

The Republic, Nature and Right

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How can a republic be perpetuated and civic virtue maintained? The historian Dan Edelstein responds to the criticisms posed by Annie Jourdan in her account of his book, *The Terror of Natural Right*. In particular, he defends the thesis according to which natural right is two-sided, at once liberating and violent.

This article is a response to the review of Dan Edelstein's book, *The Terror of Natural Right. Republicanism, the Cult of Nature and the French Revolution* (University of Chicago Press), by Annie Jourdan, published as « Le mystère de la Terreur. Violence et droit naturel » [“The mystery of the Terror. Violence and Natural Right”] in *La Vie des Idées*, 5 February 2010.

I wish to thank the editors of *La Vie des Idées* and Annie Jourdan for the interest they have taken in my study of the Terror, and for the invitation to respond to her review. I shall use this opportunity to correct certain mistaken impressions she has arrived at in her reading of my book, and to add a few clarifications that I hope will clear up other confusions.

Many of Annie Jourdan's criticisms result from her having confused what I call the Jacobins' “republic-to-come,” which never saw the light of day, with the First French Republic, which clearly did exist. My counterfactual approach can be criticized, but it is wrong to say that my book tries to describe “the allegedly natural republic of Year II,” since I very clearly point out that this republic never existed in Year II (or later). The contradiction between the “republic-to-come” which, ideally, would no longer need positive laws, and the actual republic with its incessant legislation, codification of laws, and so on, is thus merely apparent. In defense of this approach I contend that one cannot understand the *raison d'être* of the civil institutions of Year II, nor even the constitutional arguments of 1793, without having a clear view of the ultimate end to which the Jacobin leaders hoped to lead France.

The myth of the golden age and virtue

This idea of a republic that would make do without positive laws may seem very strange, but we have to put it back into its historical context. Curiously, Jourdan ignores the entire first part of my book, in which is explained how this idea arose, and why it became prominent. At the heart of this political dream is the myth of the golden age, a myth which is of course as old as the West, but which gained new vigour when it came to be seen in the light of natural right. In the emblematic and central example of Fénelon, it was precisely this myth that enabled him to promote the model of a society that could be virtuous and just without laws (this is the description given to it by Ovid: “*sine legem fidem rectumque colebat*”). For Fénelon this was the society of Boetica, but also, in a slightly different form, the kingdom of Salente, or even Ithaca, under a future reign of Telemachus.

Echos of this Fénelonian ideal occur throughout the eighteenth century: in Voltaire, with the Gangarides; in Rousseau, with the Montagnons; in Diderot, with the Tahitians; in the idylls of Sylvain Maréchal; and so on. The attraction of such a model is that it makes it easier to criticize the often defective legislation of one's own time: for example, Diderot asserts: “How short the code of nations would be, if we made it conform rigorously to the code of nature!” This idea of legislation “rigorously” modelled on natural right was also fundamental for the Physiocrats, who developed the most complete theory based on this idea.

Thus, contrary to what Jourdan suggests, when Saint-Just reformulated this political vision, he was not being at all untypical. Not only was he acting as a spokesperson for a rich literary and philosophical tradition, he was also expressing, no doubt more clearly than some, an opinion that was widely held among the Montagnards, and which can easily be detected in their constitutional projects. Indeed, in my fourth chapter I show how the Montagnards and the Girondins clashed with each other on the necessity of a social contract, the former minimalizing its importance and insisting that natural right suffices as the basis of political rights, the latter in contrast defending the absolute need for a contract. Of course, there were differences of opinion and of degree between different members of each “party”. But in broad outline this division is quite striking to anyone who has attentively studied the constitutional projects and the ensuing debates. This is a key to understanding why the suspension of the Constitution (almost immediate, since the Jacobins had already talked about suspending it *before* it was ratified on 10 August 1793) was not perceived among the Montagnards as a destabilizing event.

According to Jourdan, my natural right reading of the Terror overlooks the importance that the Montagnards accorded to civil institutions. However, neglecting the first part of my book, she fails to take into account the emergence of what I call “natural republicanism”. To be sure, the myth of the golden age is certainly not the only decisive element in Jacobin thinking. Mingled with it are quite a number of features belonging to the tradition of classic republicanism (as defined by, among others, John Pocock and Keith Baker). For these republican theorists, the great question is how to preserve a republic across the ages. They propose two solutions: laws and institutions (such as censorship, a volunteer army, and civil religion). Without good laws, a republic is doomed to fail immediately; but without good morals, a republic is quickly corrupted. That is why in addition to laws it is necessary to have institutions to maintain virtue. The theorists of natural republicanism retained this narrative, but replaced the fundamental laws of the city, the fruit of a great legislator, with natural laws. There still remained the problem of corruption, which they resolved in the same way, by civil institutions. Thus there was very clearly a fusion of these two currents of political thought, and it is this fusion – and not natural right alone – that I find in Montagnard political theorists.

