *can* do but not what he *must* do. If he has an IQ of 85 his intellectual activities will be limited; if he is physically weak he cannot become a heavyweight boxer. If a woman has neither good looks nor acting ability she is unlikely to succeed as a film star. But what people may do with their capacities is extremely varied, and there is no one thing which they must do in order to be human. It would be nonsense to say: 'I am not going to be an actress, a school teacher, a postman, a soldier, a taxpayer, but simply a human being.' For what is the alternative? A man may choose whether he will become a civil servant or a schoolmaster, a conservative or a socialist, but he cannot choose whether he will be a man or a dog. There is certainly a sense in which it is often said that in the air-raid shelter or in the battle people forgot that they were officers or privates, assistant secretaries or typists, rich or poor, and remembered only that they were all human beings, i.e. all liable to die without regard to status. But that is always true. They did not remember that they were something *in addition* to being the particular human being they each were and which they might be without being any particular individual. And, as individuals, when the 'All Clear' sounded, each returned to pursue his or her own ends, not the purpose of the human race. Certainly, many human beings may co-operate in a joint enterprise to achieve a particular end which each chooses. But that cannot be generalized into the spectacle of all human beings pursuing one end. There is no end set for the human race by an abstraction called 'human nature'. There are only ends which individuals choose, or are forced by circumstances to accept. There are none which they *must* accept. Men are not created for a purpose as a piano is built to produce certain sounds. Or if they are, we have no idea of the purpose.

It is the emphasis on the individual sufferer from bad social conditions which constitutes the appeal of the social contract theory and the 'natural' origin of human rights. But it does not follow that the theory is true as a statement of verifiable fact about the actual constitution of the world. The statements of the Law of Nature are not statements of the laws of nature, not even of the laws of an 'ideal' nature. For nature provides no standards or ideals. All that exists, exists at the same level, or is of the same logical type. There are not, by nature,

prize roses, works of art, oppressed or unoppressed citizens. Standards are determined by human choice, not set by nature independently of men. Natural events cannot tell us what we ought to do until we have made certain decisions, when knowledge of natural fact will enable the most efficient means to be chosen to carry out those decisions. Natural events themselves have no value, and human beings as natural existents have no value either, whether on account of possessing intelligence or having two feet.

One of the major criticisms of the doctrine of natural rights is that the list of natural rights varies with each exponent. For Hobbes, man's only natural right is self-preservation. More 'liberal' theorists add to life and security, liberty, the pursuit of happiness, and sometimes property. Modern socialists would probably include the right to 'work or adequate maintenance'. M. Maritain enumerates a list of nine natural rights which include besides the rights to life, liberty, and property of the older formulations, the right to pursue a religions vocation, the right to marry and raise a family, and, finally, the right of every human being to be treated as a person and not as a thing.[13] It is evident that these 'rights' are of very different types which would need to be distinguished in a complete discussion of the problem. My aim in this paper, however, is only to try to understand what can be meant by the assertion that there are some rights to which human beings are entitled independently of their varying social relationships. And it seems difficult to account for the wide variations in the lists of these 'rights' if they have all been deduced from a fixed human nature or essence, subject to an absolutely uniform 'natural law'. Nor is the disagreement one which can be settled by more careful empirical observation of human beings and their legal systems. The doctrine seems to try to operate by an analogy which it is logically impossible to apply.

The word 'right' has a variety of uses in ordinary language, which include the distinction between 'legal right' and 'moral right'. 'A has a legal right against B' entails B has a duty to A which will be enforced by the courts. A has a claim against B recognized by an existing law. No person has a legal right which he cannot claim from some other (legal) person and which the law will not enforce. That A has a moral right against B likewise entails that B has a duty to A. But it is not necessarily a duty which can be legally enforced. A has a right to be told the truth by B and B has a corresponding duty to tell A the truth. But no one, except in special circumstances recognized by law, can force B to tell the truth, or penalize him, except by censure, if he does

[13] loc. cit., p. 60.

not. No one can, in general, claim to be told the truth, by right, under penalty. But a creditor can claim repayment of a debt or sue his debtor.

