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978-1-107-01007-9 - Human Rights Law and the Marginalized Other

William Paul Simmons

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HUMAN RIGHTS LAW AND THE MARGINALIZED OTHER

This groundbreaking application of contemporary philosophy to human rights law proposes significant innovations for the progressive development of human rights. Drawing on the works of prominent “philosophers of the Other,” including Emmanuel Levinas, Gayatri Chakravorti Spivak, Judith Butler, and, most centrally, Argentine philosopher of liberation Enrique Dussel, this book advances an ethics based on concrete face-to-face relationships with the Marginalized Other. It proposes that this ethics should inspire a human rights law that is grounded in transcendental justice and framed from the perspective of marginalized groups. Such law would continuously deconstruct the original violence found in all human rights treaties and tribunals and promote preferential treatment for the marginalized. It would be especially attentive to such issues as access to justice, voice, representation, agency, and responsibility. This approach differs markedly from more conventional theories of human rights that prioritize the autonomy of the ego, state sovereignty, democracy, and equality.

Dr. William Paul Simmons is associate professor of political science and director of the MA program in Social Justice and Human Rights at Arizona State University. His interdisciplinary research employs numerous theoretical, legal, and empirical approaches to social justice and human rights issues. He is the author of *An-Archy and Justice: An Introduction to Emmanuel Levinas’ Political Thought* and numerous articles and chapters on contemporary political thought. Dr. Simmons also has worked extensively on human rights issues in Mexico and at the U.S.–Mexico border. He is co-editing a volume on localizing human rights in the U.S.–Mexico context and conducted, with Michelle Telléz, groundbreaking ethnographic research on sexual violence against migrant women. He has also published law review articles and a book chapter on violence against women in Ciudad Juárez, Mexico, and has served as a consultant on human rights and social justice issues in The Gambia, China, Mexico, and the United States.

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Dedicated in humility, with love and pride, to Alfusainey Jarju

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Preface

This ambitious and complex work of both philosophy and human rights law seeks to make major advances in both fields and to develop a fresh dialogue between the two. I delve into a wide range of philosophical works in considerable detail, especially debates in recent philosophies of the “Other,” and analyze many legal cases from disparate jurisdictions around the globe. In the philosophical chapters, I analyze concrete legal situations, and I suffuse the legal chapters with philosophical insights. To make this work more accessible to a range of readers, and not just philosophers and political theorists, this preface quickly lays out the overall argument of the work and provides a roadmap for the reader, especially those in nonacademic fields who may be attracted to the topic but might find some more densely theoretical sections relatively inaccessible.

In a nutshell, this book argues that human rights law should be *deconstructed* – that is, continuously examined and critiqued to expose existing dominant power relations – and *reinvigorated* by adopting a new theoretical orientation, one that privileges the voices of people who are excluded from social and political power, referred to in this work as the Marginalized Other. The two chapters in Part I make the case for critically examining or deconstructing the prevailing modes of thought that inform human rights law through detailed readings of works by political theorists Hannah Arendt and Seyla Benhabib. These chapters aim to show the resilience of dominant or hegemonic ways of thinking and the need to have a more radical deconstruction of these discourses to privilege the voice of the Marginalized Other. I argue that to conduct the necessary deconstruction of hegemonic ways of thinking requires a new way of thinking about the Other, one that is founded in transcendence – that is, beyond the hegemonic discourses – but that also can be made concrete to affect the political and social realms in a profound way. The two more theoretically rich chapters in Part II develop

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my phenomenology of the Saturated Other by combining insights from the philosophies of Emmanuel Levinas, Jean-Luc Marion, and Enrique Dussel. Note: When referring to my phenomenological account of the Other that is excluded from power, I will use the term “Saturated,” because the ego owes a deeper, more saturated responsibility to this Other than to those within the system. When referring to the resulting application of this phenomenology to human rights and human rights law, I will refer to the “Marginalized” Other. The two are interchangeable, but the term “Saturated” has more of a technical philosophical meaning. The three chapters in Part III further develop this phenomenology, especially through the writings of feminist scholars Gayatri Spivak and Judith Butler. This part also shows how scholars and activists can concretely reinvigorate contemporary human rights law by analyzing such critical issues as environmental displacement in India, asylum law in the United States, aboriginal rights cases from Canada, reparations in the Inter-American Court of Human Rights, and the right to mental health in the African Commission on Human and Peoples’ Rights. Throughout the work, the theoretical insights are made concrete through the case law, and the case law is deconstructed and reinvigorated by theoretical insights.

