

# Spirit of Rights

## Response to Comments

DAN EDELSTEIN

Let me begin by expressing my thanks to Ivo Cerman for organizing and contributing to this forum, as well as to Thérance Carvalho, Emmanuelle de Champs, and Olivier Grenouilleau for their generous, erudite, and very insightful comments. I am very honored by the time and attention that these four distinguished scholars have dedicated to reading my book so closely.

Reflecting on these comments, my greatest regret is that I cannot go back and address some of their feedback in the book itself. In particular, the authors have brought to my attention various studies that would have enriched my understanding of the topics discussed in the book. I knew when writing this book that I was undoubtedly overlooking some of the scholarship in French and German, and these comments have confirmed my fears.

While I genuinely regret not having benefited from these additional sources, I will note in my defense that, for a book that ranges from the 12<sup>th</sup> to the 20<sup>th</sup> century, I could not track down all the secondary literature on all my sources. To be sure, this is a weak defense where the specific lacunae identified by the comments are concerned, as they mostly fall in the chronological and subject areas that the book focuses on, namely the 18<sup>th</sup> century. In this regard, I can only say that while I discuss such topics as Physiocracy and abolitionism at length, the book is not primarily about either of these topics.

So what is the book really about? It may be helpful here to restate its goals and origins, particularly as I am largely responding to two trends in Anglo-American scholarship. These trends are in some respects mirror-images of each other. The first concerns older works on the history of human rights. These studies tended to take an either/or approach to political texts that discuss natural law or natural rights. Scholars such as Leo Strauss, Michel Villey (who was French, but played an influential role in English-language scholarship), and Richard Tuck traced a general evolution, from the thirteenth to the seventeenth centuries, away from natural law toward natural rights. They typically accompanied this analysis with a value judgment, privileging one over the other (natural law, for Strauss and Villey; natural rights, for Tuck).<sup>1</sup>

The second trend concerns more recent scholarship. In the influential studies by Lynn Hunt, Samuel Moyn, and others, the history of human rights is almost entirely severed

<sup>1</sup> See Leo Strauss, *Natural Right and History*, Chicago 1953; Michel Villey, *Leçons d'histoire de la philosophie du droit*, Paris 1962; idem, *La genèse du droit subjectif chez Guillaume d'Occam*, Archives de philosophie du droit 9, 1964, pp. 97–127; Richard Tuck, *Natural Rights Theories: Their Origins and Development*, Cambridge 1979.

from the history of natural law.<sup>2</sup> If the older scholarship granted excessive importance to natural law, these newer works suffered from the opposite problem, and excessively downplayed its role. This was in part made possible by a shift in their own chronological focus. Most of the newer scholarship on the history of human rights concentrates on the modern period, and the twentieth century in particular.

My own approach owes a great deal to Brian Tierney's argument that natural law and natural rights are two sides of the same coin.<sup>3</sup> Rights are correlatives of legal duties, which is indeed how most past authors defined them. While it may be possible to detect a historical shift in emphasis from natural law to natural and human rights, the two were always seen as related, at least up through the Age of Revolutions.

Once we abandon the story of an epistemological shift from natural law to natural rights, we need to find some other way to write the history of human rights, especially in the early-modern age. In my book, I propose examining the competition between three different rights regimes, or accounts of what happens to rights in political society. Since the four commentators discuss this thesis in their contributions, I won't elaborate on it here.

But I do believe that there is another important, and for some uncomfortable, corollary of my attempt to stitch the early-modern and modern parts of human rights history back together. By writing natural law out of the modern story of human rights, scholars have been able to sidestep the epistemological challenge that lies at the heart of human rights theory. If natural law does not form the basis of human rights, then where do they come from? The UDHR points to the inherent „dignity“ of all humans. But scholarly reconstructions of the UDHR (notably by Johannes Morsink) have revealed the extent to which natural law theory provided an essential cornerstone for the assertions made in this document, a cornerstone that was effaced in the final version.<sup>4</sup> There is a missing center at the heart of modern human rights theory. Political philosophers such as Charles Beitz have devised ingenious work-arounds to remedy this hole in the epistemological infrastructure of human rights.<sup>5</sup> But these work-arounds ultimately underscore the fact that human rights are the product of a hasty and unfinished secularization process.

