

The Right to Live: Response to the Commentators

I want to begin by expressing my heartfelt thanks both to the editors of the *London Review of International Law* for organising and publishing this symposium on my book *A False Tree of Liberty*, and to the three commentators – Anna Chadwick, Ben Golder and Kasey McCall-Smith – for their generous and astute readings of the book. There is something deeply moving about being read in a way that perfectly grasps what you were trying to say and do, and then recasts it so that it becomes clearer and more compelling than in your own version. I am immensely grateful to each of the commentators for the time and effort that have plainly gone into producing such wonderful texts. The present symposium is partly based on an event organised by Andrew Lang and held online at the University of Edinburgh in December 2020, and I wish also to take this opportunity to record warm thanks to him for that.

The three commentaries take the discussion in diverse directions, but they contain some common themes which will be my focus in the remarks that follow. A first theme has to do with the kind of investigation undertaken in *A False Tree of Liberty*. The book reconstructs a neglected tradition of thought, and proposes that, had the tradition not been neglected, things might have been helpfully different. What is the point of that when we know that the tide of history was, in fact, against it? A second theme concerns the substantive issue of the relation between today's human rights and the 'property question', as I term it following Robin Blackburn.¹ The 'property question' interrogates the structured inequalities that are the basis and outcome of the capitalist mode of production. Non-discrimination and inequality are, of course, central issues in contemporary human rights law and practice. So why does the book take as seriously as it does the claim that human rights cannot pose the property question relevant to the twenty-first century?² A third theme, and the final one on which I will touch, pertains to the implications of the enquiry. The book concludes with the suggestion that certain ideas from the past still remain available. What does 'availability' mean here – available to whom, and for what? McCall-Smith mentions that my book opens

¹ Robin Blackburn, 'Reclaiming Human Rights' (2011) 69 *New Left Review* 126, 138.

² In the politest possible way, Golder rightly chides me for associating Blackburn with this claim, when Blackburn's contention in the essay I cite is more precisely, and less strongly, that human rights cannot *alone* pose the property question relevant to the twenty-first century.

with 'writing on the wall', and in trying to illustrate something of this, I turn again to wall-writing.

Contingency and Necessity

As all the commentators have highlighted, I dwell in this book quite a bit on Thomas Spence, who lived in England from 1750 to 1814 and had some prominence in his day as a radical political writer, publisher, and bookseller. The title of the book comes from a text written by Spence in 1796. Striking a quasi-mystical note that can be heard in many of his writings, he called the text *A Fragment of an Ancient Prophecy*, and published it in a periodical that he put out for poor people seeking edification. Spence adopts in this work the voice of a prophet who foretells a future in which 'certain philosophers shall arise of great abilities', and those philosophers 'shall erect a false Tree of Liberty'. The philosophers whom Spence has in mind are his contemporary Thomas Paine and others who were advancing arguments at this time in favour of the rights of man. The tree of liberty stands here for those arguments. Spence proposes that it is a *false* tree of liberty because, as he explains, it is 'capable of shedding the influence of liberty and independence only on the wealthy, the shadow scarcely falling on the poor who are still to groan under oppression'. 'Nevertheless', he goes on, these philosophers 'shall so far animate the people with the display of their specious, but partial Rights of Man, that the multitude shall arise, and great convulsions shall be in many countries, and kingdoms and principalities, and hierarchies and governments shall be overthrown'. But 'oppression shall still remain'.³

Spence also develops in other texts this idea that political revolution – the approach he identifies with the 'philosophers of great abilities' – is not enough. In order to bring lasting freedom to all, a social revolution is needed that can deal with the roots of unfreedom and transform the conditions in which the poor will otherwise continue to be exploited and oppressed. What is important to note is that, although this line of thought led Spence to be profoundly critical of the rights of man as advocated by Paine and others, it did not lead him to reject the rights of man. Rather, making a move that, much later, would be theorised as a hallmark of critical argumentation, he reappropriated the concept for emancipatory

³ Thomas Spence, 'A Fragment of An Ancient Prophecy' in H. T. Dickinson, *The Political Works of Thomas Spence* (Avero (Eighteenth Century) 1982) 45.

