Law

Metaphysics, Meaning, and Objectivity

Social, Political, & Legal Philosophy, Volume 2

Edited by
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Rodopi

Amsterdam - New York, NY 2007

In Defence of the Hybrid Theory

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There is a lot with which I agree, and still more that I admire, in Horacio Spector's sophisticated and insightful defence of the Will theory against my advocacy of a hybrid alternative.[1] Implicitly or explicitly, Spector appeals to four conditions of adequacy on a theory of claim-rights in the course of his discussion. I accept two of these, as well as a weaker version of a third. But, as we shall see, this is not enough either to ground an objection to my Hybrid theory or to vindicate the Will theory. Since it will serve as a useful frame of reference for later points in the argument, I shall begin by reviewing the nature and merits of Spector's conditions of adequacy. Then I shall consider Spector's treatment of what he calls the 'strength difficulty,' a problem for the Will theory he attempts to dismiss. Finally, I shall turn to what Spector calls the 'instrumentalization problem' and dispel the doubts he wishes to cast upon the Hybrid theory's ability to improve on the Interest theory.

§1

Spector's four conditions of adequacy on a theory of claim-rights may be summarized as follows:

1. The theory must account for both moral and legal rights.
2. To account for moral [claim-]rights, the theory must account for them as trumps or constraints on the consequentialist calculus.

1 H. Spector, "Is the Will Theory of Rights Superseded by the Hybrid Theory?" this volume. References to Spector's commentary are given as bare page numbers in the text.

3. The theory must be sensitive to the history of rights.
4. The theory must build a principled rejection of paternalism into the attribution of rights.[2]

Of these conditions, I accept (1) and (3), but reject (2) and (4).

The challenge in (3) arises from the fact that, as Spector notes, developments in different historical periods correspond respectively to the Will theory of rights and to the Interest theory of rights. Fidelity to history, then, requires the correct theory of rights somehow to embrace both the Will theory and the Interest theory. So it is no wonder that he cautions that 'it may be impossible to provide an analysis of rights that does full justice to ... its historical evolution' (p. 294). While I used to despair of the possibility myself, I now believe that the two theories can be reconciled. Of course, any reconciliation will have to be *somewhat* revisionary, since the historical evolution of rights has arguably overshot the mark. Legal and social discourse, that is to say, now contains such a proliferation of rights claims that the language of rights, as many have lamented, is in serious jeopardy of losing its distinctive content. As I understand it, the question is therefore whether a principled intermediate point can be found in this historical evolution, in terms of which the notion of a claim-right may be rehabilitated. My proposal is that the Hybrid theory represents this point.

There are various reasons to reject (2). I shall mention a couple of them, but only rely upon one here. To begin with, it is worth pointing out that (1) and (2) are actually inconsistent. Like Spector, I assume that *legal* claim-rights are Hohfeldian in structure—they are defined, that is, in terms of their correlation with a duty that is *owed to* the claim-right holder. Presumably, therefore, the moral claim-rights to which (1) refers have the same structure. However, to function as a constraint on the consequentialist calculus, as (2) requires, a claim-right has, as I argue elsewhere, to be defined in terms of something rather different, namely, the all-things-considered moral ought.[3] Unfortunately, there is no suitable logical bridge between an Hohfeldian claim-right's correlative duty

2 This is one of two conditions of adequacy Spector adopts from Eric Mack. I ignore the other only because it is effectively a re-statement of (2). See E. Mack, "In defense of the jurisdiction theory of rights," *Journal of Ethics* 4 (2000), pp. 71-98.

3 See my "Duties and their direction" (in preparation), §2.

and the all-things-considered ought.[4] So the moral claim-rights to which (2) refers must *not* be Hohfeldian in structure.[5] Hence, there is no univocal sense of 'moral claim-right' on which both (1) and (2) are true.

A simpler reason to reject (2) will suffice, as it removes Spector's ground for imputing the condition to me. (2) is not, in fact, necessary 'to make sense of the instrumentalization problem' (p. 292). Spector refers here to my criticism of Raz's version of the Interest theory, and of his piggy-backing solution in particular. At bottom, however, my criticism of Raz turns on the premiss that assignments of a claim-right should 'reflect nothing apart from the *intrinsic* standing of the individual who is to possess it.' While I take it that Spector accepts this premiss, the crucial point, for present purposes, is that the premiss is considerably *weaker* than the anti-consequentialism of (2). It is one thing to *restrict* the basis of a claim-right *to* an individual's intrinsic standing, and quite another to say *how much* that standing is *worth*. As I emphasized in the paper, my criticism of Raz leaves it open whether an individual's intrinsic standing '(always) has sufficient weight to prevail against the onslaught of the social calculus.' It thereby leaves open whether consequentialism is true.

