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Stability, natural rights, and the limits of prudence

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Abstract

This essay investigates Prof. Nigel Biggar's critique of natural rights and his subsequent reliance upon "prudence" to secure positive rights for citizens. It offers a modest defense of natural rights as explanatory for certain intuitions, while raising questions about whether positive rights are sufficiently stable on Prof. Biggar's view.

Keywords

Karl Barth, natural rights, Nigel Biggar, political theology, positive rights

In *What's Wrong with Rights?* Nigel Biggar challenges the "rights-fundamentalism" that he sees animating many political orders across the globe with his now-trademark clarity, breadth, and subtlety. The problem with "rights-fundamentalism," he writes, is that it "proceeds to take rights as given, and by asserting at the beginning what is properly a conclusion, pre-empts and shuts down ethical deliberation." Consequently, "rights-talk has the tendency to push all other moral considerations off the table."[1] Ever interested in going his own way, though, Biggar declines to follow other eminent theological critics of legal rights like Oliver and Joan Lockwood O'Donovan, who reject them *tout court*. Instead, he seeks to save them by situating them within a broader framework of objective moral rightness. Biggar seems to take as his own the modern Roman Catholic position "that morally justified positive rights are the socially contingent products of political deliberation about the common good."[2] Biggar is no legal positivist, to be sure: he thinks

[1] Nigel Biggar, *What's Wrong with Rights?* (Oxford: Oxford University Press, 2020), 325.

[2] Biggar argues that the idea that "moral claims of the common good sometimes override legal ones" was familiar to pre-modern Christian ethics. While he notes that it is a "dangerous idea," he suggests that the "circumstances will be rare where another private citizen, or even a public officer, can legally override" the legal right of an individual. Rare, that is, but not impossible.

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"natural morality" has an important role to play in a political order, and that rights-fundamentalism should be rejected (among other reasons) because of how it backfills this morality with notions of possession and entitlement.[3] "Crucial to my argument," he writes, "is the view that 'a right', being paradigmatically legal, is stricter, more stable, and more secure than 'moral right.'"[4] Yet *natural rights* have no purchase within this broader moral framework (which is why Biggar speaks of the "moral right," instead of *a* moral right). Among Biggar's several objections to them, he emphasizes that what "might be rightly claimed *morally* is usually subject to a greater number of qualifying conditions, which might or might not obtain."[5] The legal right to free speech, for instance, can survive our abuse of it; but what we are morally entitled to depends upon contingencies like the "feasibility of corresponding duties, economic circumstances, and political stability."[6] The superior stability of legal rights arises in part from the fact that they are justiciable: natural rights have no authority that can secure them, but are effective only as they appeal to the other person's conscience.[7]

In this rejection of natural rights, Biggar seems to transpose his earlier rejections of absolute moral prohibitions into a more explicit political key. If one worry is that natural rights need "support" from institutions to exist, another worry is that they are too nebulous or general to be action-guiding for a polity. Biggar rejects the idea that there are any "non-tautologous, practically illuminating, natural rights that, transcending variable social circumstances, are absolute, applying always and everywhere."[8] Instead, "prudence" both governs moral action and grounds positive rights.[9] Because the "positive, legal rights

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On Biggar's account, the "*un*civil situation of justified war is significantly different." In that context, the threshold for respecting rights seems to be lowered. See 230–31.

[3] Biggar asserts his moral realism at the outset of the book as an outflow of his Christian convictions, and returns to it at a number of points throughout. See page 4, where he argues that natural morality stems from an account of the goods of human flourishing that are accompanied by norms of conduct which their "protection and promotion generate" (4).

[4] Biggar, 3.

[5] Biggar, 325.

[6] Biggar, 326.

[7] Biggar argues in response to Joel Feinberg that "any claim has to command the backing of some social authority in order to be sufficiently secure to deserve the title of 'a right.'" On his view, this authority must "comprise more than prevalent public opinion and individual conscience, since these are too unreliable to provide the claim with any assurance of security." Rights do not need enforcement by that authority, but they do need "support" (Biggar, 94n2). See also Biggar, 98: "Insofar as it always remains possible for any persons accusing, witnessing, and judging to treat the accused with scrupulous honesty—that is, insofar as there always remains the safeguard of an individual's conscience—we could say that the natural right to a fair trial exists, insofar as the accused would have a moral claim upon the consciences of others." In the absence of social institutions to support rights claims, "liberty rights do not exist—only insecure liberty claims to conscience do." So also 99: "Yet, while an appeal by the accused to the authority of the consciences of witnesses and judges need not be in vain, its power is too uncertain to warrant talk of his possessing a natural right to fairness." See also 120–121.

