THE EMBARRASSMENT OF HUMAN RIGHTS

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TABLE OF CONTENTS

The "flagless vessel" of Itamar Mann's exceptionally important and impressive essay on the moral foundations of human rights law is no mere philosopher's example.[1] Jews fleeing post-Holocaust Europe in a risky gambit for safety and freedom are not just a heart-wrenching case in themselves. Their plight also resembles that of a host of other persecuted migrants before and since. But the *Exodus* affair as Mann rereads it is also, and primarily, a philosophical example. Mann is convincing in suggesting that his reading of it uncovers a novel potential rationale for human rights and forces us to consider its viability.

But while the flagless vessel promises a new proposal for how philosophers might "ground" human rights, Mann turns out to be much better at establishing the need for such a proposal than actually substantiating it. The notion of human rights as a law of encounter emerges from Mann's treatment of it as little more than a promissory note for a fuller statement of a new natural law for our time. In this Response, I shall offer some worries that it will be difficult to pay off the note. Briefly, I cannot see any reason why Mann's proposed theory survives the same skepticism that has always haunted — and normally devastated — prior theories of natural law. Mann's approach might also ignore the need for theoretical pluralism: the strategic need in any important project like human rights today to scant foundations, as indeed normally occurs in view of the very difficulty of securing agreement about their ultimate justification.

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1. Itamar Mann, *The* Exodus *Encounter: Towards a Foundational Theory of Human Rights*, 50 TEX. INT'L L.J. 1 (2015).

More briefly, I put pressure on Mann's deployment of his example to extricate appeals to the human status from specifically nationalist politics. Mann's story of men and women at sea captures the plight of many contemporary asylees and migrants, who are looking for a home where their humanity is not merely a poor substitute for political membership. Mann distinguishes as much as possible between the bare claim to humanity that he sees his shipboard characters making, on the one hand, and the aspiration to political membership they also harbored, on the other. But he may take the distinction too far. As many have observed, notably Hannah Arendt, nobody wants to be human only.[2] It is here that Mann's reading of his example is most revealing. One suspects that because he wants to identify with Jewish victimhood but is wary of Jewish nationalism, he reinterprets his historical case so imaginatively — but at the price of excessively and implausibly separating between human rights as a phenomenon of encounter and sovereignty as the collective claim to membership.

Lastly, I turn to the more general claim Mann advances about the uses of history for human rights scholarship. He is absolutely correct that the study of history can play a multiplicity of roles in scholarship — including suggesting candidate views for the grounds of human rights. But if history can provide such candidate views for philosophical justification, it can also reveal how temporary are the opinions that philosophers belatedly try to ground as if they were eternal normative truths. Mann misstates the stakes of contemporary human rights history because he omits this more important use.

This Response is organized to advance these counterpoints. In a first section, I engage with Mann's core proposal to trace human rights law to sources in phenomenological encounter rather than in positive consent or "transnational" processes. The next section turns to the relation between the claims to human protection to which that experience of encounter gives rise and the aspiration to collective membership that so often – and perhaps inevitably — follows next. A final section takes up the uses of history in the age of human rights.

I. A NEW NATURAL LAW

At its core, Mann offers a fascinating reading of *R. v. Secretary of State for Foreign Affairs*, *Ex parte Greenberg*, a case that arose under British jurisdiction when authorities interdicted the *Exodus*, a ship bearing Jews that set sail for Palestine in 1947.[3] At stake was whether post-Holocaust Jews with no entitlements under extant law ought to be allowed to find a new home.[4] Mann stresses the *embarrassment* that one judge suggested would ensue from disposing of the fleeing Jews as mere things or animals — rather than humans, who cannot be "*maltreated to any extent*."[5] This embarrassment, Mann says, points to "the most fundamental premise" of human rights as a law of encounter: Power must respect morality, when the latter is

2. *See generally* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1973).

3. R v. Sec'y of State for Foreign Affairs & Sec'y of State for the Colonies, *Ex parte* Greenberg, [1947] 2 All E.R. 550 (A.C.) (Eng.).

4. *Id*. at 551–52.

5. Mann, *supra* note 1, at 30 (emphasis added).

embodied in claims of the weak from below.[6] The encounter of hierarchical power with weakness gives rise to moral constraint, not *carte blanche*.

