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What's Wrong with Rights **by Nigel Biggar.**
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Abstract

Human rights and their history are highly contested topics these days in religious and secular circles alike. This review essay takes up the critical analysis of rights offered by leading Christian theologian and ethicist Nigel Biggar. His book provides a careful mapping of rights skepticism from Edmund Burke until today. Following these skeptics, Biggar questions the pre-modern Christian contributions to rights developments; laments the modern dominance of rights talk in political and religious circles; and blisters various human rights instruments, tribunals, cases, judges, and lawyers. This review essay argues that Biggar rather badly misjudges the roots, routes, and roles of rights developments and declarations in the West. He exaggerates the separation of objective and subjective rights. He ignores the many forms and forums of actual rights in legal practice historically and today. He deprecates the sacrifices of human rights advocates over the centuries, and the vital protections that a rights regime offers today for many people around the world. And Biggar's peculiar faith in a positivist legislative theory of rights ignores the roles of nature, custom, and plain political prudence in grounding and protecting the rights and liberties of all from the tyranny of legislative majorities.

Keywords: Nigel Biggar; human rights; Edmund Burke; declarations of rights; subjective rights; natural rights; history of rights

This volume is a cleverly-titled, briskly-paced, and hard-hitting study of the history, concept, and limits of rights and rights talk in the Western tradition and beyond. Nigel Biggar, Regius Professor of Moral and Pastoral Theology at Christ Church, Oxford, brings a powerful analytical mind to the task, and a pair of sharp

[1] This review is abridged from a larger book review symposium on this book with responses from Nigel Biggar. (https://canopyforum.org/whats-wrong-with-rights/).

elbows, too, as he wades into the crowded interdisciplinary field of human rights study. Biggar's skeptical attack on many forms and forums of historical and modern rights has won dust jacket raves and reviews from a number of fellow Christian scholars. But the book has also raised the hackles of several jurists and others who bristle at the author's defense of torture and warfare, his uncharitable disdain for judicial activism, and his sometimes blistering rebuke of national and international human rights instruments, tribunals, cases, judges, and legal counsel. I come to this book as a legal historian and find it learned and provocative, but also limited and flawed at critical points.

This book has twelve chapters with an ample introduction and conclusion that set out candidly the author's credentials and concerns as a Christian thinker and British citizen about the value, validity, and valence of rights talk. The first five chapters map the history of rights skepticism from Jeremy Bentham and Edmund Burke to David Ritchie and Onora O'Neill. Biggar distills their skeptical arguments about rights and then marches through a series of writers from the middle ages until today to see how their rights formulations measure up, finding most of them wanting. Four middle chapters critique modern defenders of 'universal,' 'absolute,' and 'subjective' rights, including a number of Christian worthies like Nicholas Wolterstorff, Oliver O'Donovan, and John Finnis. The last three chapters critique a few recent cases on war and euthanasia in the European Court of Human Rights and the Supreme Courts of the United Kingdom and Canada as an illustration of the ample problems of modern 'rights-fundamentalism' (p. 234). A final chapter blisters three prominent UK human rights lawyers, Shami Chakrabarti, Conor Gearty, and Anthony Lester to illustrate 'what wrongs with (some) human rights lawyers.'

Biggar's prose, at first measured and elegant, gets increasingly purplish and sardonic as the book goes on. Here, for example, is how he concludes two later chapters on 'what's wrong with (some) human rights judges' (p. 234):

> First of all, there are charters of rights that include absurdly ill-defined items, which place the burden of rigorous proof onto anyone wishing to limit them, and afford judges vast freedom to exercise philosophical and political discretion that far exceed their professional expertise and authority. Second, there is the flattering self-understanding of judges as best able to discern what 'real rights' are and as responsible for the 'progressive' interpretation of the law. Third, is some judges' lack of awareness of their natural, case-focused myopia. Fourth, is their lack of self-restraint in

> light of their relative immunity from democratic accountability. Fifth, we have observed signs of a rights-fundamentalism and a deficiency in historical imagination, which express themselves in a practically absolute resistance to accommodating rights to political realities. Sixth, we have also found evidence of culture of risk-aversion. Finally, a universal missionary zeal has produced an innovative expansion of jurisdiction that threatens to jeopardize national confidence in international law (309).

