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Book Review

Rights from Wrongs. Alan Dershowitz. Boulder: Perseus Book Group, 2004. ix+261 pages. \$24.00 hardback. ISBN 0-465-01713-4.

Alan Dershowitz, the Felix Frankfurter Professor of Law at Harvard Law School, is regarded by many – certainly outside of academia, at least – as one of America’s foremost legal scholars. He has participated in high profile public cases, such as those of O.J. Simpson, Mike Tyson, and Claus von Bülow. He has written numerous books and articles, almost exclusively for a lay audience (i.e., not for professional lawyers or academicians). The present book is no exception; it is written for nonprofessionals. (Indeed, among the laudatory quotes on the book’s back cover is one by Larry David, comedy writer and co-creator of the Seinfeld television show.) The fact that this book is obviously written for a non-professional audience colors the remarks that follow.

This book is rather simple-minded. Though this reviewer is actually quite sympathetic to much of the content of the book and to the project of presenting this material (and the author’s views) to a wide, lay audience, it is not an advancement in rights theory and it is not a work to use in a college classroom.

The book, which the author claims represents a summary of his life’s work, consists of an introduction followed by three sections: “The Sources of Rights,” “Some Challenges to Experience as the Source of Rights,” and “Applying the Experiential Theory of Rights to Specific Controversies.” Each section contains multiple chapters.

The introduction provides the first concern about the book. Dershowitz remarks: “Where do rights come from? The answer to this question is important because the source of our rights determines their status, as well as their content” (page 1). I absolutely disagree! As every philosopher knows, there is a long-standing distinction – ripe with controversy, yes! – between contexts of discovery and contexts of justification, or, if one prefers, between description and prescription. The source of a right (or a belief or a value) is not the same thing as the justification for that right (or belief or value). To give a hackneyed example, if I declare that males are inherently superior to females (or whites to blacks or Americans to Arabs or ...), you would properly be aghast. If you asked me why I believe such a view and my reply is that this is what my father taught me, I have given you the source of my belief (or value), but surely I have not given a justification for that belief (or value). I have simply shown that my father is sexist (racist) and so am I! Identifying the source of a belief (or value) or, what is important here, of rights is not the same thing as identifying the justification of that belief (or value) or, what is important here, of rights. Yes, the issues of source and justification might well be interrelated, but that interrelation needs to be spelled out, not presumed or merely asserted. Having said this, I am not claiming that the issue of the source of rights is irrelevant to their justification, but being relevant is not the same as being identical or

even co-extensive. And it is certainly not self-evident that the source of rights determines their status! Nevertheless, I am actually quite sympathetic to Dershowitz's "naturalistic" approach to rights. As he puts it: "It is more realistic to try to build a theory of rights on the agreed-upon wrongs of the past that we want to avoid repeating, than to try to build a theory of rights on idealized conceptions of the perfect society about which we will never agree" (p. 7). I absolutely agree! So, the issue of the source of rights is important, and it will be the focus below, but it is not sufficient to build a theory of rights on clarification and/or consensus regarding the source of rights.

The book's first section ("The Sources of Rights") begins with a short chapter on the nature of rights (what are they?). Frankly, Dershowitz doesn't say much in this chapter. He certainly does not engage with the vast philosophical literature on the nature of rights (e.g., Joel Feinberg on rights as valid claims, Martha Nussbaum on rights as capacities, Rex Martin on rights as recognized entitlements, Joseph Raz on rights as significant interests, etc.). Indeed, at one point Dershowitz seems to contradict himself. After just having claimed that the source of rights is important because it determines their status, in this chapter he says, "Whatever the source or sources of rights, most people see rights as something special, to be respected and not to be treated lightly" (p. 20). This remark certainly makes it sound as if the source of rights is not particularly important, since most people take them to be important regardless of where they come from!

The next four chapters contain suggested sources of rights, all of which Dershowitz rejects: God, nature, logic, civil law. I noted above that I see this book as rather simple minded, even though I am sympathetic with much of Dershowitz's position. Here is an example: He rejects God as the source of rights (so do I). However, he states: "But if rights were written by 'the hand of the divinity,' and if there is only one God, then the content of rights would be consistent over time and place" (p. 23). Well, this is not at all obvious! Try this: If the stars and planets were all created by God and there is only one God, then the features of all stars and planets would be consistent over time and place. Not at all! It is these kinds of remarks that permeate Dershowitz's book that display an unfortunate simple mindedness to it. This is especially regrettable, since the audience of the book is the general lay public. This kind of sloppy argumentation does not empower the public, which is the author's very laudable goal. A much better work on exploring this issue is *Does Human Rights Need God?*, edited by Elizabeth Bucar and Barbra Barnett.