purposes. By his analysis, the roots of oppression lay in private ownership of land, and he denounced that phenomenon as fundamentally incompatible with the rights of man. For the 'real rights of man', he maintained, were rights of access to land and its bounty. As Golder rightly observes, from an anti-essentialist perspective, there can be no real rights of man. But there can perhaps be false rights of man, in the sense of rights of man that are, to use Spence's word, partial – and hence misleading and delusive. At any rate, just as he believed that Paine's tree of liberty was false, so too Spence clearly believed that Paine's rights of man were false in that sense, and his way of making the case for a more adequate alternative was to specify what should be considered the 'real rights of man'.

The main reason why Spence made his case in this way was that he wanted, on the one hand, to affirm the rights of man in the face of argument by the likes of Edmund Burke that there were no rights of man and the world rightly belonged to the rich and powerful. On the other hand, he wanted at the same time to disaffirm the particular account of the rights of man that was gaining traction thanks to the highly successful publications of Paine. But I have wondered whether part of the reason may also have been that it came somehow naturally to Spence to think that rights were for ordinary people, and had to do with the means of subsistence. As the three commentators have further highlighted, *A False Tree of Liberty* situates Spence in a longer tradition of English activism and thought that invoked rights and humanity to resist the depredations of enclosure – that is to say, the process of acquiring exclusive possession of land that was integral to the initial phases of capitalism in England. To be sure, the rights in question then were local use-rights, rights of common defined by manorial law. Yet the peasants and others engaged in anti-enclosure struggle do not seem to have felt any pressing need to delineate categorically between local and universal in this context. At stake in the process of enclosing land and extinguishing the rights of common on which their livelihoods partly or even wholly depended was, as they seem to have seen it, the right of everyone to live.

In investigating these aspects of English history, I was fascinated to learn of the world which enclosure transformed – a world in which it was a commonplace that land and other resources needed to be to subject to some measure of shared use, that action oriented purely to self-interest was anomalous and morally dubious, and that markets, unless strictly

regulated, allowed some people unfairly to take advantage of others. Likewise, I was fascinated to learn of how, when debate raged over the rights of man, those and related ideas informed a way of thinking that seems quite orthogonal to our current regime of human rights. It is not just that Spence's 'real rights of man' are concerned with access to land and its bounty – something few of us would today associate with human rights (even though, as McCall-Smith recalls, the problems that preoccupied him have enduring resonance in contemporary issues of land monopolisation and opacity of land ownership, including in England). It is also, and more generally, that Spence puts forward his real rights of man as part of an effort to promote systemic change, by which I mean change affecting the organisation of economy and society. I think it is not very controversial to observe that that is a much more ambitious and radical vision than is reflected in our thinking about human rights today. For all the optimism of human rights, there is a widely remarked fatalism about the extant organisation of economy and society,⁴ a deeply pessimistic tendency to treat the systemic conditions in which abuses occur, and will presumably recur, as the given backdrop to human rights interventions and initiatives.

Historical research can challenge the self-evident truths of our time. It can liberate us from the thrall of actuality by rekindling awareness that things were once different and could become so again. But how could they become different? Pointing to the historically contingent character of subsisting arrangements alters their significance. It puts a dent in their solidity, and makes their future look less certain. As Golder observes, however, it does not, by itself, change the social relationships and processes that go with those arrangements. More than that, Chadwick registers that a focus on contingency may obscure the dynamics and logics which shape possibilities and render some paths to social-systemic change more accessible than others. The critique of necessity ('false necessity') sometimes needs correcting by a critique of contingency ('false contingency'). This bears on my book because the activists and thinkers of whom I write can challenge, embolden and inspire us. They can feed our imaginations, and provide encouragement for our efforts to call out false liberty, the beguiling alter ego of false necessity and false contingency. From Spence and his radical antecedents, we can learn what it was in their times and places to insist on a project of

⁴ See esp. Wendy Brown, "'The Most We Can Hope For ...': Human Rights and the Politics of Fatalism" (2004) 103 *South Atlantic Quarterly* 451.

emancipation that will not leave oppression still to remain. But we cannot learn what it is to insist on such a project in our time and our respective places, and nor can we receive instruction regarding which paths to pursue and where obstacles lie along the way. Those things, of course, only we can know.