In different ways, Spector's anti-consequentialist (2) and the premiss of my criticism of Raz both express the historical connection between the language of rights and (liberal) individualism. The version of individualism expressed by anti-consequentialism is much stronger, as I have said, than the version on which I rely to criticize Raz. In the light of (3), I cannot resist adding that, historically, anti-consequentialism is also a rather later version. The connection with individualism is there from the beginning of the long history of (natural)

4 The obvious candidate is the idea that the duty to ϕ that correlates with an Hohfeldian claim-right *entails* that its bearer ought all-things-considered to ϕ. But this is demonstrably false. See J. Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), ch. 3. A logically impeccable alternative is that the duty to ϕ that correlates with an Hohfeldian claim-right entails that, *other things being equal*, its bearer ought all-things-considered to ϕ. But this is not suitable either, since the bridge it provides is too weak to satisfy (2). For elaboration, see the previous note.

5 I agree with Spector that there is *a* sense of 'moral claim-right' on which (2) is true and that it is commonly invoked in moral philosophy. But this is a distinct sense of the term—the *deontological* sense, rather than the Hohfeldian sense. It is imperative not to confuse the two, not least when trying to satisfy (1).

rights discourse,[6] well before the advent of utilitarianism or even the landmark formulations of Kant. It strikes me as controversial, if not simply anachronistic, to read specifically anti-consequentialist overtones into the natural lawyer's figure of the sovereign individual, even though an emphasis on individual autonomy later came to acquire them.[7]

Finally, I also reject (4). In brief, my reason is that it excludes a perfectly eligible rationale for making a claim-right inalienable. Since inalienability is another feature of rights that has been there from the beginning, (4) cannot be a condition of adequacy on a theory of claim-rights. But I shall return to spell this out in the context of a fuller discussion of inalienability below.

§2

My criticism of the Will theory in the paper consisted of two standard objections, the inalienability objection and the incompetence objection. The inalienability objection itself has two parts, corresponding to the two kinds of inalienable claim-right, *partially* inalienable claim-rights and *completely* inalienable ones. Spector's efforts to vindicate the Will theory concentrate exclusively on the first part of the inalienability objection.

In the case of a partially inalienable claim-right, the right-holder lacks the power to waive the correlative duty, but retains the power to sue for enforcement and to waive compensation. As I freely granted in the paper, the Will theory is entirely capable of explaining how someone who retains a residual measure of control over a duty can be vested with a correlative claim-right. In the partial case, the objection, following MacCormick, is rather that the Will theory cannot explain how the inalienability of the claim-right *strengthens* the right.[8] Spector calls this the 'strength difficulty.'

6 For the classic account, see R. Tuck, *Natural rights theories: their origin and development* (Cambridge: Cambridge University Press, 1979).

7 Of course, I do not mean to suggest that individualism in its original version is pro-consequentialist either—simply, *pre*-consequentialist.

8 This objection also applies in the case of complete inalienability. But there it supplements the objection that the Will theory cannot explain how someone with *no* control over a duty can be vested with a correlative claim-right. Whereas in the partial case, it is the only objection on offer.

To rebut this objection, Spector makes three points. First, he distinguishes different senses of 'strength.' In addition to the <degree of control over the correlative duty>, there is also the <weight of the correlative duty>. Second, he argues that the greater strength of an inalienable claim-right should be understood in line with the latter sense—in terms, that is, of the *greater weight* of its correlative duty. The Will theory would have no particular difficulty explaining strength so understood. Third, Spector complains that the Hybrid theory does not handle the strength difficulty any better than the Will theory.

Spector's distinction is well-taken. Moreover, the strategy implicit in his second point is, in principle, a good one. Partisans of the Will theory are free to re-interpret the sense of 'strength' at issue, as long as they can both preserve and explain the facts in question. The trouble with Spector's second point is that it gets the facts wrong: the duties correlative to inalienable claim-rights do not always have greater weight than those correlative to alienable ones. There is no such fact to explain.