I describe this finding as uncomfortable, because the obvious solution to this problem – i.e., reaffirming the central place of natural law in theories of human rights – is

<sup>2</sup> Lynn Hunt, *Inventing Human Rights: A History*, New York 2007; Samuel Moyn, *The Last Utopia: Human Rights in History*, Cambridge, MA, 2010.

<sup>3</sup> Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625*, Atlanta 1997.

<sup>4</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, Philadelphia 1999.

<sup>5</sup> Charles Beitz, *The Idea of Human Rights*, Oxford 2009.

unpalatable to most Western scholars today. There is a small community of Christian writers who argue strongly for the readoption of natural law and its metaphysical apparatus. But on the whole, the idea of a divinely authored moral code available to all humans by virtue of our reason is difficult to accept. We like the effects – human rights – but we wince at the cause.

In this regard, I agree with Cerman's remark that „it is not possible [to have get human rights] without early modern natural law.“ I would in fact go a step further and argue that it was not possible without natural law *tout court*, and that the early-modern developments refined and distinguished arguments that could already be found in the late medieval period. Cerman's suggestion that Wolff „created equal, universal human rights“ disregards the manifold statements by Franciscan, conciliarist, and Jesuit theologians that already attributed rights to all humans. What's more, these rights were not just abstract principles, but already had legal standing, as is evidenced, for instance, by Francisco de Vitoria in *De Indis* (1532). Similarly, the legal standing of natural rights was crucial for the Franciscan arguments about property, and for conciliarist claims about the limits of papal authority.

It is true that „France was an exception“ on the Continent, as Cerman notes, given that natural law was not taught in universities until late in the eighteenth century. But this does not mean that it was unknown. Barbeyrac's translations of Pufendorf and Grotius were widely read, as was Burlamaqui's digest of seventeenth-century natural law.<sup>6</sup> I certainly did not wish to imply that natural law was „irrelevant“ in the French context: clearly, that was not the case. But I do think that precisely *because* natural law was less of an academic discourse in France than it was in Central Europe that it produced a more malleable set of ideas. A doctrine like Physiocracy partially owes its existence to the absence of more standard, academic philosophies of natural law in eighteenth-century France.

As Thérénce Carvalho shows, moreover, the „exceptional“ history of natural law in France ended up having a major influence on the rest of the Continent. Physiocratic works – in particular Le Mercier de la Rivière's *L'ordre essentiel et naturel des sociétés politiques* (1767) – were read throughout Europe, and had particular impact in Sweden, Poland, Russia, Prussia, and Austria. It may well have been through such „popular“ texts that many government officials first considered the practical implications of natural law and rights. Just because a subject is taught at the local university does not mean that all graduates will be familiar with it (as professors today, alas, know all too well).

<sup>6</sup> See notably Samuel Pufendorf, *Le Droit de la nature et des gens*, Amsterdam 1706 (trans. Jean Barbeyrac) and *Les Devoirs de l'homme et du citoyen*, Amsterdam 1707 (trans. Jean Barbeyrac); Jean-Jacques Burlamaqui, *Principes du droit naturel*, Geneva 1747; and the posthumous *Principes du droit politique*, Amsterdam 1751.

The one faculty where French students could not have failed to encounter natural law theory was in law school. Their encounter would not have been with Grotius, Pufendorf, or Locke, but rather with the *Corpus Juris Civilis*. Historians of natural law sometimes overlook the fact that Roman law remained an important source for, and introduction to, natural law (*ius naturae*) up through the eighteenth century. Of course, it can prove tricky to tease out the relative importance of Roman law versus Christian natural law theory for early-modern scholars. Olivier Grenouilleau thus rightly questions why I privilege Roman law in the story of abolitionism that I sketch out in the book. While I focus a good deal on Jean Domat, the most important jurist in seventeenth-century France, my insistence on the central role of Roman law really comes from Montesquieu. His debt to Domat – from whom he derives the title of his famous book – is well established, though Domat was of course not his only (or even his major) source for Roman law. Like Domat, Montesquieu studied Roman law as part of his legal studies, and throughout the *Spirit of Laws* exhibits an intimate familiarity with it.

