Perspectives and Roles

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Sinnott-Armstrong defends a perspectival theory of the law in which law as a social institution is best seen from a variety of perspectives representing the different roles and interests of different people who participate in the social institution. He focuses on three such roles, those of the legislator, the judge, and the common citizen. He believes that each of the main legal theories contains some truth which, if acknowledged, will remove some of the misunderstanding between them. Specifically, he maintains that legal positivism captures the perspective of the legislator, natural law the perspective of the judge, and legal realism the perspective of the common citizen.

Sinnott-Armstrong's claims to "a new approach" to legal theory give rise to two types of questions. The first is about the nature and value of such an approach. But even if it is thought that the general approach is correct, there are also questions about his accounts of the particular perspectives he describes. I shall focus on issues about the nature of Sinnott-Armstrong's perspectival theory of law, and my comments on the second question are confined to providing illustrations of points made in characterising the theory.

There is a sense in which a perspectival approach to law is not new. For example, Hart's legal positivism also stresses the importance of distinguishing between the internal point of view, or the perspective of participants who accept the law and use it to guide, evaluate, and criticise their own and others' conduct, and the external point of view, or the perspective of external observers, who do not accept legal standards but use them to predict regular patterns of behaviour. Hart himself formulates Dworkin's objections to him in terms of his alleged failure to acknowledge the internal perspective: "His central objection seems to be that legal theory must take account of an internal perspective on the law which is the viewpoint of an insider or participant in a legal system, and no adequate

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account of this perspective can be provided by a descriptive theory whose viewpoint is not that of a participant but that of an external observer." [1]

So what is new in Sinnott-Armstrong's theory is not simply that he adopts a perspectival approach. Rather, it is the manner in which he identifies the different perspectives and the way in which he sees their relationships. Thus he regards the various legal theories as themselves different perspectives on law, to be identified with different social roles. As the subtitle of his paper states, legal positivism is "one perspective among others". It captures the legislator's role or perspective, but not the perspectives of the judge and the common citizen. We can see therefore, that at one level perspectives on the law are provided by various legal theories, legal positivism, natural law theory, and legal realism. At another level, each social role—the legislator, the judge, and the citizen—generates a distinctive perspective. We can then ask: (i) what is the relationship between different levels of perspectives, the level of legal theory and the level of social roles? (ii) what is the relationship between different perspectives at the same level of social roles, the respective perspectives of the legislator, the judge, and the citizen? The novelty of Sinnott-Armstrong's theory is that he equates each legal theory with the perspective from a different social role, and the perspective from each social role is distinctive, and seems to be largely, if not wholly, independent of the perspectives from the other social roles. I wish to suggest that this account is too simple. Let us first focus on the relationships between legal theory and various social roles. Sinnott-Armstrong specifies these social roles without reference to any legal theory. This seems unproblematic if one sticks with a narrow, well-defined account of a social role. Thus one can specify the roles of the legislator and the judge in terms of the official descriptions of their respective jobs or offices. Here there are rules, what Hart calls the power-conferring rules of change and adjudication, which specify the persons who are to legislate or adjudicate, and the procedures they are to follow. However, the role of a citizen is different, once one gets beyond the notion of a voter. There is then no specific job or office that constitutes the role of a citizen. But Sinnott-Armstrong also invokes the notion of "interests", claiming that "different people play different roles and have different interests because of their roles". This is of little help when the role in question is not sufficiently specific to generate definite interests. Of course people playing certain roles have numerous interests, but these are not role-specific interests. Rather they are the interests of people who happen to occupy a certain role. Thus some doctors have interests in golf while others prefer tennis, some doctors have interests in the stock-market, others in property, still others in religion or in the promotion of charitable

[1] H.L.A. Hart, "Postscript", *The Concept of Law*, second edition, (Clarendon Press, Oxford, 1994) p. 242.

causes. None of these interests is derived from the role of a doctor. Similarly when Sinnott-Armstrong claims that the decisions of officials are "what most common citizens see as most important about the law", he is identifying one kind of interest among others which citizens might have in the law. The interests of citizens are myriad, and their perspectives on the law could be shaped by how they think the law will help or hinder them in the promotion of these interests.

A different problem arises when we turn to the official roles of the legislator and the judge. Here if we stick to the official description of the roles, we might not get conceptions of social roles rich enough to enable Sinnott-Armstrong to construct his distinctive perspectives. But a richer account of the roles will be theory-laden, and different legal theories will give competing and, to some extent at least, incompatible accounts of social roles. There is therefore no neutral account of social roles which can be used to evaluate legal theories.