As a reading of the case, Mann's interpretation is at first sight curious. After all, the judge does not say he is embarrassed, or that the authorities ought to be embarrassed to interdict and deport the refugees.[7] Rather, he says that the embarrassment for authorities that some (unstated transnational) audience might feel could regrettably constrain the behavior of powerful.[8] The judge is concerned, that is, not about ethics, but about "optics." And in part for that reason, even the hypothetical risk of embarrassment that the Jewish strategy might impose in relation between political authority and its publics (or some portion of them) did not lead the judge to find for the Jewish applicants in the suit.[9] The judge did not feel embarrassment and paid the threat that others would no mind.

Even focusing on the aspects of the scenario he emphasizes, Mann's example is open to multiple readings. One of its core features is that the judge clearly recognizes embarrassment as a *Jewish political strategy absent superior tools*. It is a weapon of the weak, a tactic of individuals in a subordinate position in a hierarchy but not altogether deprived of agency or even power in it. More important, their weapon doesn't cause embarrassment but only threatens to do so, in ways the judge fears rather than welcomes, and fails to succeed.

I will return to some implications of these features of the case and opinion in my next section, but for now I want focus on what Mann wants to derive from the fact of embarrassment. It is an ethics of conviction (as he calls it, referring to Max Weber's famous category) that the powerless impose on the powerful when they say in effect: "You, and no one else, will decide if I will have a life worth living" — or even a life of any kind.[10] For Mann, this is a new ground for human rights, beyond positivist justifications that trace all norms to the state, as well as beyond transnational authority and its power to propagate obligations.

Yet how is this different from traditional appeals to pre-political, natural norms, a standard and indeed dominant move in the history of the philosophy of law? I am surprised that Mann never takes this up, for it has potentially serious implications for his arguments. Mann appeals to Emmanuel Levinas, the French-Jewish philosopher,[11] but I cannot see that a Levinasian phenomenology of hierarchical encounter imposing pre-political moral constraint is much more than a new proposal about the *content* of age-old visions of natural law. The trouble is that positivism rose because natural law was — and largely remains — essentially discredited.[12] The most important reason this occurred was that no one could agree what nature

6. *Id*.

7. *Sec'y of State for Foreign Affairs*, 2 All E.R. at 552.

8. *Id.*

9. *See Sec'y of State for Foreign Affairs*, 2 AII E.R. at 550.

10. Mann, *supra* note 1, at 6 n.34..

11. *Id.* at 5 n.30.

12. Mann writes in passing late in his piece that "the theory of human rights as a law of encounter does not make the claim that human rights are timeless or binding in every culture or in every individual." Mann, *supra* note 1, at 39. But then it is unclear how Mann can help himself to the Levinasian theory of ethics, or why it wouldn't be important to specify the conditions under which human rights can become binding, especially to the extent these conditions are historical.

commands. "One of the delights of those who do not happen to be partial to natural law theory," political theorist Judith Shklar once commented, "was to sit back and observe the diversity and inconsistency among the various schools of natural law, each one insisting on its preferences as the only truly universally valid ones."[13] That Levinas adds still another reading of our ethical obligations as human beings risks augmenting the force of that skepticism, rather than confronting it.

Putting it more bluntly: If the judge in the *Exodus* affair rejected potential embarrassment as a source of applicable norms, why should we proceed otherwise? Wouldn't some argument about in favor of the set of norms naturalists now support — among other norms, international human rights for the weakest out of place in the extant state system — be required? As far as I can see, Mann doesn't give such an argument. If so, there is much more work to be done than simply to insist that moral norms apply in situations where law has nothing or the wrong thing to say.

In fact, proposals to root human rights in natural law are a dime a dozen in history, but have generally failed to win support, in part because they are so controversial. Perhaps that is why one of the most famous proponents of a naturalistic understanding of human rights in the 1940s, Jacques Maritain, also conceded the need to scant foundations in order to hope for any consensus around human rights in practice.[14] Not only will Mann eventually have to give an argument for his scheme, that argument will also have to survive the anxiety that the quest for foundations for universal norms will undermine their advancement.