When the lawyers said that a slave had a right in natural law to be free, they thought of a legal right not provided for by any existing statute, enactment, or custom and to whose universal infringement no penalties attached. But this, surely, is the vanishing point of law and of legal right by which a slave might demand his freedom. But perhaps there was a moral right and a moral obligation. The slave ought to be free and maybe it was the duty of every slaveholder to free his slaves and of legislators to enact laws forbidding slavery. But until this happened there was no law which forbade a man to keep slaves. Consequently, there is no point in saying there was 'really' a natural law which forbade this. For the natural law was impotent. Statements about natural law were neither statements of natural fact nor legal practice.

So, does it follow that a 'natural' right is just a 'moral' right? Kant said, in effect, that to treat another human being as a person, of intrinsic worth, an end in himself, is just to treat him in accordance with the moral law applicable to all rational beings on account of their having reason. But this is not quite the sense in which the term 'natural rights' has been historically used. Declarations of the Rights of Man did not include his right to be told the truth, to have promises kept which had been made to him, to receive gratitude from those he had benefited, etc. The common thread among the variety of natural rights is their *political* character. Despite their rugged individualism, no exponent of the Rights of Man desired to enjoy them, in solitude, on a desert island. They were among the articles of the original Social Contract; clauses in Constitutions, the inspiration of social and governmental reforms. But 'Keep promises', 'Tell the truth', 'Be grateful' are not inscribed on banners carried by aggrieved demonstrators or circulated among the members of an oppressed party. Whether or not morality can exist without society, it is certain that politics cannot. Why then were 'natural rights' conceived to exist independently of organized society and hence of political controversies? I suggest that they were so considered in order to emphasize their basic or fundamental character. For words like freedom, equality, security, represented for the defenders of natural rights what they considered to be the fundamental moral and social values which should be or should continue to be realized in any society fit for intelligent and responsible citizens.

When the contract-theorists talked of the rights of human beings which men had enjoyed in the state of nature, they seemed to be asserting unverifiable and nonsensical propositions since there is no

evidence of a state of nature in which men lived before the establishment of civil societies. But they were not simply talking nonsense. They were, in effect, saying 'In any society and under every form of government men ought to be able to think and express their thoughts freely; to live their lives without arbitrary molestation with their persons and goods. They ought to be treated as equal in value, though not necessarily of equal capacity or merit. They ought to be assured of the exclusive use of at least some material objects other than their own bodies; they ought not to be governed without some form of consent. And that the application of these rights to the particular conditions of a society, or their suspension, if necessary, should be agreed with them.' The exponents of the natural Rights of Man were trying to express what they deemed to be the fundamental conditions of *human* social life and government. And it is by the observance of some such conditions, I suggest, that human societies are distinguished from anthills and beehives.

This, however, has frequently been denied by utilitarian, idealist, and marxist philosophers who, though differing in other respects, agree in holding that the rights of an individual must be determined only by the needs and conveniences of society as a whole. Surely, they say, there can be no 'natural' right to life in any society when a man may be executed as a criminal or killed as a conscripted soldier. And very little right to liberty exists when external danger threatens the state. 'The person with rights and duties', says the evolutionist utilitarian Ritchie, 'is the product of society and the rights of the individual must, therefore, be judged from the point of view of society as a whole and not the society from the point of view of the individual.'[14] It is the duty of the individual to preserve society for his descendants. For individuals perish but England remains. But the plain man may well ask why he must preserve a society for his descendants if it neither is, nor shows any prospect of being, worth living in? Will his descendants thank him for this consideration? All that seems to follow from Ritchie's view is that at any time the members of a society may agree to sacrifice some goods in order to achieve a certain result. And the result will include the restoration of basic rights. Does the ordinary citizen consider that he has no right to life and liberty because he agrees to (or does not protest against) the suspension of those rights in an emergency? He would be very unlikely to approve of such suspension if he thought the result would be the massacre or enslavement of himself, his contemporaries, and possibly his children and descendants