Posing the Property Question

When the Covid-19 pandemic broke out, human rights organisations proclaimed the importance of keeping human rights at the forefront of measures to deal with the disease. Among the issues raised were disparities in access to life-saving treatments and vaccines, disproportionate rates of morbidity and mortality among different social groups, and the uneven distribution of hardships resulting from the measures taken to contain the disease's spread. Safety, security and wellbeing should not be privileges, but in reality they are, and in this context, as in others, human rights provided a language and a set of procedures for impugning that state of affairs and demanding its redress. To give just one example, UN High Commissioner for Human Rights Michelle Bachelet spoke of how '[t]he fight against this pandemic cannot be won if Governments refuse to acknowledge the blatant inequalities that the virus is bringing to the fore'. Among other things, she highlighted exceptionally high death rates among racial and ethnic minorities, at least where data was available. Noting that economic inequality, overcrowded housing, limited access to healthcare and poor working conditions or other employment-related risks 'may all play a part' in this, she emphasised that 'more information is needed to fully understand and address the situation'. Moreover, that information had to encompass not only 'the current impact of these disparities on groups and communities ... but also ... their root causes'.⁵

The importance of understanding and addressing root causes has become a prominent theme of human rights advocacy in recent years. At the same time, countervailing tendencies have also become better understood, thanks to works that include a series of recent histories which have added new layers to the story of human rights in the twentieth and twenty-first centuries, and enabled us to see more clearly how blatant inequalities and human rights have

⁵ OHCHR Press Release, 'Disproportionate impact of COVID-19 on racial and ethnic minorities needs to be urgently addressed – Bachelet', 2 June 2020, <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25916&LangID=E>> (accessed 3 November 2021).

come to coexist. Samuel Moyn is the towering figure in this field,⁶ but I am also thinking of studies such as Marco Duranti's *The Conservative Human Rights Revolution*,⁷ Jessica Whyte's *The Morals of the Market*⁸ and Joseph Slaughter's 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World'.⁹ Revisiting the history of the European Convention on Human Rights, Duranti highlights the central role of British and French conservatives in the framing of the Convention, and shows how their project was as much a matter of constraining social democratic governments in their own countries as it was about creating the fabled bulwark against a resurgence of fascism in Europe. The rights for which they secured recognition were conceived as vehicles for resisting the advances of nationalisation, progressive taxation and the welfare state, and turning 'free enterprise' and the defence of private property into core European values. Thus, Duranti writes, human rights emerged in their hands as 'a conduit for the reformulation by elites of older political languages [laissez-faire, etc.] in a new internationalist idiom'.¹⁰

Whyte takes up another episode in the early postwar history of human rights, the drafting of the Universal Declaration of Human Rights and the subsequent Covenants on Civil and Political and Economic, Social and Cultural Rights, and points to the influence on these instruments of Friedrich Hayek and his confraternity of neoliberal thinkers and businesspeople, the Mont Pèlerin Society. Founded in the year before the adoption of the Declaration, the Mont Pèlerin Society was dedicated to seeing off the danger of communism and, more immediately, of mass politics and Keynesian economics, and its well-known policy prescriptions revolved around expansion of the 'free market', constraint of the social state, and the transfer of public functions to private enterprise. However, Whyte calls attention to another dimension of the Society's programme. As she tells it, 'the neoliberals of Mont Pèlerin reinvented human rights as the moral language of the competitive market', developing 'their own account of human rights as protections for the market order'.¹¹ For their part, Western

⁶ See esp. Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) and *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018).

⁷ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017).

⁸ Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019).

⁹ Joseph Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 *Human Rights Quarterly* 735.

¹⁰ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017), 219.

