

Review | Philosophical Foundations of Human Rights

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Journal of Moral Philosophy 16/4 (2019): 517-20

Rowan Cruft, S. Matthew Liao, and Massimo Renzo (Eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), 702 pp. ISBN: 97780199688630

Abstract. This is a review of a long, comprehensive, and mostly very good collection of philosophical essays on human rights. I briefly summarise the main ideas put forward in some of the essays that I most admired in the collection. While the collection includes essays from proponents of a wide range of theoretical and methodological perspectives, I suggest in my review that the collection's overall function is to serve as a kind of demonstrative rejoinder to those philosophers, like Raz, who argue that we can and should theorise human rights without trying to furnish them with philosophical foundations.

John Rawls famously held the view that human rights should be defined in terms of their political function: they are individual rights whose gross violation by a state provides a *pro tanto* justification for military intervention against that state (see *The Law of Peoples*, Cambridge: Harvard University Press, 1999). Joseph Raz defends a variant of this kind of view, which he calls human rights *without foundations*. Human rights lack a foundation, he says, “in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations” (‘Human Rights without Foundations’ in S. Besson and J. Tasioulas (Eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 336). For Raz, human rights have a claim on us because of the kind of political world we inhabit and the institutional role we accord to them in that world. From a more abstract, purely philosophical perspective, that claim is neither here nor there.

Considered as a whole, *The Philosophical Foundations of Human Rights* serves as a demonstrative rejoinder to this kind of view. Granted, among the book's 38 contributors there are some who have an anti-foundations leaning, including Raz himself. But still, the task that the book seems most concerned with is that of giving foundations to human rights, and as the title suggests, the type of foundations that are being sought are (for the most part) ones which can be apprehended through moral philosophy or some other type of philosophical inquiry – as opposed to the kind of empirical study that's needed to understand the contingencies of the current system of international relations. The task is approached from many different angles, and this is why I say that the book's response to an anti-foundations stance is demonstrative. Rather than trying to compel the reader to *infer* that human rights have philosophical foundations, from these or those premises, this collection is showing us: "see how you could provide foundations for human rights like this author does, or like this one, or this one".

Most of the direct attempts to furnish these foundations come in the ten essays that make up Part I. Jeremy Waldron thinks we can ground human rights in appeals to human dignity, and he works to defuse some of the missiles that have been lobbed against this proposal. James Nickel argues that judgments about desert have a role to play in grounding human rights, e.g. by informing justifications for human rights protections against disproportionate treatment. Matthew Liao argues that human rights should be understood as securing essential conditions for pursuing a good life. Among moralised approaches to the subject, this one better captures our judgments about the content of paradigmatic human rights claims, he says, compared to Griffin's agency-based approach or Nussbaum's capabilities approach. The format is dialogical. Each of these essays is followed by another author tackling similar questions, and scouring for cracks in the putative foundations that have just been laid. And a Millian spirit of inquiry surrounds the project. If human rights *can* be given philosophical foundations, we will only become justifiably confident of this by critically testing the best attempts to do so.

The exchange between John Tasioulas and Onora O'Neill that opens Part I is one of the most important, in relation to the prospects of a pro-foundations view. Tasioulas argues that human rights are grounded in our universal interests as beings who have a shared dignity in virtue of our humanity; this means that their foundations, "like those of morality generally, are characterized by a value pluralism" (p. 50), one which encompasses moral elements (i.e. human dignity) and prudential elements (i.e. interests). Part of his ambition is to show how, in trying to capture our normative judgments, a pluralistic account like this can factor in concerns about feasibility and weightiness, and thus avoid the proliferation of trivial or unachievable norms being counted as human rights. But in explaining how to piece together these theoretical elements, Tasioulas also wants to show why we needn't be pressured towards a precarious *foundationalism* about human rights, i.e. a view which says unless human rights norms are rooted in some deeper source

of normativity, outside human interests and dignity, they are redundant, or insufficiently distinctive, or not *really* objective. Tasioulas is seeking to ground human rights in objective reasons, without buying into a search for some transcendental justificatory back-stop – to offer philosophical foundations, but without this foundationalism.