In underscoring to the importance of a Roman law in this chapter, I do not mean to overemphasize its centrality for Montesquieu's understanding of natural law. I wish instead to show how it occupied a special place in Montesquieu's argument, since he structures his discussion of slavery around the traditional Roman defense that slavery was authorized by the law of nations (*ius gentium*). But developments in seventeenth-century natural law theory had made the Roman division between natural law and the law of nations untenable. By realigning the two, and excluding anything from the law of nations that conflicted with natural law, Montesquieu could simply fall back on the traditional Roman law axiom that slavery violated natural law. His great contribution to abolitionism – which David Brion Davis detailed with great precision, though I wish I had also known about Grenouilleau's own *La Révolution abolitionniste* – thus came from his revision of a famous precept of Roman law.<sup>7</sup>

It is certainly the case, as Emmanuelle de Champs points out, that natural law and human rights would undergo serious critique in the nineteenth century, by the likes of Jeremy Bentham and Karl Marx. A more thorough account of post-revolutionary rights talk would need to consider these epistemological attacks. While my own study only touches on the nineteenth- and twentieth-century history of human rights, I would note that the reaction to, and criticism of, its early-modern antecedents was oddly ineffective. To be sure, Marx's arguments in „On the Jewish Question“ reverberated throughout socialist theory. But is it not telling that Stalin's 1936 Constitution of the USSR famously enumerated the greatest number of rights ever found in a political constitution? Marx's dream of total „human emancipation,“ as opposed to the mere „political emancipation“ expressed (in his analysis) during the French Revolution would ultimately be formulated by his own successors in terms of individual rights.

<sup>7</sup> David Brion Davis, *The Problem of Slavery in Western Culture*, New York 1988.

And while Bentham's attack fueled the positivist critique of natural law, positivism itself would wane over the course of the nineteenth century. In the United States, as Amy Dru Stanley shows, human rights were revived as a crucial legal category.<sup>8</sup> Catholic thinkers renewed their defenses of human rights, particularly in the aftermath of the Leo XIII's encyclical *Rerum Novarum* (1891). And legal scholars reanimated human rights as a principle of international law in the closing decades of the century, leading to the explosion of human rights leagues in the early twentieth century. Bentham's dismissal of rights as „nonsense upon stilts“ was ultimately shortlived.

The history of human rights that extends from Vitoria to René Cassin is typically regarded as a secularization process. Cerman himself sees this secularization as taking place in the eighteenth century. But I would counter that the metaphysical foundations of human rights have only been brushed over, and never fully dealt with. Just like economic liberalism, to which it is closely related, human rights are haunted by a metaphysical specter, the supernatural ghost of their father. It is easy to look the other way, or to point to newer, positivist grounds for human rights. Was not the UDHR ratified by almost 50 countries? Should that fact alone not provide sufficient grounds for its legal basis? Perhaps for lawyers. But the „inherent dignity [...] of all members of the human family“ (UDHR, preamble) is a loaded expression, carrying with it a theological vision of God as Creator. This is a vision that many of us are deeply uncomfortable with. We have yet to find a substitute.

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<sup>8</sup> See Amy Dru Stanley, *Antislavery Ethic and the Spirit of Commerce: An American History of Human Rights* (forthcoming).

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Abstract

Dan Edelstein responds to the comments by Thérance Carvalho, Olivier Grenouilleau, Emmanuelle de Champs and Ivo Cerman. He sums up the argument of his book and stresses that it was not only about 18<sup>th</sup> century and physiocracy. He explains that the book was motivated by his efforts to bridge the gap which appeared in Anglo-American historiography, where an older trend stressed natural law, while a second newer trend focused only on natural rights and post-1700. Edelstein follows Brian Tierney's view that natural rights and natural law are two sides of the same coin. He defends the importance of Roman Law for Montesquieu's critique of slavery and underscores the religious grounding of natural law, the importance of medieval thinkers and the merits of the Catholic Church for renewing the interest in natural law at the end of the nineteenth century. Even though many people like the results of this religious thinking, they tend not to like the metaphysical foundation on which it stands.

KEY WORDS:

natural law; human rights; physiocracy; historiography; Montesquieu; Brian Tierney