

NATIONAL REVIEW

The American Understanding of Natural Rights

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National Review readers may have been surprised earlier this month to learn that “the entire ideological edifice of classical liberalism has been constructed exclusively with borrowed capital from the Christian Church” — still more, that America’s Founders “tried to carve out a vision of human rights that circumvented the need for metaphysical or theological commitments,” no less, “but they were destined to fail.” Yet such were the claims put forward by Cameron Hilditch, National Review Institute William F. Buckley Fellow in Political Journalism, in an essay entitled “[The American Misunderstanding of Natural Rights](#).” One imagines Bill himself would have been surprised.

Just to be clear, Hilditch, who hails from Belfast, Northern Ireland, and graduated recently from Magdalen College, Oxford, is not opposed to our separation of church and state. In fact, he calls the disestablishment of religion in the United States “a glorious victory for the claims of conscience.” But his brief for Christianity as the exclusive foundation of the entire classical-liberal order — the Founders’ “borrowed capital,” he writes, came from “the Catholic canon lawyers of the Middle Ages” — is seriously overstated and, in the end, misstated.

What prompts Hilditch to undertake this excursion into the origins of our political order is the release last month of the State Department’s much-anticipated “[Report of the Commission on Unalienable Rights](#),” ordered a year earlier by Secretary of State Mike Pompeo to provide him with “fresh thinking about human rights” and propose “reforms of human rights discourse where it has departed from our nation’s founding principles of natural law and natural rights.” Since its release, numerous left-leaning human-rights organizations have attacked the report, fearing it threatens not only women’s and LGBTQ rights but the very firmament of international human rights. Yet the report advocates no such thing. What it does do, however, as we outlined in a [short op-ed](#) just after the report’s release, is put modern social and economic rights on a par with our innate unalienable rights to freedom, thus enabling brutal authoritarian regimes to boast of their support for such rights even as they repress the freedom of their citizens — and worse, to wrap themselves in the mantle of “human rights” from their seats on the U.N. councils that were created to expose such tyrants.

Unfortunately, in his long essay, Hilditch says relatively little about the Commission’s attempt to find “a workable synthesis” between those two very different kinds of rights. Instead, he treats the report as a springboard for his larger agenda. Thus, he finds it “full of mistakes regarding the nature and foundation of natural rights,”

the same mistakes that were made by the Founding Fathers of this country and that persist in the minds of many Americans to this day. The American natural-rights tradition has rarely ever been articulated in a historically or intellectually defensible way, which is a great shame, because all of its major intuitions about the sacred and inviolable liberties of man are entirely correct. The truth is that Washington, Jefferson, and Madison were far more capable of building the great and glorious constitutional edifice of the American Republic than they were of accounting for it historically or philosophically, or explaining it adequately from first principles. The State Department's report falls predictably at all of the same hurdles the Founders did. But it does provide a long-overdue opportunity for Americans to understand where their rights really come from.

Seizing that opportunity, Hilditch proceeds to instruct us, first by deconstructing the classical-liberal project, then by re-grounding its conclusions on Christian foundations. But notice a problem already in that final sentence: the ambiguity in the locution "where our rights come from." Is Hilditch posing a historical or a theoretical (i.e., justificatory or normative) question? In truth, he goes back and forth between the two grounds for the Founders' claims, but in the end his argument is essentially that of the historicist. Thus, he does not leap immediately to the answer that our unalienable rights "come" from God, as Secretary Pompeo did, understandably, when he released the report last month at Philadelphia's National Constitution Center. That answer echoes Jefferson's invocation of "our Creator" in the Declaration of Independence, of course, a vague notion that believers of many kinds might accept uncritically. Clearly, however, the justificatory problem with that answer is epistemological, for the "self-evident truths" concerning our rights are thus left to rest on religious belief, which counts for little among nonbelievers. Yet to the extent that Hilditch is making a moral case for our rights, which again is unclear, that may be his ultimate justificatory argument.

He begins his deconstructive case by quoting the Commission's report: "Classical liberalism put at the front and center of politics the moral premise that human beings are by nature free and equal, which strengthened the political conviction that legitimate government derives from the consent of the governed." That indeed is how the Founders went about the matter, in the state-of-nature justificatory tradition. As the Declaration makes clear, the moral order, defined by our natural rights, comes first. The political and legal order, aimed at securing those rights, comes second, as derived consistently from the logically prior moral order.

But the problem there and in the Founders' political thought, Hilditch says, is with the word "nature." "How do we know which rights are 'natural' to human beings?" Moreover, how can our rights be said to be "self-evident" when there is so much disagreement about their nature and scope? "Jefferson was wrong," Hilditch charges. "The idea that the human being's right to life, liberty, and the pursuit of happiness is 'self-evident' to the unaided rational intellect," he concludes, "is thoroughgoing and unadulterated nonsense," echoing thus the (in)famous Jeremy Bentham: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense — nonsense upon stilts." Alas, it seems not to have occurred to Hilditch that while rights are indeed discovered through human reasoning, not all humans reason well, if at all, which is one reason we find disagreements, a matter James Madison addressed in *Federalist* No. 51.