The central thesis of this book is largely drawn from the well-worn playbooks of two centuries plus of rights skeptics. Like Jeremy Bentham and Karl Barth, Biggar rejects 'natural' rights, arguing that only positive legal rights are real. Natural rights are 'nonsense upon stilts,' as Bentham put it. And unredeemed nature, as Barth made clear, is too shifting and sandy a foundation on which to build any kind of normative or political order. 'There are no natural rights,' Biggar says repeatedly (17, 131). Like Leo Strauss and Ernest Fortin, Biggar insists that 'moral right' or 'right order' is objectively real, while 'moral rights' are not effective unless translated into positive law terms. What is objectively right does not translate into a 'subjective right' unless the legislature says so. A 'moral right' is not a legal right, even if moral claims – say, against torture or slavery – sometimes deserve legal recognition. Like Onora O'Neill and others, Biggar argues that even legal rights are not real unless there is a legislatively-created body with the duty to vindicate those rights. Rights without duties are idle rhetoric, and judge-made rights are anathema. And like Edmund Burke and David Ritchie, Biggar is dismayed by abstract and universal rights declarations – like the French Declaration of the Rights of Man and Citizen (1789) and the United States Bill of Rights (1791) that these historical skeptics critiqued, let alone the Universal Declaration of Rights (1948) and its many international and regional rights progeny. All such sweeping instruments, often cast in the 'high flying rhetoric' of natural law and natural rights, have created a dangerous 'rights fundamentalism' whose 'lack of definition' allows rights to become 'whimsical creatures of human desire and choice,' subject to 'ludicrous or recklessly licentious construals' (4, 124). In particular, these grand rights documents have encouraged citizens and authorities, lawyers and judges alike to invent all manner of untethered rights claims, upsetting long cultural traditions in so doing -- sometimes violently, as Burke already lamented in his reflections on the French Revolution.

With this critique of (natural) rights in hand, Biggar marches through selected writings of a long series of historical and contemporary jurists, philosophers, and judges to see how they measure up. Almost all of these writers fail on his skeptical reading. They conflate natural rights and positive rights. They fail to distinguish moral right and subjective rights. Particularly the pernicious nominalism of Ockham and vulgar voluntarism of Hobbes have unmoored rights from their essential moral anchors,

leading to the greedy subjectivism and individualism of the later Enlightenment and our post-Christian liberal culture.

Even the expanded rights talk offered by scores of early modern Catholic and Protestant writings -- deeply rooted in biblical and theological soils and generative of so much of the Western tradition's later constitutional and legal rights regime -- get shorter shrift in Biggar's analysis than seems warranted. These are, after all, serious and legally influential Christian theological, ethical, jurisprudential, and political sources and discussions of rights that I would have thought a modern Christian ethicist like Biggar should appreciate and applaud. Biggar's own conservatism about rights talk, however, and his appetite for the rights criticisms of Burke, Bentham, Ritchie, and others have him emphasizing the limits of these early modern Christian rights thinkers and limiting the library of earlier Christian sources he offers for analysis, and even then reading them only selectively. Had he worked in detail through all the early modern Calvinist revolutionary pamphleteers, and through Vitoria, las Casas, Suarez, Vázquez, Grotius, Pufendorf, Burlamaqui, Wolff, Coke, Milton, Selden, Hale, Lilburne, Ward, Williams, Blackstone, Backus, Adams, Witherspoon, Wilson, Madison, Sherman, Story and many scores of other self-identified Christian jurists and philosophers he would have had a much harder time coming to the conservative and cautionary conclusions about early modern Christian rights talk and its constitutional and legal influence than he offers.

It's not clear to me why universal declarations and statements of rights and liberties – from Magna Carta (1215) to the Universal Declaration of Human Rights (1948) -- are so pernicious in Biggar's view. Historically, these declarations distilled the many legal rights of prior generations that deserved new confirmation and vindication. They defined the grounds on which a community legitimately rebelled against a prior tyrannical regime. They gave priority to some rights and liberties that needed new or more nuanced protection given their recent abridgement. They indicated procedures and/or institutions for the vindication, enforcement, and amendment of rights. And these declarations often set out general preambular principles to guide the community's development of more precise precepts, practices, and procedures in pursuit of peace, order, and justice. As such, declarations of rights have functioned in the state much as declarations of duties like the Decalogue have functioned in the church. They provide normative totems and ideals for each generation to make ever more real and concrete. And they are regular reminders to all community members of the minimum duties owed to others, including to those who are in authority or those whom authorities are called to serve.