[14] Ritchie, *Natural Rights*, p. 101.

at the arbitrary will of a ruler or government. To suspend, or even to forfeit rights, as a criminal does, also temporarily, is not to deny rights. Nor is it to deny that such practices must be justified to the individuals required to submit to them. Though it may be much more useful to society that a man should remain a slave and even that he may be happier in that condition, it is not possible to prove to him that he has no right to be free, however much society wants his slavery. In short, 'natural rights' are the conditions of a good society. But what those conditions are is not given by nature or mystically bound up with the essence of man and his inevitable goal, but is determined by human decisions.

IV. PROPOSITIONS AND DECISIONS

Assertions about natural rights, then, are assertions of what ought to be as the result of human choice. They fall within class 3 of the division stated on page 23 as being ethical assertions or expressions of value. And these assertions or expressions include all those which result from human choice and preference, for example in art and personal relations, as well as in morals and politics. Such utterances in which human beings express choices determined by evaluation of better and worse have been variously interpreted, and it is, indeed, difficult to introduce a discussion of the topic without assuming an interpretation. I have tried, for example, to avoid the use of the words 'proposition' and 'statement' in referring to these utterances since these words emphasize a relation between what is asserted and a fact by which it is verified or falsified. And this leads either to the attempts of the natural law and natural rights theories to find a 'natural' fact which justifies these assertions or to search for non-sensible entities called 'Values' as the reference of ethical terms. Yet, of course, it is, in some sense, true that 'No one ought to be ill-treated because he is a Jew, a negro or not able to count above ten.' Alternatively, to talk of 'expressions of value' sounds as though such utterances are sophisticated ways of cheering and cursing. Just as the blow becomes sublimated into the sarcastic retort so our smiles of delight at unselfish action and howls of woe at parricide become intellectualized into apparent judgements about good and evil, right and wrong, without, however, losing their fundamentally emotive character.[15] On this view, value judgements do not state what is true or false but are expressions of feeling, sometimes combined with commands to do or forbear. But whatever its emotional causes and effects, an articulate utterance does not seem to be simply a substitute for

[15] Cf. A. J. Ayer, *Language, Truth and Logic*, ch. 6.

a smile or a tear. It says something. But I cannot hope in a necessarily brief discussion to do justice to the enormous variety of value utterances. So I will plunge, and say that value utterances are more like records of *decisions* than propositions.[16] To assert that 'Freedom is better than slavery' or 'All men are of equal worth' is not to state a fact but to *choose* a side. It announces *This is where I stand*.

I mentioned earlier that in the late war, propaganda appeals to defend our comforts and privileges would have been rejected as uninspiring but that appeals to defend the rights of all men to freedom and equality obtained the required response, at least in all but the depraved and cynical. I now suggest that they did so because they accorded with our decisions about these ultimate social values. For whether or not we were more or less comfortable as a result, we should not choose to act only upon orders about which we had not in some way been consulted, to suppress the truth, to imprison without trial, or to permit human individuals or classes of individuals to be treated as of no human value.

Two questions suggest themselves on this view. Firstly, if ethical judgements, and particularly the ethical judgements which concern the fundamental structure of society are value decisions, who makes these decisions and when? Is this not, as much as the natural law theory, the use of an analogy without application? I did safeguard myself to some extent by saying that these assertions are 'more like' decisions than they are like propositions. They are unlike propositions because they are neither tautologies nor statements of verifiable fact. But it is also true that if asked when we decided in favour of free speech or democratic government or many of our social values we could not give a date. It is, therefore, suggested that we no more record a decision by a value assertion than we signed a Social Contract. Nevertheless, I think the analogy does emphasize important differences between value and other assertions. For, if intelligent, we do choose our politics as we choose our friends or our favoured poems, novels, pictures, symphonies, and as we do not choose to accept Pythagoras' theorem of the law of gravitation. And when challenged we affirm our decision or stand by our choice. We say, 'I did not realize how much I valued free speech until I went to Germany in 1936', indicating that a choice had been made, but so easily that it had seemed scarcely necessary to record its occurrence.