II. THE ALLURE OF SOVEREIGNTY

Adroitly and convincingly, Mann analytically separates out the claim to simple protection and "bare life" that the Jews on the *Exodus* made. In a brilliant appeal to novelist Yoram Kaniuk's treatment of the episode, *Commander of the Exodus*, Mann distinguishes between the pre-state claims to humanity Jews made on ship and the state that would come into being if they could disembark in freedom.[15] More abstractly, Mann's goal is to loosen – or snap – the connection between human rights and sovereignty.[16] He not only wants to claim that states are not the sole sources of law; he also wants to doubt that the necessary consequence of a claim to humanity is that there has to be a state to protect them.[17] The key moment of "founding," Mann reads Kaniuk as saying in a subversive passage, "is *when [the] doors are still closed*" before humans seeking home, not when they are thrown open;[18] it is when slaves confront their tormentors, not when they reached their own promised land. What matters to Mann is when potential victims impose obligations on potential oppressors, not when the victims succeed in their aspirations to sovereignty.[19]

But the victims themselves do not appear to have made any neat distinction. And it doesn't seem very plausible to strive so mightily to marginalize the centrality

13. JUDITH N. SHKLAR, LEGALISM 68 (1964).

14. JACQUES MARITAIN, MAN AND THE STATE 80 (1951).

15. *See* Mann, *supra* note 1, at 20–22 (discussing YORAM KANIUK, COMMANDER OF THE EXODUS (Seymour Simckes trans., 1999)).

16. Mann, *supra* note 1, at 5, 32.

17. *Id.* at 5, 42.

18. *Id.* at 32.

19. *Id*. at 42.

of their highly political agenda, which Mann himself recognizes.[20] Granted, Mann has a powerful point in reminding us, through Kaniuk's narrative, that the *Exodus* commander Yossi Harel refused to fight his way into Haifa's port, since he did not want to end up with a ship full of dead refugees.[21] Similarly, Mann cites interesting testimony from Massachusetts minister John Stanley Grauel that it was planned in advance that those on the ship would avoid violent belligerency.[22] But non-violence is also a form of agency and partisanship. It is the choice of one activist tactic rather than another. Put differently, evoking embarrassment or shame – a category central both to Levinas's thought as well as to the armamentarium of the international human rights movement[23] — is also a political strategy. Its aim is not just to evoke ethical obligation, and indeed in Mann's presentation, that intermediate goal was clearly and instrumentally subservient to a broader agenda.

A moral encounter was, for these agents, not merely staged for the sake of saving life, which was merely a preliminary aim in a larger set of political aspirations.[24] In this sense, it was hardly an accident that the *Exodus* affair became central to Zionist ideology. If the appeal to humanity on the flagless vessel was missed before Mann's article, it is because the refugees themselves did not dwell on it but on its instrumental consequences: their successful achievement of citizenship in a sovereign polity of their own.[25] Mann suggests that it was an act of "resistance" that escapes instrumental or political logics,[26] but I don't see why. It didn't escape such logics for the very people engaged in resistance. For that matter, the desire for collective insertion has lots of "phenomenological" evidence in its favor too — and Levinas himself was a Zionist.[27]

I would speculate that the causes of Mann's search for a non-nationalist interpretation of the drama of the *Exodus* affair are to be sought through the crisis of Zionism in our time,[28] and the crisis of sovereignty more generally.[29] The standard reading of the historical episode nonetheless retains considerable power. Cast as a story about political agency, however weak, the story naturally prompts the question of how weak agents could become strong, for they themselves wanted to do so. This question is the burning one even today for contemporary refugees and asylees, who are more than bare life, since they want— in Mann's own words — "a life worth living."[30] It is true that a move from the weak agency of causing embarrassment to

20. *See id.* at 33 ("[T]he [*Exodus*] affair can only be understood as part and parcel of one policy with orders that were later given by Haganah leaders to expel the Palestinians.").

21. *Id.* at 32.

22. Mann, *supra* note 1, at 35.

23. *See id.* at 24 n.203 (suggesting that personal responsibility for the fate of powerless others drives entities to make humane choices) (citing EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY 215 (Alphonso Lingis trans., 1969)).

24. *See id.* at 19–23 (recounting the traditional Israeli understanding of the *Exodus* incident as embedded in the founding of Israel).

25. *Id.*

26. *Id.* at 34.

27. For a more skeptical engagement with Levinas's overall philosophy, see SAMUEL MOYN, ORIGINS OF THE OTHER: EMMANUEL LEVINAS BETWEEN REVELATION AND ETHICS (2005).

28. For one perspective of the crisis, see generally PETER BEINART, THE CRISIS OF ZIONISM (2013).

29. *See generally* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2004).