[8] Biggar, 92.

[9] Biggar argues that the absolute legal right against what is commonly called torture can only be justified on prudential grounds. See 182–83, 188–89.

justified by the value of personhood are often contingent upon the obligatory requirements of prudence," the "natural, moral rights that some think [personhood] justifies are more highly contingent upon a wider range of moral factors than [their endorsers] tend to suppose."[10] Biggar's rejection of absolute rights includes the putative "right to life," which he repeatedly suggests could be used to sue the Almighty for immortality.[11] Against David Rodin's invocation of such a right to constrain killing, Biggar argues that the doctrine of double effect—or the notion that causing death is licit if one's intention is for a proportionately valuable end—both permits killing and limits it in ways that render appeals to the "right to life" superfluous. Because it is not proportionate to aim at the "annihilation of soldiers as such," the soldier should not intend to kill them. Yet proportionality has nothing to do with whether they, or innocent bystanders, are owed life.[12]

Yet if natural rights can do too much work, this reader was left wondering if Biggar has allowed them to do too little. Biggar's fight is against rights—*fundamentalism* and the rights-talk that generates it, not with positive rights per se. Yet such rights are narrowly constrained: determining whether a legal right should be granted requires paying heed "to such considerations as feasibility, cost, and risk."[13] Yet one might subject natural rights to parsing and qualifying similar to those that Biggar puts legal rights through, rather than rejecting them altogether because of their putative instability. For instance, Biggar raises his worry that the "right to life" could be invoked to sue the Almighty for immortality seemingly to indicate the absurdities natural rights can generate. But to borrow a phrase well-known to Biggar, one might "specify and distinguish" such life in such a way that mortality is intrinsic to it and that death is required on account of sin.[14] Such an approach would limit the contexts in which the right might be claimed, and offer a more fine-grained way of deciding what moral salience it has than Biggar allows.[15]

Moreover, Biggar's repudiation of natural rights leaves open questions about *who* is wronged when we fail to abide by what is morally right, and whether the victims of our wrongs have any special or unique claims against us. For instance, Biggar argues that double-effect is sufficient for a morality of killing. On his view, double-effect reasoning requires the killer to respect the victim. While the claims of the social good "can justify the killing of those who are doing objective injustice, but are not morally culpable for it," without some proportionately weighty reason for killing, the killer is "guilty of an

[10] Biggar, 126. As he puts it, "That is to say, exactly what legal rights, and what degree of security, are morally justified depend upon what is possible and prudent in the prevailing circumstances."

[11] Biggar, 59, 67, 276.

[12] Biggar, 227. Biggar's defense here obscures a crucial difference between intending to kill *a soldier* and intending to, as he puts it, "annihilate the enemy as such." One might think that any particular soldier might intend to kill any particular soldier on the other side, without thinking that anyone intends to "annihilate the enemy as such." The intention to kill an individual is not transparent for the intention to disproportionately slaughter one's foes. On Biggar's view, intentions seem to have to endure *despite* shifting circumstances—but it is not clear why this is.

[13] Biggar, 332.

[14] Nigel Biggar, "Specify and Distinguish! Interpreting the New Testament on 'Non-Violence,'" *Studies in Christian Ethics* 22 (2009): 164–84.

[15] I take it that something like this is Karl Barth's view. See *Church Dogmatics*, III.2, §47.

immoral act of grave *dis*respect."[16] Yet on what basis are individuals *owed* this reason? Do they have *the right* to claim it? (The formulation is so customary that it is nearly impossible to resist.) Biggar seems to accept Rodin's claim that a "right to life" is a "breakwater" that is lowered in the theater of war: so, he suggests that combatants "only have a right to life, *when they are manifestly disabled or have manifestly surrendered, and so cannot perpetuate further wrong*."[17] But it seems more plausible to say that their "right to life" explains *why* it is morally bad to aim at their killing, and why they are entitled to some proportionately weighty reason for being killed. Their natural right to life endures even in the "uncivil situation of justified war," as Biggar calls it: if positive laws do not govern such a context, natural laws and the rights they generate do.[18] The enemy's right to life would become more transparent when warfare ended, and one no longer had a proportionately weighty reason to accept their death. Biggar seems to follow Onora O'Neill in arguing that "rights that oblige no one are not rights."[19] Yet he does not defend, that I can see, an asymmetry between rights and duties—although he would seem to need one if we are obligated to have a proportionately weighty reason before accepting someone's death as a side-effect of our intentional action, without any right on the other side to explain it. If it is plausible to think there are no duties without corresponding rights, then the duty to restrain a combatant with means proportionate to the threat would correspond to our recognition of their right to life.