For, indeed, the fundamental values of a society are not always

[16] Karl Popper makes a similar distinction in an interesting discussion of value judgements in *The Open Society*, Vol. I, ch. 5.

recorded in explicit decisions by its members, even its rulers, but are expressed in the life of the society and constitute its quality. They are conveyed by its 'tone' and atmosphere as well as its laws and Statutory Rules and Orders. The members of a society whose values are freedom and equality behave differently, walk, speak, fight differently from the members of a slave society. Plato expressed this nastily in the Republic[17] when he said that in a democracy even the horses and asses behaved with a gait expressive of remarkable freedom and dignity, and like everyone else became 'gorged with freedom'. Suspicion, fear, and servility are absent, or, at least, inconspicuous in such a society. And no one who visited Germany after 1933 needs to reminded of the change of atmosphere.

Decisions concerning the worth of societies and social institutions are not made by an *élite*, by rulers, or a governing class but, explicitly or by acceptance, by those who live and work in a society and operate its institutions. But these decisions may be changed by the effective propaganda of a minority who have reached other decisions of whose value they desire to convince the majority. Perhaps, ultimately, men get the societies and governments which they choose, even if not those which they deserve, for they may deserve better than passion, indolence, or ignorance permits them to choose.

This leads to a second question. Upon what grounds or for what reasons are decisions reached? Consider the expression of the doctrine of equality; that all human beings are of equal worth, intrinsic value, or are ends in themselves. Is there an answer to the question, Why? On what *evidence* is this assertion based? How can such a decision be maintained despite the obvious differences between human beings? The answer of the natural law theorists and of Kant was that the 'natural' fact that all men have reason proves that they are of intrinsic worth, and are thus entitled to the Rights of Man. It is not clear, however, whether imbeciles and lunatics forfeit human rights. No one can deny that they are human beings. A person who becomes insane does not thereby become a mere animal. But if statements about the possession by anything of a natural characteristic is related to a decision of worth as evidence for a conclusion, then it would be illogical to retain the decision when the characteristics were absent or had changed. It is irrational to continue to believe a proposition when evidence shows that it is false. I affirm that no natural characteristic constitutes a *reason* for the assertion that all human beings are of equal worth. Or, alternatively, that *all* the characteristics of *any* human being are equally

[17] Bk. 8, 563.

reasons for this assertion. But this amounts to saying that the decision of equal worth is affirmed of all human beings *whatever their particular characteristics*. It does not follow that they are of equal *merit* and that their treatment should not vary accordingly, in ways compatible with their intrinsic value. But even a criminal, though he has lost merit and may deserve punishment, does not become worthless. He cannot be cast out of humanity.

I am aware that this view needs much more elaboration, and especially illustration, than can be given in a very limited space. I can, therefore, indicate only in a general way the type of value assertions and the manner in which they are related to each other and to other assertions. They are not related as evidence strengthening a conclusion. For decisions are not true or false and are not deduced from premisses. Do we, then, decide without reason? Are decisions determined by chance or whim? Surely, it will be said, the facts have some relevance to what is decided? To say that decisions are made without reason looks like saying that we choose by tossing a coin; opening the Works of Shakespeare or the Bible at random and reading the first sentence; or shutting our eyes and sticking a pin into the list of starters to pick the Derby winner. These seem very irrational methods of choice. Nevertheless, we do sometimes choose by a not very dissimilar procedure. If two candidates for a post are of exactly equal merit, the selectors may well end by plumping for one or the other. This, it may be said, was justified because there was 'nothing to choose between them', not that the decision bore no relation to their merits. But there are some choices into which merit hardly enters. Those involving personal relations, for instance. It would seem absurd to try to prove that our affections were not misplaced by listing the characteristics of our friends. To one who asked for such 'proof' we should reply, with Montaigne:[18]

> If a man urge me to tell him wherefore I loved him, I feel it cannot be expressed but by answering, because it was he, because it was myself. . . . It is not one especial consideration, nor two, nor three, nor four, nor a thousand. It is I wot not what kind of quintessence of all this commixture which seized my will.