30. *See* Mann, *supra* note 1, at 43 (describing "a life worth living").

the strong agency of making a home implicates its advocates in historical violence, thus potentially creating new weak agents: Mann observes that one reason Kaniuk rethought the *Exodus* affair was that the Zionist ideology of the refugees created another set of victims.[31]

All the same, there is a corresponding risk in extricating a moral claim to be human — like the massive larger focus on human rights today — from its longtime political ambiance. Mann not only fails to respect the complete aspirations of historical actors, but may also indulge a desire for moral purity that real politics cannot deliver. Voluntarily and necessarily going beyond encounter, the Jews on the *Exodus* were willing to drop that indulgence. Perhaps that fact, and not only the new ground their plea for safety might provide international law, is worth meditating upon.

III. THE USES OF HISTORY

In the final section of his article, Mann contends that his argument concerning the flagless vessel illustrates a use of history that has so far not been recognized.[32] It is, Mann reports, a "phenomenological" use that illustrates that past actors have been committed to some set of beliefs[33] — in this case, beliefs in norms anterior to and binding on power. It is a powerful suggestion.

No one could object that the reason to study the past depends on the goals one brings to it. History can serve different intellectual agendas, and the specificity of a rich example, such as that Mann has chosen here, is often good to think with. It is also fair to say, as Mann writes, that the recent historiography has excessively focused on how to account for the *inception* of human rights, neglecting a potentially broader set of purposes.[34]

Yet as I have already suggested, it is hard to see how simply citing historical beliefs provides any philosophical help with respect to what Mann calls "the fundamental question of legal theory: what are human rights?"[35] History, of course, can reveal that claims about the reality of norms that bind before or beyond extant law have been made in the past. But this has been obvious since Antigone. On its own, history doesn't help in telling us what human rights are, any more than it tells us what witches and unicorns are just because some past actors have believed in them.[36] And it certainly doesn't save Mann from the responsibility to provide some argument about why his naturalism is plausible, when prior versions (for example, appeals to God-given or natural norms to support all manner of horrors over time) are not. History proves that, phenomenologically, actors have felt "already committed" to sets of norms that run the gamut of human experience.[37] What help, then, does history provide philosophically in showing that one set of these is the right one? I doubt it provides much.

31. *Id.* at 33.

32. *Id.* at 36.

33. *Id*. at 37, 40.

34. *Id.* at 36–37.

35. *Id*. at 36.

36. The allusion is to Alasdair MacIntyre's comparison of rights to witches and unicorns. Alasdair MacIntyre, AFTER VIRTUE: A STUDY IN MORAL THEORY 69 (3d. ed. 2007).

37. Mann, *supra* note 1, at 37.

Conversely, it does afford much help in understanding why people become committed to the contingent norms they do. Mann characterizes my own recent history of human rights as indentured to legal "positivism,"[38] but my account has little emphasis on law at all, taking as its main focus how people began to adopt the ethical opinion that human beings have various moral entitlements that, his article shows, Mann also holds dear because they are not reducible to the modern politics of state and nation.[39] There may be historians, of course, who have stuck to the reconstruction of origins for their own sake. But others — with whom I sympathize — are interested in chronology so as to understand the causal determinants of the beliefs and actions that became prevalent in some place and era, as human rights have surged in ours.

The history of human rights, in this version, is not so much about the discovery of ethics as about the endurance of politics – and about political choices to believe in some norms rather than others and to advance them in some ways rather than others. In my own view, the history of human rights ought to be about (among other things) how people adopted the myth of pre-political norms for international law that has showed itself – just as in the *Exodus* affair — a not particularly useful political strategy, judged by its achievements so far. The history of human rights ought to adopt this focus because the movement that has coalesced around these norms in recent times has provided neither the improvement nor the solidarity of prior — and, I hope, future — political agendas. The main flaw of human rights in the end is not so much that their advocates have failed to justify them normatively, but that they have achieved so little politically. That, too, is embarrassing.

38. *Id.* at 38.

39. I will not generally comment on Mann's description of my own history of human rights, let alone Professor Philip Alston's critique of it. But note that I hardly attach prime significance to Jimmy Carter, even in the larger scheme of 1970s history of human rights, and am largely critical of the Finnish jurist Martti Koskenniemi when it comes to the post-World War II history of international law generally, and the history of human rights specifically. *See generally* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 120-75 (2010); Samuel Moyn, *The International Law That Is America: Reflections on the Last Chapter of "The Gentle Civilizer of Nations"*, 27 TEMP. INT. COMP. L.J. 399 (2013).