¹¹ Whyte (n 8) 28.

human rights activists then, in many cases, made ‘common cause’ with the neoliberals to parry Third Worldist demands, with the consequence that those activists should not be regarded simply as ‘powerless companions of the rising neoliberals’, but rather, as active ‘fellow-travellers’.¹²

Slaughter extends this analysis with particular reference to the 1970s, the decade that has been presented as marking the worldwide take-up or ‘breakthrough’ of internationally protected human rights.¹³ By his reckoning, the 1970s were indeed ‘a crucial decade for human rights, but for reasons that have very different implications for a history of human rights’. What may appear as a breakthrough from a Euro-American perspective looks from a broader, global perspective ‘more like retrenchment or repossession’.¹⁴ For whereas, before this period, human rights had been a significant aspect of the conceptual toolkit used to contest imperialism and structural racism, to support struggles for national liberation, and to further the agenda of decolonisation in other domains, a narrowing of human rights occurred which made this more difficult or even impossible. The narrowing took the form of a focus of individual dissidence, epitomised by the campaigns for the release of prisoners of conscience waged by Amnesty International. Slaughter characterises this as a Global North ‘hijacking’ of human rights, and he links it to the actual aircraft hijackings which were another feature of this time. Inasmuch as the response to these hijackings worked to discredit collectivist goals and decolonial demands, he argues that the hijacking of the planes partly set the scene for the hijacking of the rights.

This illuminating body of scholarship does not feature in my book, which is concerned with the history of the idea of human rights well before the establishment in the twentieth century of regimes and organisations for the international protection of human rights. The narrative I relate mostly involves texts and events from the late eighteenth century, though it begins in the sixteenth century and contains a brief flashback to the Peasants’ Revolt of 1381. I considered concluding the book without any ‘what does it all mean now?’ discussion, but

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¹² (Whyte n 8) 17, 141. Whyte alludes here to Samuel Moyn, ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’ (2015) 77 *Law and Contemporary Problems* 147.

¹³ See esp. Jan Eckel and Samuel Moyn (eds.), *The Breakthrough: Human Rights in the 1970s* (Philadelphia: Pennsylvania University Press, 2014).

¹⁴ Joseph Slaughter, ‘Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World’, (2018) 40 *Human Rights Quarterly* 735, 736-7.

thought better of that, and accordingly there is one final chapter – I call it an ‘Afterword’ to set it apart from the rest – which engages explicitly with the present. The chapter begins by pulling together information about how things currently stand with respect to a few of the people, places, and works on which my historical narrative touches. My idea was thereby to provide a small, illustrative snapshot of phenomena constituting our current conjuncture – hunger or fear of hunger linked to (among other things) speculation on food commodity markets (as examined in detail by Chadwick),¹⁵ urban ‘beautification’ that makes cities inaccessible to all but the rich, deepening poverty (exemplified in England by heightened reliance on foodbanks) as a result of ‘austerity’ economics, and so on. Against this background, I open the subject of contemporary human rights and the ‘property question’. As indicated, that phrase was coined by Robin Blackburn, who glosses it as the nexus of problems arising from, or contributing to, the circumstance that ‘the world is owned by a tiny elite of expropriators’¹⁶ – the very circumstance which Spence used the rights of man to call into question. Can the human rights ‘mechanisms and machinery’ now in existence pose the property question relevant to the twenty-first century? My study does not help with that, but the work of others which I have just briefly summarised suggests that there is a good chance the answer lies somewhere on the spectrum between ‘only to a limited extent’ and ‘no’.

For Reflective Nostalgia

I spoke earlier of my fascination to learn of the world which enclosure in England transformed. So too, in undertaking the research for this book, I was fascinated to learn of the struggles against enclosure and how they were waged. This is partly a matter of the diverse and often highly coordinated forms of protest and resistance that were used, from direct action to the attempt to establish fully-fledged alternative communities. But it is partly also a matter of the striking clarity and urgency of some of the statements that have come down to us. The late medieval preacher John Ball set the tone when he urged on the participants in the Peasants’ Revolt with the words ‘Now is time’.¹⁷ More than a century later, the participants in Kett’s Rebellion are reported to have denounced those whose enclosure of land paved the way for the enclosure of ‘all the commodities and pleasure of this life’.¹⁸ These men ‘would have all

¹⁵ Anna Chadwick, *Law and the Political Economy of Hunger* (Oxford University Press 2019).