Yet it is also correct to say that our decisions about worth are not merely arbitrary, and intelligent choices are not random. They cannot be proved correct by evidence. Nor, I suggest, do we try to prove them. What we do is to support and defend our decisions. The relation of the

[18] 'Of Friendship', Essays (trans. John Florio).

record of a decision to the considerations which support it is not that of proof to conclusion. It is much more like the defence of his client by a good counsel.

Consider an analogous situation in art. Suppose one were trying to defend a view that Keats is a greater poet than Crabbe. One would compare passages from each writer, showing the richness and complexity of the imagery and movement of Keats's verse and the monotonous rhythm, moral platitudes, and poverty-stricken images of Crabbe. One would aid the effect by reading passages aloud for their comparable musical effects; would dwell on single lines and passages which show the differences between the evocative language of Keats and the conventional 'poetic diction' of Crabbe. The 'Season of mists and mellow fruitfulness' of the one and the 'finny tribes', etc., of the other. One might eventually resort to the remarks of the best critics on both writers. In short, one would employ every device to 'present' Keats, to build up a convincing advocacy of his poetry. And the resistance of Crabbe's defender might collapse, and he would declare the case won with the verdict 'Keats is the better poet'. But nothing would have been *proved*. Crabbe's supporter might still disagree. He would dwell on Crabbe's 'sincerity'; his genuine sympathy with the poor and excuse his poetic limitations as due to a bad tradition for which he was not responsible. He might add that Crabbe was one of Jane Austen's favourite poets. And if he so persisted he would not be *wrong*, i.e. he would not be believing falsely that Crabbe was a better poet than Keats but much more persuasion would be needed to induce him to alter his decision.

Compare with this the correct attitude to the proof of a scientific law. If the empirical evidence is conclusive then a person who rejects the conclusion is either stupid or biased. He is certainly believing a false proposition. We do not 'defend' the law of gravitation but all instructed persons accept the proof of the law.

On the other hand, we do not refer to Mill's proof but to his 'magnificent defence' of civil liberty. For a successful defence involves much more than statement of facts. The facts of the case are known to both the prosecuting and defending counsel. The question is, should the accused be condemned or acquitted? The skilful lawyer uses these facts, but he uses them differently from the scientist. He marshals them so as to emphasize those which favour his client. He interprets those which appear unfavourable in terms of legal decisions in similar cases which would benefit the accused. He chooses language which does not merely state, but impress; he uses voice, gesture, facial expression, all the devices of eloquence and style in order to influence the decision

of the jury in favour of his client. His client may still lose, but he would admit that he has a better chance of winning if he briefs a good counsel.

But, it may be asked, is this a recommendation to take fraudulent advocacy as our model for defending the rights of man? Not at all. Lawyers and art critics are not frauds, but neither are they scientists. They are more like artists who use material with results which impress and convince but do not *prove*. There is no conceivable method of *proving* that Keats is a better poet than Crabbe or that freedom is better than slavery. For assertions of value cannot be subjected to demonstrative or inductive methods. It is for this reason that such assertions have been regarded as simple expressions of feeling or emotion like cries of pain and anger. But we do not defend or support a cry of pain or shout of joy though it may be related to a cause. If our value choices are defensible their defence requires other methods.