Besides rejecting God as the source of rights, Dershowitz argues that human nature is also not their source. If anything, he notes, rights are not natural, that is, it is not in the nature of most humans to value the rights of others above their own (immediate) interests. In addition, rights do not come from civil laws (i.e., a social, legal system). Civil laws might recognize, enforce, protect, etc. the rights that moral agents have, for Dershowitz, but those laws are not the source of rights, at least of basic rights. (Yes, a legal system might be the source of particular rights, such as the right to drive, but not of general basic rights such as the right to liberty.) This is a very important point and one which the general lay audience does need to address much more fully. Once again, there is a vast body of philosophical literature on these topics, but Dershowitz barely mentions any of it and certainly does not engage with it beyond noting that he agrees or disagrees with particular claims.

Having rejected several candidates as the source of rights, Dershowitz argues that wrongs, suffered injustices, are the real source of rights. In his words: "...rights are those fundamental preferences that experience and history – especially of great injustices – have taught are so essential that the citizenry should be persuaded to entrench them and not make them subject to easy change by shifting majorities"

(p. 81). As the book's title says, rights come from wrongs. Though Dershowitz does not provide any detailed conditions or even characterization for what counts as wrongs or injustices, he takes it that reasonable people can recognize them. This is another source of frustration with this book. I have already remarked that often the argumentation and scholarship in the book is thin. Here, in what I take to be the heart of Dershowitz's view, there is no recognition of others who have made the same, or very similar claims. To take just one example (and there are others), John Dewey argued at various places for just this "experiential" view of the source and nature of rights. A more recent example is Beth Singer's *Operative Rights*. Dershowitz, however, just does not engage with the literature (resulting in the howler in the book's liner notes: "*Rights From Wrongs* is the first book to propose a theory of rights that emerges not from some theory of perfect justice but from its opposite: from the bottom up, from trial and error, and from our collective experience of injustice." Please, if nothing else, read John Dewey!)

The second section of the book ("Some Challenges to Experience as the Source of Rights") has the author responding to several objections about his take on rights. Most importantly, he asks (in chapter ten) how rights are different from preferences. That is, if rights are not self-evident or do not have some external basis (such as God or human nature), what is the source and nature of their obligatory power in regulating our behavior? Dershowitz's answer seems to be a straightforward simple utilitarian one: "A society that recognizes and enforces certain basic rights...is preferable to a society that does not. That is my case for rights" (p. 114). I confess that I find this a bit breathtaking. Rather than go into all the aspects of this that are troubling, I will simply point out that this answer speaks to why a society that respects rights is better than one that doesn't, but that fact doesn't really shed much light on why or how rights have a different or stronger obligatory power than preferences.

Another challenge to his experiential view of rights that Dershowitz addresses is the question of philosophy vs. sociology (or: in what ways and to what extent is his view descriptive vs. prescriptive). His answer boils down to rejecting a dichotomy between them: "A theory of rights that is based on experiences with wrongs breaks down the high wall between philosophy and sociology, between the ought and the is, between the normative and the empirical" (p. 136). Once again, here is an example of assertion over argumentation, so I will leave this point by saying that I think it would have helped had Dershowitz not addressed philosophy vs. sociology (or ought vs. is, or normative vs. empirical), but rather had specified what elements of his view are descriptive and what elements are prescriptive and why (and why that's important).

Yet another challenge is the issue of whether or not rights themselves produce wrongs. Good question! And, once again, I wish the author had engaged with the literature on this issue rather than basically making some assertions. For example, there is a large body of literature on the issue of group rights; do groups qua groups have rights separate from the rights of the individuals who constitute those groups? This is especially important if the rights of the group conflict with the rights of the group's members. So, kudos to Dershowitz for raising this issue, but, unfortunately once again, his treatment is disappointing in its failure to wrestle with what others have written.

The third section of the book ("Applying the Experiential Theory of Rights to Specific Controversies") displays the author's attempt to relate his conception of rights to a number of specific controversies about the extension of rights: right to life, animal rights, right to emigration/immigration, etc. If the point of these chapters is to demonstrate to a general lay audience that he has a particular approach to addressing these sorts of issues, he succeeds. If the point of these chapters is to demonstrate any appreciation of the

complexity of the issues or the relevance of the already extant literature regarding them, he fails. To take just one example, the chapter on animal rights (“Do animals have rights?”) is seven pages. Not one philosopher who has written on this topic is mentioned, much less discussed, analyzed, or evaluated. The same holds for each of the other topics in this section of the book.

Should you read this book? Sure! (There are worse books you could read!) A better one to read, however, which is also in the spirit of addressing a general lay audience, but in a more substantive way is Mary Ann Glendon’s *Rights Talk*. In spite of my obvious concerns, the book is clear and concise. It touches on many important issues related to rights. It provides a socially active, legally aware, perspective on rights in society. It actually has, in my view, a generally correct conception of rights (I truly am quite sympathetic with his experiential conception of rights). These genuinely positive features of the book are, however, outweighed by generally simplistic argumentation and a lack of recognition of complexities and an enormous body of literature. So, read the book, but don’t assign it in a class for your students! There are many other works that are much better, such as *The Philosophy of Human Rights*, edited by Patrick Hayden or Michael Perry’s *The Idea of Human Rights*.

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