Yet the nonsense continues today, Hilditch laments, as in George Will's recent tome, *The Conservative Sensibility*, where Will writes that "rights are natural in the sense that they are

discovered by something that is natural: reason,” aided by “empirical observation.” Hilditch elaborates: “In other words, the light of human reason should be able to observe what is consistently true about human beings across space and time and then to infer from these data what rights are ‘natural’ or appropriate for such a creature,” all of which he calls “very silly.”

With that sketch before him of “how retrograde the Founders’ naïveté on this issue is” — to say nothing of the Commission’s and Will’s — Hilditch unleashes his criticism:

The stubborn fact is that rights commonly referred to as “natural rights” or “human rights” by people in Western liberal democracies have not been thought of as such by most human beings at most times and in most places in world history. This means that they cannot be thought of as “naturally discoverable” in our nature in the same way language or the appetite for food is, because only certain communities, nations, and civilizations exhibit any kinds of adherence to them. Human rights are, consequently, radically contingent in historical terms.

“Because human beings contain such a bewildering variety of contradictory desires, impulses, intuitions, and habits,” Hilditch continues, “it’s possible to infer just about anything one might care to from our nature.” Humans exhibit a great range of behaviors, he notes, from the noble to the appalling, all of it “natural.” “Our nature supplies us with a kaleidoscopic array of facts about ourselves and the world around us; all accessible to reason and none obviously more prescriptive of our political institutions than any other.”

If Hilditch’s critique of the classical-liberal project and the American vision in particular is not stewed in moral relativism, it is at least grounded in naïve empiricism. Take his claim, for example, that because “most human beings at most times and in most places in world history” have not thought of natural rights as we do, “this means that [rights] cannot be thought of as ‘naturally discoverable’ in our nature *in the same way language or the appetite for food is.*” No serious philosopher would go about discovering the nature, foundation, and scope of our rights *in that way*. One would ask instead what rights are, how they differ analytically, linguistically, and operationally from other moral notions, whether there are rights, what it means to say that there are, what the truth-conditions of such claims are, how one demonstrates them, and, from answers to such questions, what rights we do and do not have. In short, one would *reason*.

But even the implications Hilditch draws from his armchair empiricism are faulty. To be sure, it’s easy to claim a right and thus to find disagreement about what rights we have; and rights can easily be created, withdrawn, or ignored through political, legal, or brute force, as the world makes clear. But that empirical evidence is irrelevant to the question of whether we have natural or moral rights: Again, one does not go about addressing that question by comparing conditions around the world. Yet even if we did, we would, through extrapolation (reasoning), reach two distinct conclusions. First, despite Hilditch’s “kaleidoscopic array of facts,” however various the cultural and political arrangements of a society may be, certain fundamental “rights” would be evident, even if not called rights and even if severely limited, absent which the society would simply not function: some form of property, contract, familial arrangement, redress for wrongs, and due process. The variety of such arrangements in evidence notwithstanding, those “basics” are found everywhere, and they are the building blocks of a general theory of rights.

Second, even in highly repressive societies — even in North Korea, as closed and repressive a society as can be imagined — people try to flee, because they know that things are not right there: They know they have rights, natural rights. Those who doubt the universality of basic

human rights need only ask victims deprived of them. Ask a Chinese citizen about to be arbitrarily shot after an unfair trial; ask the torture victim if this is not a fate universally undeserved. But even in free societies, the simplest of examples informs us that rights are inherent, for when someone interferes with us, the “natural” response is to object, even if tacitly, to demand a justification, to assert no right to interfere, and thus, by implication, to claim a right to be free from the interference. Yes, in the world, as Hilditch says, human rights may be “radically contingent in historical terms.” In human nature they’re not contingent. They’re in our DNA.

Hilditch’s historicism, aimed at unseating the traditional, reason-based case for human nature and natural rights and at showing instead that the “entire” ideological edifice of classical liberalism rests “exclusively” on Christian foundations, has led him, ironically, to focus on non-Western *societies* rather than on the individuals in those societies. Thus, by failing to take notice of the often tacit, inchoate right-claims of those individuals, repressed as they may be by their social or political regimes, he slights the very thing that explains, he will argue, our Western respect for rights: the individual. We turn briefly, then, to his affirmative argument.