Part of why we feel pressured to look for these deeper foundations is because we want to ensure that our justification for human rights norms doesn't allow us to be argued into routinely accepting rights-violating trade-offs. O'Neill is dubious about whether, without these deeper foundations, Tasioulas's account can explain how to resist this pressure. The problems boils down to the specification of duties. We can fill out the content of human rights norms by appeal to these or those moral reasons, but still, she says, we won't be describing a proper regime of rights "unless some configuration of counterpart duties that could realise or secure them is possible" (p. 73). So how can the schedule of duties be specified, on an account like Tasioulas's? In part this question is about what subset of the reasons derived from human interests in fact constitute duties proper. O'Neill is happy enough with Tasioulas's proposal on this front. The duties we're trying to specify are determined by the type of being that is their object (humans), and the terms on which these beings are trying to coexist (egalitarian ones). But the task of specifying duties, on O'Neill's view, also hinges on what we can ask of duty-bearers, and she thinks Tasioulas doesn't say enough here. "We cannot assess the 'joint feasibility of the supposed duties'", she says, and impart to human rights the non-instrumental clout that they're supposed to have, "unless we already know on whom those duties are to fall, what capacities they have, and what other duties they are simultaneously to carry" (p. 78). This is a challenge, to be sure, but it seems like it could be overcome, in principle, while working within Tasioulas's type of realist-but-anti-foundationalist theoretical approach.

Part II focuses on 'Human Rights in Law and Politics'. With respect to the book's overarching focus on foundations, this section serves to show how even some of our more legalistic human rights questions can be addressed by exploring foundational normative issues in a philosophical mood. One example of this is George Letsas's essay on "Rescuing Proportionality". Letsas notes that the application of human rights standards in international law allows a range of human rights to be infringed if the infringement is proportionate to a legitimate government aim. Can this approach avoid descending into pure utilitarianism, on which human rights ideals are merely used as rhetorical window-dressing? Letsas says it can, if we understand appeals to proportionality in this context as a way of demanding that everyone who would be affected by the upholding of a rights claim be accorded equal respect and concern vis-à-vis the implications of that settlement. Another highlight of Part II is Samantha Besson's piece asking how domestic constitutional rights and international legal human rights stand in relation to one another, when they are underpinning the same rights claims in a given jurisdiction. Her proposal is that the relation is one of mutual validation and legitimation

– “international human rights are specified as domestic human rights, but domestic human rights progressively consolidate into international human rights in return” (p. 288).

Part III contains twelve essays on six ‘Canonical and Contested Human Rights’: free speech, freedom of religion, security, democracy, health, and subsistence. The dialogical format is pronounced here. For each of the nominated rights, we have an essay offering a broadly vindictory account of how the right should be characterised, and of how it can be characterised specifically as a *human* right in a philosophically rigorous fashion. This is then followed (except in one case, in which the order is reversed) by a slightly more trouble-making take on the same questions, which either explicitly addresses itself to the previous author’s arguments, or else uses those arguments as a jumping-off point for its own analysis of the problems involved in understanding the nominated right as a human right. Part IV gathers together a series of different ‘Concerns and Alternatives’ to what has come before, including a hard-line critique of the priority of liberty rights, a re-visitation of Griffin’s discussion of how we might address the dangers of cultural parochialism in a morally-grounded theory of human rights, as well as discussions of human rights in relation to Kant’s ethics and the ethics of care.

Does the book show that human rights can be given philosophical foundations? Well, it at least adds to the catalogue of sophisticated proposals that the anti-foundations theorist will need to consider before asserting that a foundation-less theory of human rights is the better option. Raz himself, in his contribution here, similar to O’Neill, isn’t trying to settle the issue, so much as calling us to fully face up to the difficulties (e.g. related to cultural diversity, and the legitimacy of transnational institutions) that come with trying to specify the actual duties in whose absence a philosophically-grounded schedule of human rights might merely be a wish-list. The essays here demonstrate the willingness of those who want to give human rights philosophical foundations to speak to those difficulties in an attentive and meticulous fashion. Whether their responses could satisfy the doubters, and how we might adjudicate this debate at a further remove, remain live questions, as they probably should for now.