Natural right, a double-edged sword

Jourdan herself introduces some confusion in her description of natural right. On the one hand, she asserts that the law of nations is “moderate and humane, derived from natural law – and therefore from the moral sense or from reason”. However, a few sentences later, she writes that “there is nothing liberal in the natural right that is brought to bear in the law of nations, the author's view to the contrary notwithstanding. It was conceived in the context of seventeenth-century monarchies that engaged in merciless warfare with each other”. As she had just recognized, however, natural right does clearly have a liberal dimension, in the English sense of the word “liberal” (since I wrote in English). In the name of human reason and moral compassion (for example, in Rousseau), natural right attributes inalienable rights to human beings. But at the same time – and here is the paradox – it also insists that, by certain “inhuman” actions, one can lose these rights.

There are of course differences between the law of nations and natural right, but in addition to the fact that many eighteenth-century jurists (among them, Burlamaqui and Boucher d'Argis) conceived of these two forms of right in an identical way, the important point is that the concept at the heart of my study – which Jourdan curiously fails to mention – the *hostis humani generis*, the enemy of the human race, is common to both. The origin of this category of enemy is complex – we have to go back to ancient Rome, where it was an epithet

reserved for tyrants, and then to Christian theology, for which it was a name for the devil – but it appears in nearly all books on natural right and the law of nations that were written between 1624 (Grotius) and 1758 (Vattel). The authors of these books also have the same definition of this extraordinary criminal, as someone who breaks the laws of nature. Thus they all agree on the appropriate punishment: Locke says it is necessary “to destroy” him ; according to Diderot, he is a “man to be suffocated”.

If I insist on the presence of this violent injunction in eighteenth-century natural right theories, I do so especially in order to counterbalance the purely liberating view of natural right that is held by many historians (notably Florence Gauthier). I do not deny that natural right has a positive side, and (in the book's conclusion) I explicitly recognize the essential role that natural right played at the outset of the Revolution. But the fact that 78 % of the executions that took place under the Terror were authorized by a law that, I maintain, originated in natural right thinking (the *mise-hors-la-loi*) reveals a rather negative side. It is time to recognize that natural right is a double-edged sword: if it allowed the revolutionaries of 1789 and 1793 to secure new rights to French citizens, it also made it possible for the members of the Convention to take these same rights away from a large number of these citizens.

None of this amounts to saying that natural right should be reduced to its violent side, quite the contrary. Moreover, I clearly contend that the Jacobins in particular “normalized” a natural right category that was quite exceptional. But that is the problem with exceptional legal categories, as the philosopher Michael Ignatieff has emphasized: the exception rapidly becomes the norm. It is precisely this dynamic that characterizes revolutionary laws, starting with the trial of the King – for whom one should, according to Robespierre, make a “cruel exception” to the sought-for abolition of capital punishment – and proceeding to the law of 22 Prairial, which stretched this exception to the limits.

It also seems to me that Jourdan underestimates the constitutional differences between 1789 and 1792. Can it really be said that “1789 broke completely with the Old Regime” and that “everything restarted at zero,” given that the King and the ministers were still in power? Furthermore, the idea that France had returned to a state of nature in 1789 was not at all widespread, whereas it was in just these terms that the revolution of 10 August 1792 was conceived by the Jacobins; the members of the Convention even felt obliged to decree that the pre-existing laws still remained in force.

Violence and revolution

At the end of her review, Jourdan tries to put the political violence that took place in France into perspective, declaring that “all eighteenth-century revolutions at one time or another experienced the 'terrorist temptation',” and citing the torture of tarring and feathering in the American colonies. It seems to me that while comparative interpretation of the revolutions of this era is important, we should not overlook essential differences ; as Patrice Higonnet notes in *Sister Republics*, no one was ever executed for political crimes during the American Revolution. The question that I pursue in my book is not that of popular violence, but of political violence, engaged in by the state. On this basis, it seems to me that to compare the terrorist laws of the French Republic with the Alien and Sedition Acts of 1798 – which admittedly constituted an anti-liberal step in American politics, but which did not involve capital punishment (though this was regularly applied for other crimes) – is to underline the exceptionality of the French Terror.

That Americans had also invoked “the Laws of Nature and of Nature's God,” in the celebrated words of the Declaration of Independence, is no reason to say that we have to look elsewhere to find the origins of the Terror. The American dependence on natural right is interesting exactly because it allows us to rise above the false dichotomy that Jourdan sets up between “positivism and historicism” on the one hand and “natural right universalism” on the other. After all, what does Jefferson do in his Declaration? He shows how natural right is useful to establish general principles, but he then attacks George III in terms that had already been well defined in the English constitutional tradition. This is the great difference between the French and the American Revolutions, on the level of political theory : with a few exceptions (Tom Paine among them), American revolutionaries recognized that it is impossible to deduce all legislation from natural right principles, and that one must interpret natural right in the framework of a constitutional tradition. The Montagnards, on the contrary, expressed a desire to be able to deduce all laws as “corollaries” of natural laws. Pushed to the extreme, this view amounts to saying that positive laws are no longer needed, since everyone, from the natural laws “engraved in their hearts”, should be able to work out the right thing to do. In criticizing this utopian view, I did not seek to defend a hardline positivism, for there is a readily-identifiable in-between position : a jurisprudence that recognizes at the same time the principles of universal justice and the need for a legal and constitutional tradition to guide the interpretation of those principles. This, incidentally, is the meaning of the preamble of the American Constitution: “In order to form a more perfect union”... The work of perfecting and

interpreting is never over.

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