Hilditch draws largely on Larry Siedentop’s *Inventing the Individual: The Origins of Western Liberalism* (2014), which treats Christianity as “the cradle of the rights tradition in the West.” As he notes, Siedentop disputes the claim that the Founders’ idea of human nature “is something ‘obvious’ or ‘inevitable,’ something guaranteed by things outside ourselves rather than by historical convictions and struggles.” Precisely what Siedentop means there is less than clear. He seems to be pitting the Anglo-American *justification* of liberalism, based on “things outside ourselves” (universal reason, apparently), against the Continental *explanation* of liberalism’s origins in a history of “convictions and struggles,” origins that better “guarantee” that outcome, he avers, than pure reason. If that is what he means, that final point is hardly self-evident; for reason, constant and universal, when properly institutionalized, is surely a better guarantee of liberty than history, which taken alone not only does not justify but often evolves in directions that cannot be justified. Here again, we see explanation treated as justification.

Nevertheless, history is Hilditch’s main focus. Thus, he goes on to trace how history evolved in the direction of individual equality by contrasting the ancient Greek conception of natural inequality, a hierarchical world of “everything in its place,” with “the modern political emphasis on the many ways in which individuals are equal to one another.” Reviving his earlier critique of “natural,” he asks why the former should be considered any less “natural” than the latter. When it comes to politics, he argues that the real civilizational shift “began not, according to Siedentop, with the isolated machinations of unaided reason, but with the advent of Pauline Christianity.”

Without question, the rise of Christianity was a factor in the evolution of European thought about what we’ve come to call the human condition, broadly understood. But it was hardly the only factor, much less the “exclusive” foundation for liberalism’s “entire ideological edifice,” as Hilditch claims. In fact, well before the birth of Christ, after the demise of the Greek city-states in which ethics was a function of politics, we find the Stoics invoking our capacity for reason as undergirding human equality and moral universality, ideas that found their way through Roman Stoics such as Seneca the Younger into the *jus gentium*, described later by the Roman jurist Gaius in the *Institutes* as “that law which natural reason established among all mankind.” And the Old Testament too has a clear conception of the individual, of our duty to others, and hence of the rights of others.

But it was the much later, 500-year evolution of the English common law, especially after John Locke recast it in 1690 as a theory of natural rights, that more directly influenced the Founders than the Continental developments that concluded, on Siedentop and Hilditch's telling, with "the Catholic canon lawyers of the Middle Ages." Christianity was certainly in the background as the common law developed. But the law's origins trace to the third quarter of the twelfth century when Henry II established a system of circuit courts and a central appellate court to hear complaints brought by one subject against another and, later on, against the Crown, all in the name of the subject's rights, reflected in property and contract. Consulting reason, custom, and often what they knew of Roman law, judges "discovered" rights as they decided cases brought before them, crafting over time a body of positive law — common-law rights and obligations. It's important to see, however, that it was their character as reasoned decisions that marked these rulings not simply as positive but as higher or natural law, with a universal character about it. As the eminent legal historian Edward S. Corwin put it in his classic *Harvard Law Review* essays on "The 'Higher Law' Background of American Constitutional Law," "the notion that the common law embodied right reason furnished from the 14th century its chief claim to be regarded as higher law."

There is nary a mention of this law in Hilditch's account. Instead, our attention is directed away from "unaided reason" and to medieval canon law as the exclusive source of our liberties. That is a large overstatement. And a misstatement too, for it was through reasoning, in fits and starts for sure, that the canon lawyers reduced Christian dogma to political principle — principle that others too discovered quite apart from Christian dogma. Yet for Hilditch, the moral intuitions undergirding our unalienable rights are not natural, "apprehended by naked reason, but cultural artifacts bequeathed to us by 2,000 years of Christian history."

Toward the end of his essay, Hilditch returns to the report of the State Department's Commission on Unalienable Rights, which laments, he notes, "the fact that 'the core principles on which nearly all nations once agreed are now threatened by a competing vision in which' the rights of the individual are being 'radically subordinated in the name of development or other social and economic objectives.'" Hilditch then contends that "these complaints make sense when one understands that the Western understanding of human rights is predicated on one particular and historically contingent idea of what it is to be human: that of the Christian religion. There is furthermore no evidence that this particular notion of rights will outlive the faith that birthed it."

We see there, finally, what animates Hilditch — and prompts his essay. Thus, understandably, he concludes that what he views as our "borrowed capital" from the Middle Ages

is dwindling and is now almost spent. Our inheritance of human rights was built to reflect the fact that we are all living images of a particular crucified criminal from Galilee, who proclaimed that we are each and all more than what Caesar would make of us. If we care to enjoy the rights bequeathed to us by this tradition throughout the coming years, decades, and centuries, then we can no longer avoid publicly discussing the inextricable nature of religious and political ideas. A civilization can only avoid this discussion for so long before it begins to wither on the vine. For the United States, the day is already far spent in this regard.

Hilditch's concern is not unfounded, for in the West, for some time now, it is not only religion but reason too that has been dwindling. But if our unalienable natural rights are mere "cultural artifacts," we are in trouble indeed. Our chances are far better, we submit, if we defend them with appeals to reason, common to all, as America's Founders did.

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