Such a defense of natural rights would entail that they have stability across circumstances, and that they might help us identify the limits of just action.[20] Biggar rejects these propositions in part because he thinks rights claims require a governing authority to support them. Because the bonds of society are broken in warfare, it is immune to rights claims: the "right to life" on Biggar's account only matters when one authority prevails and the enemy is defeated. Yet this framework raises additional questions. For one, if positive rights depend upon a strong government, they risk becoming merely the luxury toys of developed, stable political orders. On one side, Biggar follows O'Neill in arguing that when there is no body "capable of performing the duty necessary to realise a right, *there is no right.*"[21] The net effect of this view, though, is that in tragic circumstances when "weak" citizens have basic human needs that neither their own government nor any other agents can satisfy, they "have no right at all."[22] If this is the case, though, then rights are derivative upon the power of governments to meet their citizens' needs—and, ironically, the very contexts where we might think appeals to rights are most salient turn out to be contexts where they exist only as abstractions. Biggar is less-than-conclusive about whether we should still endorse rights under those conditions. So, he suggests

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16 Biggar, 228–29.

17 Biggar, 232.

18 Biggar, 230.

19 Biggar, 32.

20 Note that "identifying the limits of just action" does not entail that they would tell us what to do in any specific circumstance. They might only demarcate what we *cannot* do, or cannot do without some extremely grave reason.

21 Biggar, 29.

22 Biggar, 29–30.

that the "unconditional rhetoric of abstract rights" undermines "the seriousness of rights-claims" and "'comprises a bitter mockery to the poor and needy', giving rise to expectations whose impossibility generates frustration—and . . . inappropriate blame and political cynicism."[23] At the same time, when governments are unable to secure the rights of their citizens, Biggar allows that they should still be upheld as "ideals of maximal security against risks to important freedoms, to which fragile governments, with aid from international partners, should approximate as circumstances allow." If rights are conditional upon their feasibility, though, then this concession to "ideals" seems to fall prey to Biggar's criticisms of rights-as-abstractions.

Moreover, it is also hard to see how Biggar's account of "positive rights" affords them any more stability or security than natural rights. As I read Biggar, positive rights are contingent upon "prudence." While such rights might be justiciable, governments can decide when circumstances are tragic enough that they warrant "suspending" various rights, including *habeas corpus*, free speech, and religious expression.[24] As Biggar writes,

> Circumstances might dictate (through the virtue of prudence) that certain rights should not be granted at all, or that they should be suspended; and circumstances always dictate what level of security it is prudent to accord any right. . . . What is not appropriate is imprudent, and imprudence is a moral vice.[25]

Yet Biggar thinks that circumstances also affect what is morally right to do, and that if one is incapable of meeting another's *basic* needs then one has no obligation to do so. In Biggar's framework, positive rights are paradigmatically legal—but the shaky ground of "prudence" that positive rights stand upon seems analogous to the insecurity Biggar thinks natural rights have. Yet Biggar affirms the one, and rejects the other.

That discrepancy in Biggar's response seems to arise from the weight he gives to the institutional "support" that positive rights claims require. On his view, positive rights are justiciable by an existing authority that has the competence to adjudicate claims—whereas natural rights only appeal to "the private court of conscience."[26] The judgments of conscience, he contends, will be "more urgent and agile than those of courts, but, given human ignorance and vice, also more prone to error."[27] Biggar's skepticism about conscience as a moral force when there is no authority to enforce rights claims, though, sits uncomfortably with his later commendation of Sir John Malcolm's campaign with Sahajanand Swami to abolish female genital mutilation in 1830s India through moral *persuasion.*[28] Nor does it seem easily compatible with his optimistic defense of specifying rights legislatively rather than in courts, because the members of legislative parties "will have consciences, possess moral reasons, be susceptible to rational persuasion, and

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[23] Biggar, 31.
[24] Biggar, 137, 163.
[25] Biggar, 218. See also 69.
[26] Biggar 136. See above, note 6.
[27] Biggar, 124.
[28] Biggar, 205.