¹⁶ Robin Blackburn, ‘Reclaiming Human Rights’ (2011) 69 *New Left Review* 126, 138.

¹⁷ See R. B. Dobson, *The Peasants’ Revolt of 1381* (2nd edn, Macmillan 1983), 381-383.

¹⁸ Alexander Neville (Rich Wood, trans.), *Norfolke Furies, and their Foyle under Kett* (Casson, 1623), sig. B2.

in their own hands', writes Robert Crowley; they 'would be alone on the earth'.¹⁹ Or, as the Digger leader Gerrard Winstanley puts it another century later, the earth has been made into a 'particular Treasury for some'; yet God created it as a 'common Treasury for all'.²⁰ A 'Livelihood [is] ... the right ... of every man', his comrade Robert Coster declares.²¹

The next – eighteenth – century would see the near-completion of the enclosure of the English commons, and here it was fascinating to see how radicals like Spence carried this message forward. Some say, remarks Spence, that it is just and reasonable for a people to sell or give away their country, that is to say their common, to whomever they wish, to be held by the acquirers and their heirs and successors for ever. To this his reply is that, if the people's posterity 'require no grosser materials to live and move upon than air', then certainly, there can be no objection. But if their posterity require more than air, as all human beings plainly do, then they do not have the right to sell or give away common lands and other resources upon which everyone depends. 'For a right to deprive any thing of the means of living, supposes a right to deprive it of life', and that right one generation or group of inhabitants cannot justifiably claim over others.²² In this regard, it is notable that Spence read earlier texts in ways which the subsequent history of ideas has rendered quite unfamiliar. For him, for example, the most notable aspect of Chapter 5 of Locke's *Second Treatise of Government* is the opening statement that God gave the earth to 'mankind in common'. Rather than focusing on Locke's explanation for how private property emerged out of what was given to mankind in common, how the original community of property became individuated, Spence shifts the emphasis to common ownership of the earth as the starting-point for analysis of the property question.

To what kind of posture vis-à-vis the past might the recollection of such statements and approaches incline us? One of my favourite books is Svetlana Boym's *The Future of Nostalgia*,²³ a work evidently inspiring also to Golder, who has brought into the frame of a

¹⁹ J.M. Cowper (ed.), *The Select Works of Robert Crowley* (Kegan Paul, Trench, Trübner & Co 1872), 132.

²⁰ Thomas Corns, Ann Hughes and David Loewenstein (eds.), *The Complete Works of Gerrard Winstanley, Volume I* (Oxford University Press, 2009) 520.

²¹ Robert Coster, 'A Mite Cast into the Common Treasury' in Andrew Hopton, *Digger Tracts 1649-50* (Aporia Press, 1989), 13.

²² Thomas Spence, *Property in Land Every Man's Right: A Lecture Delivered at the Philosophical Society, Newcastle upon Tyne, 8 November 1775* and later republished as *The Real Rights of Man, Pig's Meat 3* (1795) 220, reprinted in H. T. Dickinson, *The Political Works of Thomas Spence* (Avero, 1982) 1.

²³ Svetlana Boym, *The Future of Nostalgia* (Basic Books, 2001).