Spector's strategy works well enough with the claim-right not to be enslaved. But it does not work with other, more mundane inalienable claim-rights, such as the claim-right not to be employed in unsafe working conditions (or, for that matter, the artist's claim-right to the integrity of her work, which in certain jurisdictions is partially inalienable). In these examples, which the paper included by design, the correlative duties are not especially weighty; and it is not hard to imagine *alienable* claim-rights that have weightier correlative duties (e.g., the right to property). It is important to keep the comparison class straight here. Some inalienable claim-rights are not stronger than other alienable claim-rights. But *every* inalienable claim-right is stronger *than it would be* without the disability imposed on the right-holder.

Of course, Spector is quite right that the Hybrid theory must itself be able to explain this fact. But the task is easily discharged. Inalienable claim-rights are stronger than their alienable counterparts in the sense that they afford a *greater degree of protection* to the right-holder's interests on balance. In certain cases, vesting the right-holder with a lesser degree of control (including zero) over the correlative

duty, i.e. imposing a disability on her, actually results in a greater degree of protection to her interests *on balance*—notably, cases in which the right-holder is expected to exercise the relevant powers (e.g., to waive the correlative duty) to her own detriment on balance.[9] Moreover, these are precisely the cases in which the Hybrid theory makes a claim-right inalienable—in which, that is, it recognizes an individual who is disabled from (fully) controlling a duty as holding a correlative claim-right.

This explanation naturally invites the observation that an obvious rationale for making a claim-right inalienable, whether partially or completely, is simply to protect the right-holder. More specifically, it is to protect the balance of the right-holder's interests from, among other things, certain actions of her own. It is therefore a classically *paternalist* rationale. Now I do not say that the paternalist rationale is the best, still less the only, rationale for making a claim-right inalienable. But it is a sufficiently obvious and straightforward rationale that its *eligibility* as a rationale for inalienability is really beyond question.[10] Admitting its eligibility, however, rules (4) out as a condition of adequacy on a theory of claim-rights.[11]

Before leaving the subject of inalienability, I should perhaps say that, in my own view, the strength difficulty is not the most fundamental part of the inalienability objection. The fundamental objection is the one that only applies in the case of *complete* inalienability (see note 8). Since Spector does not discuss that case, nor indeed the incompetence objection, his argument would not have vindicated the Will theory, even if it had succeeded in dismissing the strength difficulty.

9 So, *in these cases*, it is actually correct to say that someone vested with a claim-right under (SH)'s second disjunct thereby has her interests protected to a greater degree on balance (i.e., has a stronger claim-right) than she would have if she had the powers described under (SH)'s first disjunct.

10 If the paternalist rationale were *conceptually* ineligible as a rationale for making a claim-right inalienable, then assertions of inalienable claim-rights should, throughout history, have been accompanied by references to an alternative rationale. Otherwise they risked not making sense.

11 Substantive moral objections to paternalism are beside the point here, which is that the falsity of paternalism is not guaranteed by anything in the *concept* of a claim-right.

§3

Let me close by returning to 'the instrumentalization problem,' i.e. my criticism of Raz's theory (RZ). The nub of my criticism, recall, is that (RZ) makes the assignment of a claim-right depend, in some cases, upon a contribution from select third party interests. (RZ) therefore allows such assignments to depend upon something *other than* the intrinsic standing of the (relevant) individual, which is objectionable. I claimed that my Complex Hybrid theory (CH) is immune from *that* problem. Although (CH) makes the assignment of a claim-right depend upon a balance of interests, the interests in question are all interests of the same individual. The required alignment of interests, and hence the basis of (CH)'s assignment, is therefore *an aspect of* that individual's intrinsic standing and not something other than it.

To illustrate the crucial difference, contrast the role of third party interests in (CH)'s constrained piggy-back scenario with their role in (RZ)'s piggy-back scenario. Recall the example of the artist's right to integrity from the paper. Say individual artists have the power to waive the duty not to distort their works of art; and that the common good and audience interests not only support (the artist's interest in) this duty, but are also consistent with the artists' power of waiver.