The lawyer says: 'I agree that my client was on the premises; I deny that his being there in those circumstances constitutes a *trespass*. This may be confirmed from *Gower v. Flint* where this ruling was given in similar circumstances.' The critic says: 'You agree that Keats's imagery is *rich* and *complex*; his language *original* and *powerful*: that Crabbe, on the contrary, is *frigid* and *conventional* in language; *meagre* in imagery, etc. etc.' The lawyer supports his plea from previous decisions. The critic likewise appeals not to physical or psychological facts about the occurrences of marks on paper, internal pictures, etc., but to previous decisions *evaluating* these and other occurrences. Rich and powerful poetry is good; frigid and meagre versifying is bad. If we stand by our previous decisions it does not follow that we *must* on account of them make a further decision now, but they are certainly relevant. Incorporated into a system of skilful advocacy they may win a favourable verdict. But, on the other hand, we may reject our former decisions. Elaborate imagery, lyrical quality, are dismissed as *barbarous* or *sentimental*; our choice is now for the *plain* and *elegant* statement. Such a complete change in systems of evaluation seems to occur in different ages. The eighteenth century listened to Shakespeare, but gave the palm to Pope. The Victorians saw Georgian houses but chose sham Gothic. So we may present the authoritarian with an attractive picture of a free and democratic society, and if he already values independence, experimentation, mutual trust, he may agree that these values are realized in such a society. But he may call independence, insolence; experimentation, rash meddling; and the picture will fail in its effect.

There are no certainties in the field of values. For there are no true or false beliefs about values, but only better or worse decisions and choices. And to encourage the better decisions we need to employ

devices which are artistic rather than scientific. For our aim is not intellectual assent, but practical effects. These are not, of course, absolutely separate, for intellectual assent to a proposition or theory is followed by using it. But values, I think, concern only behaviour. They are not known, but accepted and acted upon.

Intellectuals often complain that political propaganda, for example, is not conducted as if it were scientific argument. But if moral values are not capable of scientific proof it would be irrational to treat them as if they were. The result of a confusion of logical types is to leave the field of non-scientific persuasion and conviction to propagandists of the type of the late Dr Goebbels.

II

JUSTICE AND EQUALITY

GREGORY VLASTOS

I

THE CLOSE connection between justice and equality is manifest in both history and language. The great historic struggles for social justice have centred about some demand for equal rights: the struggle against slavery, political absolutism, economic exploitation, the disfranchisement of the lower and middle classes and the disfranchisement of women, colonialism, racial oppression. On the linguistic side let me mention a curiosity that will lead us into the thick of our problem. When Aristotle in Book V of the *Nicomachean Ethics* comes to grips with distributive justice, almost the first remark he has to make is that 'justice is equality, as all men believe it to be, quite apart from any argument.'[1] And well they might if they are Greeks, for their ordinary word for equality, *to ison* or *isotes* comes closer to being the right word for 'justice' than does the word *dikaiosyne*, which we usually translate as 'justice'.[2] Thus, when a man speaks Greek he will be likely to say 'equality' and *mean* 'justice'. But it so happens that Aristotle, like Plato and others before him, believed firmly that a just distribution is in general an unequal one.[3] And to say this, if 'equal' is your word

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[1] 1131a 13.

[2] 'Righteousness', the quality of acting rightly, would be closer to the sense of *dikaiosyne*: at *Nicomachean Ethics* 1129b 27 ff. Aristotle finds it necessary to explain that, though his theme is *dikaoisyne*, he will not be discussing 'virtue entire' or 'complete virtue in its fullest sense'. No one writing an essay on *justice* would find any need to offer this kind of explanation; nor would he be tempted regardless of his theory of justice, to offer (as Plato does at *Rep.* 433ab) 'performing the function(s) for which one's nature is best fitted' as a *definition* of 'justice'.

[3] Plato, *Gorgias* 508a (and E. R. Dodds ad loc., in Plato, *Gorgias* (Oxford, 1959); *Rep.* 558c; *Laws* 744bc, 757a ff. Isocrates, *Areopagiticus* 21–22; To *Nicocles* 14. Aristotle, *Nic. Eth.* 1131a 15 ff., and the commentary by F. Dirlmeier, *Aristoteles, Nikomachische Ethik* (Berlin, 1956), pp. 404–7.