genealogical critique of human rights its argument about nostalgia.²⁴ Combining the ideas of returning home (*nostos*) and pain or unfulfilled longing (*algia*), nostalgia is characterised by Boym as ‘a longing for a home that no longer exists or has never existed’. She suggests that a ‘cinematic image of nostalgia is a double exposure, or a superimposition of two images – of home and abroad, past and present, dream and everyday life. The moment we try to force it into a single image, it breaks the frame or burns the surface’.²⁵ Alongside this, Boym points to another doubling associated with nostalgia. There exist two distinct sorts of nostalgia, she contends: ‘restorative nostalgia’ and ‘reflective nostalgia’. ‘Restorative nostalgia stresses *nostos*, and attempts a transhistorical reconstruction of a lost home’. Its desire is to restore what is said to have been lost, and go back to the place it identifies with ‘truth and tradition’. In contrast, reflective nostalgia ‘thrives [on] *algia*, the longing itself’. It ‘dwells on the ambivalences of human longing and belonging’, and, rather than searching for origins and the conspiracies that have led us astray from them, it invites consideration of what it might be to defer the homecoming and imaginatively inhabit different historical moments at once.²⁶ Key to Boym’s analysis is the insight that if, ‘[a]t first glance, nostalgia is a longing for a place, ... actually it is a yearning for a different time’.²⁷ Both restorative and reflective nostalgia accordingly contrast with the celebration of ‘newness and ... progress’, but what marks out reflective nostalgia, and commends it as a way of capturing the posture towards the past which my book may evoke, is its orientation towards ‘unrealised possibilities’, paths not taken, ‘crossroads’ then and now.²⁸

As Boym observes, nostalgia ‘is not always about the past; it can be retrospective, but also prospective’. Certainly, it is ‘determined by the needs of the present’, and has a ‘direct impact’ on current realities and on their future.²⁹ With that in mind, I want to conclude with brief reference to an event that came to my attention around the time *A False Tree of Liberty* was published. The story I tell in the book has a narrow focus. Its temporal scope is wide, but its geographical scope is very limited. As just indicated, the voices of members of the dispossessed peasantry of England made a powerful impression on me. As someone who has

²⁴ Ben Golder, ‘On the Genealogy of Human Rights: an Essay on Nostalgia Nostalgia’ (2016) 22 *Australian Journal of Human Rights* 17.

²⁵ Boym (n 23) xiv.

²⁶ Boym (n 23) xviii.

²⁷ Boym (n 23) xv.

²⁸ Boym (n 23) xvi.

²⁹ Boym (n 23) xvi.

worked for a long time on international human rights law, I was struck, as well as surprised, to hear how such people advanced claims to a decent livelihood, claims to social justice and the fair allocation of access to the means of life, in the language of universal rights. Scholars working in the field of English history are well aware of this, but it occurred me that there were unrealised possibilities, paths not taken, and conceptual crossroads which had yet to be explored in the field of human rights. So my book examines the particular English history of dispossession, enclosure and class formation. That history is, of course, inextricably linked to the history of the British empire, and to imperialism and colonialism more generally, and the event to which I now refer indeed concerns a former British colony.

On 6 August 2019 the *Guardian* reported on the death of Carilton Maina, a 23-year old resident of Kibera, the neighbourhood of Nairobi that has the dubious distinction of being Africa's largest slum.³⁰ Maina had been shot, and his community believed that those responsible were police.³¹ Pointing to a pattern of police killings, locals said the police were working hand-in-hand with criminal gangs, and committing crimes against them with impunity. And while the Kenyan government claimed that it was 'making an effort to weed out rogue officers and bring them to justice', there was little sign that the problem was abating. What drew me to this report was, in part, the photograph which accompanied it. It showed a mural spray-painted onto a wall depicting Maina with an open book in front of him. Maina was a student at the University of Leeds, and had been at home visiting family at the time of his death. The mural carries the legends 'Justice for Maina', 'Empower our dreams' and 'Right to live'. How are we to understand this concept of the right to live? The internationally protected right to life – the right not to be unlawfully killed, and to be protected from unlawful killing – is manifestly part of it. But it is not all of it, as the report goes on to signal. Life expectancy in Kibera is thirty years. The biggest killers of residents there are malnutrition and disease. Maina was a brilliant student who made it to the University of Leeds, but in Kibera, one in four children attends school. The right to live also engages the conditions of insecurity and the falsity of emancipation that sheds the 'influence of liberty and independence only on the wealthy, the shadow scarcely falling on the poor who are still to groan under oppression'.

³⁰ "If we don't kill these people they will kill you": policing Africa's largest slum', *The Guardian*, 6 August 2019.

³¹ A police officer was later charged. See 'Kenyan officer charged with murder of former Leeds student', *The Guardian*, 24 April 2020.