In (RZ)'s piggy-back scenario, the role of these third party interests is to qualify individual artists for a claim-right to which their own interests, considered by themselves, would *not* entitle them. It is to push the individual over the line into right-holder status, a line she would not cross on her own.[12] By contrast, in (CH)'s constrained piggy-back scenario, we must first ask whether, on balance, an artist's own interests favour empowering her to waive the duty in question. If they do, then artists qualify for a claim-right entirely on the basis of intrinsic facts about them as individuals: they qualify, according to (CH), because their actual degree of control over the (correlative) duty and the degree of control favoured by their own interests is the same, i.e. the full measure of control. Here the role of third party interests is

12 Moreover, it pushes the individual over the line *in order to* grace the third party's cause with the banner of right-holding. That is where the instrumentalizing aspect enters.

simply to augment the weight of the duty that correlates with a claim-right to which the individual artist is *independently* entitled.

Against this defence of (CH), Spector raises two principal complaints. First, he charges that (CH)'s restriction of the trade-offs taken into account to trade-offs among the individual's own interests is 'arbitrary' (p. 294). By this, he could mean either that the restriction is *unmotivated* or that it is *unjustified*. But neither charge stands up. Far from being unmotivated, (CH)'s restriction is positively required, as we saw earlier, to preserve the connection between the language of rights and (liberal) individualism—to satisfy the weaker version of Spector's condition of adequacy (2).

Nor is the restriction unjustified. To assign a correlative claim-right, (CH) requires an individual's actual degree of control over the duty in question to *match* the degree of control that advances her own interests on balance. (CH) focuses, that is, on whether she has the degree of control that *would be* justified overall if her interests were the only relevant interests. Obviously, however, the individual's interests might not be the only relevant ones. The salient case here is where relevant third party interests are not only weightier than the individual's own, but favour vesting her with a different degree of control from that favoured by her own interests (e.g., none instead of some).[13] In this case, if the individual's actual degree of control over the duty *did match* the degree of control that advances her own interests on balance, the outcome would be unjustified overall.

Still, there is no objection to (CH) to be found here, since it does not require the unjustified outcome. (CH) *says nothing* about what an individual's actual degree of control over a duty should be. A fortiori, (CH) does *not* say that her actual degree of control *should match* the degree that advances her own interests on balance. The individual's actual degree of control over a given duty is what it is. (CH) 'requires' her actual degree of control to match the degree that advances her own interests on balance *only as a condition of* assigning her a correlative claim-right. If this match is not justified overall, then (CH) does not require the individual to have an unjustified degree of control over the duty. It simply fails to assign her a correlative claim-right (as in the case in note 13).

13 In the paper, this case was illustrated by the initial discussion of the right of integrity, conducted under the assumption that the audience and common good interests are *inconsistent* with artists' being empowered to waive the duty not to distort their work.

Spector's second principal complaint is that the 'balance of interests that justifies powers might be traded off against the interests of other people' (p. 294). In other words, the possibility remains that the (balance of the) right-holder's interests may be overwhelmed by social interests. This could mean one of two things. It could mean that *the degree of control favoured by* the right-holder's interests is overwhelmed by social interests. In effect, this is the scenario we have just discussed.[14] Alternatively, it could mean that *the correlative duty protecting* the right-holder's interests is overwhelmed by social interests. On this reading, which is suggested by Spector's arresting example, his complaint reiterates the charge that (CH) fails his condition of adequacy (2).

Now Spector is right that (CH) does *not* exclude the possibility that the duty correlative to a given claim-right may be over-ridden by competing interests in the social calculus. However, this has nothing in particular to do with my criticism of (RZ). More importantly, it provides no basis for objecting to (CH). Simplifying matters somewhat, consequentialism is either true or false. If it is true, then the possibility of a given (correlative) duty's being permissibly over-ridden is *genuine*, in which case (CH)'s failure to exclude it is no defect. If consequentialism is false, then (correlative) duties *cannot* be permissibly over-ridden, in which case there is no genuine possibility that we still need (CH) to exclude. In neither case does (CH) lead to an objectionable result. It does, of course, leave us to decide the merits of consequentialism on independent grounds, but that is as it should be.

14 Notice, however, that even in this scenario *(CH)* does not trade the powers favoured by the individual's interests off against social interests. Rather, (CH)'s matching requirement simply turns out to be impossible to satisfy—impossible, at least, on the assumption that the individual's actual degree of control over the duty is justified overall. Hence, no claim-right is assigned.