Biggar objects that such declarations of rights 'are burdensome to uphold,' set 'absolute' and 'impossible standards' for individuals and government to attain, encourage 'nagging overuse' by restive citizens, and comprise an 'ever fruitful source of thoughtless frustration' for 'weary governments' now forced to expend 'finite resources' better spent on other 'public purposes' (331-32). Similar arguments were raised by King John against those restive barons and bishops clamoring for Magna Carta; by King George III against those rebellious American colonists pressing for

independence after repeated violations of their long chartered rights and liberties; and by the American white establishment against the black leaders of the civil rights movement who were demanding liberty, equality, and rights after centuries of oppression. These arguments are not persuasive.

Of course, rights claimants pressing legitimate claims rankle the status quo, demand attention, and often force governments to redirect their fiscal and political priorities. Of course, the demands for 'due process of law' and 'equal protection under the law' often create work. But sometimes that's what it takes to correct fundamental wrongs of the past and to safeguard against future injustice if not tyranny. Of course, some rights claimants overplay their hands, and some courts get some cases wrong. But most rights claims are not absolute and are not interpreted so; they are and must always be balanced against each other and limited by many other fundamental goods and needs of societies. Biggar is surely right that a 'liberal society cannot live on rights alone' (164). But a liberal society cannot long live without them. Rights declarations are useful instruments to achieve just and right order, and guarantees of rights and liberties can and do provide citizens with the means to discharge the duties and practice the virtues that Biggar rightly praises.

It's also not clear to me what rights ultimately concern Biggar. His shifting criticisms of 'universal,' 'natural,' 'subjective,' and 'absolute' rights claims sometimes spills over into criticisms of public, private, penal, and procedural rights altogether. That is clear already from his choice of book title: 'What's Wrong with Rights' the cover announces, without the qualifier 'natural' rights, and without the familiar question mark that other books with similar titles have used to create a double entendre. While Biggar works hard to distinguish objective moral right from subjective legal rights, he provides less guidance to judge the value and validity of various 'legal rights.' In this book and other writings, he takes intermittent swipes at civil liberties and human rights, individual rights and personal rights, sexual freedom and women's rights, welfare and poor rights, children's rights, freedoms of speech and expression, rights and freedoms of personal autonomy and self-determination, and more. It's not clear what in the many long catalogues of modern legal rights on offer today ultimately pass muster. Biggar does allow that rights can provide a useful means to provide security and protect human flourishing so long as they are protected by a treaty or statute. He also allows that international rights statements can now provide 'a powerful way of holding states to account – although the way of invoking them can be more or less prudent' (324-25). But one cheer for rights and liberties is about all we get.

Biggar's book is decidedly philosophical, not legal, or juridical, in orientation, terminology, and method. This is not to dismiss his approach but to point out its limits. While the last chapters on torture, suicide, euthanasia, and war get into some nitty-gritty legal questions, a good deal of the volume hovers well above the quotidian daily questions of rights, liberties, privileges, immunities, franchises, capacities, powers, procedures, remedies, and more that jurists have been dealing with since the early days of Jewish law and Roman law. The irony is that this is the realm of real, clear,

specific enumerated legal or positive rights that Biggar says he favors over lofty declarations on rights. But rather little of the quotidian occupies him in this book.

Moreover, following modern skeptics about rights whom he engages, Biggar focuses largely on scattered 'individual' rights – not the sundry institutional rights and liberties of churches, families, associations, corporations, banks, unions, publishers, schools, hospitals, charities, foundations, guilds, and other groups that jurists and judges have also long had to wrestle with. Further, he offers philosophical critiques of early modern and modern bills and declarations of individual rights, not acknowledging that many of these are distillations and affirmations of positive legal rights of earlier generations, and not addressing the complex concerns of due process and procedural remedies that bring these rights to real life.