vote in favour of what they believe to be right."[29] Biggar does not supply a criterion to help legislatures determine when circumstances might require "suspending" rights. As prudence is sensitive to circumstances, it may be impossible to specify a meaningful criterion. Yet we might have worries about legislators' reliability similar to those concerns that Biggar himself raises against judicial efforts to "weigh" rights against each other. Judicial attempts to employ proportionality tests to weigh rights and interests are often, Biggar writes, "reduced to intuitive assertions whose confidence far outstrips their rational authority" and "little more than opinion masquerading as arithmetic."[30] While I am sympathetic with Biggar's case for specifying rights legislatively, in contexts where rights might become especially important, it is not clear that they are any more reliable than judges. It was, after all, not a judge that suspended the rights of citizens in the Weimar Republic.[31]

More fundamentally, Biggar's critique of natural rights for being "unstable" on the grounds that they only appeal to conscience is surprisingly *atheological*. While Biggar owns his Christian convictions at the outset of the book, they seem to do very little normative work in his hand-to-hand combat about rights. While *What's Wrong with Rights?* is not a "fully worked out theory of rights," the lack of systematization leaves open questions about what sort of dignity Biggar thinks human beings possess—and what sort of moral work that dignity does.[32] Biggar contends that the "value of personhood . . . is a matter of its *morally responsible* freedom," a formulation that risks inviting the thought that its value is contingent upon both whether it is able to *exercise* that freedom and on *how* it exercises that freedom.[33] Biggar suggests that he "strain[s] to understand what kind of dignity might remain" in Hitler, such that it would be wrong to torture him.[34] Yet in the shadow of the Second World War, Karl Barth decried the "hesitation to take seriously the general honour of man as such (his human dignity, as it is often called)." Founded as it is on the death and resurrection of Jesus Christ, human dignity is "alien" to humanity. But it is also in Barth's judgment an "unlost and unlosable distinction" that "belongs to every man in his limitation, whatever his attitude to it[.]"[35] There is a limit to

[29] Biggar 205, 300.

[30] Biggar 284.

[31] Biggar, 302. The session in which this talk was presented happened on 6 January 2020, mere hours before the U.S. Congress was subject to a dangerous invasion of angry citizens. The precariousness of the moment was in part exacerbated by the irresponsible decision by legislators to accommodate conspiratorial accusations that the election had been fraudulently stolen. It was a stark reminder of the unreliability of legislators in the middle of populist uprisings, insofar as they are similarly susceptible to the distortions that both fuel and come out of mob environments.

[32] Biggar, 3.

[33] Biggar, 126. Biggar's use of such a category extends back to *Aiming to Kill*, in which Biggar writes that the value of human life "lies, not in sheer autonomy, but in responsibility to God and therefore to one's fellows." The explicitly theological basis Biggar affirms for such responsibility does not appear in *What's Wrong With Rights?* Its absence is unfortunate, and important. See Nigel Biggar, *Aiming to Kill: The Ethics of Suicide and Euthanasia* (London: Darton, Longman and Todd, 2004), 45.

[34] Biggar 171.

[35] Barth, *Church Dogmatics*, IV.3, 653–54.

political and moral action here deeper than prudence, which is obscured in Biggar's critique of rights-fundamentalism.

Without a more stable foundation for political rights, I worry that Biggar's therapeutic remedy for rights-fundamentalism will not go deep enough. While circumstances are salient to any moral decision, absolute prohibitions and rights prevent "prudence" from dissolving into a situationalist ethics, even one that is more Burkean in its willingness to uphold institutions and their judgments than the progressive versions that marked the 1970s. In his conclusion, Biggar proposes that "behind rights-fundamentalism appears to lie a secularized version of biblical religion," which defends the disadvantaged with a "utopian rigidity" that refuses to "reckon with tragedy."[36] But are appeals to "prudence" or "duty" or "virtues" a sufficient antidote to this malaise? If rights-fundamentalism is a secular response to theodicy problems, will not its only *true* counter be the real answer to the groans that both injustice *and* tragedy bring forth: the Word of God in Jesus Christ? In order to fully address what's wrong with rights, then, Biggar might need more Barth—and perhaps just a little less Thomism.

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[36] Biggar, 329. Biggar argues that affirming the existence of rights without feasibility would mean that there is "only ever injustice, never tragedy." It is in "tragic" circumstances that the weak have no rights. Yet this frames natural rights as entirely within the sphere of creation: it might be that the "tragedy" of unmet basic needs when there is no human culpability actually does give one a legitimate claim against God, and that God is obligated to compensate those who suffer in some manner. In that case, all true "tragedy" might really be injustice. Even if this is wrong, Biggar's argument does not give any reference to whether or how God's presence in human affairs *outside* of civil institutions makes a difference to the basis or effectiveness of their claims upon each other. This is all the more curious since it is in just such contexts where the need for a divine adjudicator is so palpable and transparent.