Let me illustrate this with Sinnott-Armstrong's description of the role of the judge. According to him judges have two jobs: they must reach decisions, and they must base their decisions on the law. In hard cases, when the explicit words in precedents, statutes, and constitutions, do not dictate a unique decision, judges have to appeal to the underlying moral principles. "When judges use their moral beliefs to reach decisions, they cannot see themselves as applying the law unless they also see those moral principles as part of the law. Moreover, the judge will have to see those principles as having been part of the law even before the decision, since otherwise the decision would be retroactive and unfair. Thus judges will not be able to see themselves as accomplishing their dual job of deciding every case on the basis of the law unless they view the law as including implicit moral principles."

Sinnott-Armstrong bases his account of the judge's role on a Dworkinian natural law theory. But Dworkin's view that there is no gap in the law, which allows the judge to exercise law-creating discretion, is precisely the issue between him and Hart's legal positivism. Thus in the "Postscript" to his *The Concept of Law*, Hart maintains:

> The sharpest direct conflict between the legal theory of this book and Dworkin's theory arises from my contention that in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete. If in such cases the judge is to reach a decision and is not, as Bentham once advocated, to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide, he must exercise his *discretion* and *make* law for the case

> instead of merely applying already pre-existing settled law.[2]

To assume that Dworkin's account of the judge's role is correct is to beg the issue in favour of his controversial legal theory and against the alternative conception of the judge's role provided by Hart's theory. Hart is careful to point out that the limited law-creating powers he ascribes to judges do not make them into full-fledged legislators. The established law imposes substantive constraints which narrows judges' choices. Furthermore they may not introduce "large-scale reforms or new codes" because their powers are to be exercised only to dispose of particular instant cases.

So far we have conflicting descriptive accounts of the judicial process which support different conceptions of the judge's role. Sinnott-Armstrong also sides with Dworkin's prescriptive view that the exercise of law-creating powers by the judge would make the decision in a hard case retroactive and unfair. But again Hart has responded to this by arguing that retrospective law-making is unjust when it disappoints the justified expectations of those who have acted in reliance on the established law at the time of their acts. In hard cases, judges do not retrospectively change clearly established law. Where the law has gaps, there is no such clear established law to justify expectations.[3]

Although, unlike Sinnott-Armstrong, my sympathies are with Hart rather than with Dworkin, I do not intend to settle the issues between them here. Rather, my point is that alternative accounts of the judge's role are derived from different legal theories, and Sinnott-Armstrong cannot simply rely on one disputable conception of the judge's role to evaluate these theories. He maintains that, unlike legal positivism, natural law theory captures the judge's perspective. Of course it does because Sinnott-Armstrong's account of that perspective is derived from a natural law theory! Appealing to his conception of the judge's role in the way he does fails to provide a theory-neutral starting point.

Sinnott-Armstrong seems to judge the perspectives of legal theories by whether they capture the various important role perspectives of the legislator, the judge, and the citizen. He treats these role perspectives as data on which to build legal theories. But this suggests that the role perspectives can be identified independently of legal theories. I have tried to show that the alleged independence is illusory.

There are also issues about the relationships between the perspectives at the same level but from different roles. Consider a possible analogy. Looking at a distant object I say: "From my perspective, that's a duck."

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2 *Ibid*, p. 272. The italics are Hart's.

3 *Ibid*, p. 276.

You point out that I have a bad perspective; in fact what I see is a swan. But now I retreat and say: "From my perspective, it looks to me like a duck." Now there is nothing independent of my perspective which corrects my perspective. So swan or not, it still *looks like* a duck to me. However, this "looks like" sense of perspective is of no help in the understanding of law. Law is a social phenomenon, and if a perspective makes a contribution to the understanding of law, then it must tell us something about the law, and not just about the interests of the person who has a perspective on the law. However much a perspective captures the person's interest in the law, it is still misleading or incorrect if it fails to give an adequate account of the social institution of law.

When Sinnott-Armstrong identifies perspectives in terms of a person's interests, such as the interests of those citizens who are most concerned about what officials do in particular cases and situations, there is a danger of his moving towards a "looks like" conception of perspectives. We can add perspective to perspective in this sense, as we survey the variety of interests of citizens, without adding to our understanding of the law. When the interests of citizens are not derived from a specific role, but merely reflect the myriad concerns of individuals who use the law each for his or her own purpose, we have no reason to believe that the multiplication of such interest-based perspectives will enhance our understanding of the law.