Biggar sometimes equates legal discussions of 'subjective rights' with modern 'subjectivist' defiance of objective right order, and claims of 'individual rights' with forms of greedy and grasping 'individualism'. But since biblical and Roman times, lawyers defined 'subjective' rights and liberties as the claims that could be made by parties who are 'subject' to political authorities. St. Paul was not being a subjective relativist for insisting on his right as a Roman citizen to appear before the emperor (Acts 25:10-12). A spouse who lovingly calls in her conjugal rights (1 Corinthians 7:3) is not being greedy but affirming the right order of marriage. A plaintiff who sues to vindicate their rights to life, property, and reputation, or to the integrity of their marriage, family, and household is giving their neighbor the chance to honor their basic moral duties set out in the Decalogue: to not murder, steal, or bear false witness; to not dishonor parents or breach marital vows; to not covet, threaten, or violate 'anything that is your neighbor's' (Exodus 20:12-17).

Biggar wants the legislature to decide about legal rights and their limits, and to cast these rights into specific statutes and treaties. But rather than being guided by natural law or by declarations of natural rights, he wants legislation rooted in and 'justified by natural morality.' This he defines rather vaguely as 'a set of moral principles that are given in and with the nature of reality, specifically the nature of human flourishing' (131). I suspect that many legislators would find more inspiration and instruction in the American Declaration's ringing endorsement of the 'laws of nature and nature's God,' that decree 'that all men [now persons] are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

Moreover, Biggar's peculiar positivist dependence on legislated rights raises large questions about legislative competence, separation of powers, the role of constitutions (written or unwritten, with or without bills of rights), and judicial review. And it also begs deep questions about the role of precedent in a rule of law state, and the place of democratic ventilation and deliberation in determining legal fundamentals. Should fundamental rights and wrongs be decided by simple majority votes of whatever party happens to be in power, or by plebiscites of whatever portion of the voters happens to get to the polls? Today, when slender legislative and popular

majorities in democratic lands are making substantial nationalist and xenophobic moves that impose significant costs on (the rights of) many, this faith in the legislative process needs much more discussion. Even the vaunted British Parliamentary system has shown ample signs of trouble of late, to say nothing of the hopeless dysfunction of recent United States Congresses.

Finally, Biggar's history of rights talk is not about the legal history of rights but largely about historical philosophical texts discussing rights, or modern philosophers' accounts of these historical texts. Thus, we hear a bit about Ulpian and Cicero and their modern echoes, but not about the evolving concept and legal protection (with limits) of rights in all their diversity. We hear again about Aquinas and Ockham, and about the Franciscan poverty debates in the Middle Ages – that Michel Villey and Brian Tierney engaged deeply two generations ago -- but not much about the massive and complex apparatus of rights in the medieval *ius commune* or even about the many, often elaborate medieval rights charters – of which the Magna Carta of 1215 is only the most famous. We hear about Burke and Bentham and their worries about rights, but rather little about the rather full development of rights and liberties in England from the Petition of Right in 1628 to the Bill of Rights sixty years later, or the comparable rights discussions and legal developments on the Continent and in the Americas in early modern times. Where are the hundreds of canon lawyers, civil lawyers, and common lawyers who worked seriously on rights before and after Burke and Bentham with much broader and more enduring legal and political influence than these rights skeptics? Where are the massive constitutional documents and thousands of constitutional cases that have been so central to the Western and increasingly global protection of rights in early modern and modern times?

This is not to throw legal stones at a philosopher's elegant glass house. But it is to say that the rights and the histories of rights that occupy Biggar in his quest to determine 'what's wrong with rights' are often limited and abstract. His analysis shifts back and forth from what's wrong with rights in general to what's wrong with certain forms of natural, absolute, subjective, universal, or human rights. Testing out his understanding and critique of rights in a few extreme modern cases of torture, suicide, euthanasia, and war helps to determine and define the value, validity, utility, limits, and distortions of certain kinds of rights talk. But Professor Biggar would do well to bring this lofty discussion to the ground, especially as he sorts out more charitably and completely what's *right* with rights for individuals and groups, for states and churches, and for societies and cultures throughout the world.