Several common themes stand out in the legal analysis. We encounter a number of well-meaning theorists, judges, and other legal players who failed to push past varieties of hegemonic discourses and in the process further marginalized the Other, the people actually seeking redress for human rights violations. We also encounter a number of progressive judges who managed to suspend the violence of the hegemonic discourses and patiently listened to the voices of the Marginalized Other, as well as a series of progressive tribunals that have modified their procedural rules to give voice to the Other and crafted new rights or given progressive new meanings to existing rights to better serve the Marginalized Other.

The theoretical insights of this work are drawn mostly from phenomenology, postmodernism, post-colonialism, and deconstruction – precisely those fields usually considered most opaque to non-philosophers, and even to some philosophers. I hope to persuade the reader that these seemingly obscure lenses are especially fitting for developing the necessary sustained deconstruction of hegemonic systems and for developing an alternative framework for reinvigorating human rights law. In particular, phenomenology, which seeks to “bracket” or suspend pre-existing theoretical insights to better dwell on experiences or phenomena, can be particularly beneficial when examining what types of knowledge have been privileged in human rights law. Post-colonialism, which takes the side of the marginalized and uncovers oppressive structures, is especially apt for identifying those voices that should be privileged.

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The phenomenology in Part II is quite meticulous so that it will stand up to the scrutiny of philosophers and political theorists. Those who are mostly interested in legal analysis might want to skim through the intricate phenomenology in Part II and focus on Parts I and III. Similarly, readers with less facility in legal issues may struggle with the terminology and institutional intricacies in the discussions of case law and might focus on Parts I and II. Of course, my hope is that those who initially focus on only parts of the work will be drawn back to the remaining sections, as the theoretical insights and case examples are meant to complement each other.

It is heartening that an increasing number of theorists are taking on issues in current human rights law and some legal scholars are taking seriously the insights of contemporary debates in philosophy. Of course, scholars from a variety of disciplines and theoretical orientations embrace theories and methods that privilege marginalized communities, including many in cultural anthropology, critical race theory, critical legal studies, feminism, and post-colonialism. This book, heavily indebted to scholars in these fields, proposes something of an overarching theoretical framework that could be fruitfully applied in each of these areas.

I am thrilled by just how far this work has evolved from its initial conception several years ago and how many diverse voices have shaped and reshaped it. Of course, I alone remain responsible for its remaining limitations, many of which undoubtedly are the result of my failure to listen patiently enough to my mentors.

Many gifted scholars have informed my thinking through their comments on earlier drafts or through their encouragement, including Bill Conklin, James Hatley, Randy LeBlanc, Diane Perpich, and Devorah Wainer. Special thanks to Todd Landman, Rhona Smith, and the groundbreaking Chinese human rights scholars and practitioners who worked with us during the Training on Multi-Disciplinary Human Rights Research funded by the Norwegian Centre for Human Rights and the Raoul Wallenberg Institute for Human Rights and Humanitarian Law. Todd's and Rhona's published works have for many years been insightful and faithful companions in my human rights research. Numerous thinkers have also inspired me through their brilliant writings, including Upendra Baxi, Bill Conklin, and Gayatri Spivak. Two anonymous reviewers for Cambridge University Press offered helpful advice, especially for clarifying my central arguments and for making the work as a whole more accessible. Special thanks to Enrique Dussel for being a role model of infinite hospitality and radical deconstruction of hegemonic systems. A lively conversation with Professor Dussel over dinner at Purdue University enlightened and encouraged me at a critical point in the manuscript's evolution.

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This book is inspired in countless ways by my many role models in the community, whose love and guidance have sustained me much more than they could ever know or I could ever repay. These include Marco Albarran, Peggy Bilsten, Judy Butzine, Deb Carstens, Elsa Chyrum, Stella Pope Duarte, Jean Fairfax, Semere Kesete, Jack Lunsford, Elaine Maimon, Melanie Ohm, Vicky Ortiz, Dave Tierney, Steve Tracy, Libby Walker, Dr. C. T. Wright, and Mary Wright. They live the philosophy that I develop in this work. I am heavily indebted to the Institute for Human Rights and Development in Africa, especially Executive Director Sheila Keetharuth and Deputy Director Angela Naggaga, for allowing me to hang out with them and, in a small way, make a contribution to their wonderful work advancing human rights for marginalized communities across Africa. To those marginalized communities that I have been privileged to work with in several countries: Thank you for teaching me more about ethics than I can ever have imagined and showing that there is so much more work to do.

An infinite debt is owed to Monica Casper, my collaborator, co-conspirator, and life partner, for her wisdom and her uncanny editing ability, and for seeing promise in my work that often escaped me. To my daughters, Mason and Delaney: Thank you for teaching me new ways of listening and for giving me so much hope for the future.