The impression that Sinnott-Armstrong might be slipping into a "looks like" conception of perspectives is strengthened by his failure to allow for the possibility of mistakes at the level of the role generated perspectives. Even when he explicitly rejects the form of perspectivism which leads to "wholesale relativism", he speaks of definitions of law being incorrect "because they fail to capture any legitimate perspective on law" (p. 18). But there is no suggestion that the interest-based perspectives of some citizens can themselves be incorrect. So long as they have the relevant interests from which their perspectives spring, he seems prepared to treat these perspectives as part of the data which definitions of law and legal theories must accommodate. As I noted earlier, he seems to regard the perspectives at the level of legal theory as corrigible by the various role-perspectives, but the role-perspectives themselves are treated as basic.

But suppose we move away from a "looks like" conception of perspectives as irrelevant to an understanding of law. Let us instead acknowledge that in the relevant sense perspectives on the law provide knowledge of the law, that there is something independent of a particular perspective which determines the accuracy of the perspective, that each perspective only captures a part of the law, and that we therefore need a combination of different perspectives to arrive at a proper understanding of the law. Perhaps a model which depicts these characteristics of perspectives

better captures Sinnott-Armstrong's view of the nature of perspectives than the discredited "looks like" conception. So consider a different analogy. There is a very large object, and each of us is spatially located at a different place such that each of us can see only a small part of the object, different from the parts which others see. I say that the object has property a because that is what I see from my perspective; you say correctly from your perspective that it has property b, and so on. Now it is true that a proliferation of perspectives will give us a better understanding of the object than any single perspective. Something like this model seems to be what Sinnott-Armstrong has in mind when he describes the different perspectives of the legislator, the judge, and the citizen. The model might also explain why he refuses to allow one perspective, however important, to correct another perspective.

However, different perspectives on the law can clash in the way that different perspectives on the large object cannot. It is this idea that one perspective can undermine or qualify another perspective that Sinnott-Armstrong's perspectival theory of law leaves unexplained. Different perspectives on the law are not mutually exclusive, each looking at a different part of the law in the way you and I are looking at different parts of the very large object. Thus judges are not the only people who interpret the law. Ordinary citizens also interpret the law, both when they obey or choose to violate it, and when they evaluate official behaviour. An analogy used by Hart is illuminating. In a game where there is an official scorer whose determinations of the score are final, "statements as to the score made by the players or other non-officials have no status within the game; they are irrelevant to its result".[4] However, Hart points out that both the players and the scorer are assessing the progress of the game by reference to the scoring rule. Similarly, both the citizen and the judge are interpreting the same legal rule, even though the interpretation of the citizen is not authoritative and will not be enforced by officials. This consideration is ignored by Sinnott-Armstrong when he claims that legal realists, by defining law in terms of the particular decisions of officials, captures the citizen's perspective on the law. This account of the citizen's perspective as completely different from the judge's perspective overlooks the fact that citizens also typically adopt the internal point of view, using legal standards for evaluating the conduct of officials and non-officials.

There are of course official deviations from rules enacted by the legislature, and, as Sinnott-Armstrong observes, citizens are interested in whether their liberty or property will be affected by the decisions of the courts. But even in such contexts it is misleading to suggest that they are simply interested in what officials do. Citizens have a firm sense of whether official deviations from rules are legal or illegal. Official deviations from

4 *Ibid*, p. 143.

the enacted rule because of the complexities of application and the need to satisfy other relevant rules, as is the case with Sinnott-Armstrong's speed-limit rule, are treated very differently from official deviations because of corruption. Citizens are interested not just in whether officials are going to deprive them of their liberty or property, but also in whether such deprivations are made in accordance with the law. Here again the law provides them with a standard for evaluating conduct. Different people may look at the law from different perspectives, but these perspectives can conflict and interact, and some perspectives might be wholly or largely mistaken.

Nothing I have said undermines a perspectival theory of law as such. But we need to clarify the way in which different perspectives are identified, their relationships to one another, and to various legal theories. Perhaps then some theories will be more illuminating than others, and the best theory will be that which gives an integrated and unified account of the different perspectives, rather than being just one perspective among others.