Urbanization, the Intelligentsia, and Meaning Change: A Comment on Horacio Spector's *Value Pluralism and the Two Concepts of Rights*

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Professor Horacio Spector presents an interesting account for how a plurality of values can sneak its way into our normative world under the guise of unitary terminology.[1] In particular, the rhetoric of rights was once primarily used to refer to moral protections extended to spheres of autonomous, individual decisionmaking. Over time, however, rights were used to depict any claims in which individuals could assert that particular preferences of theirs were of sufficient weight to warrant their protection by law.

Professor Spector also presents a kind of causal theory for how this metamorphosis occurred.[2] Values are emanations from forms of life, but they can outlast the forms that brought them into being. Rights as

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1. *See* Horacio Spector, *Value Pluralism and the Two Concepts of Rights*, 46 SAN DIEGO L. REV. 819 (2009).

2. *Id.* at 821 ("New value paradigms coexist with older value paradigms because the latter are central to forms of life that continue to define people's senses of identity and meaningfulness. By the same token, values are incommensurable with one another because each value presupposes a distinct form of life that cannot be ranked along an ordering of forms of life. That is, values are incommensurable with each other due to the incommensurability of their supporting forms of life." (footnote omitted)).

autonomous decisionmaking were a natural response to sparsely populated rural settings; one imagines a farmer standing proudly in a remote field as lord of his manor. They became increasingly obsolete as the world became urban and interdependent—where no man was an island, and the consequences of individual choices were rarely limited to defined private spheres. We might have responded to this change in objective conditions by abandoning rights talk as "nonsense upon stilts" and embracing the modernity of utilitarian or consequentialist theories that see the individual as a moral resource for the community.[3] Instead, rights talk became ubiquitous—individuals are claimed to have rights to an education, healthcare, housing, and the rights to be free from torture, cruel punishments, and discrimination. But most of these uses of the term *rights* are not best conceptualized as protections for spheres of autonomous decisionmaking. The individual's interests may have pride of place in these conceptions, but the dominant idea is sympathy for the welfare of the individual rather than respect for the autonomous capacity for making choices and plans.

In my view, Professor Spector's paper is more persuasive in identifying the rhetorical change that has taken place than in providing a causal account of its genesis. The traditional rights of private property and freedom of contract do seem a long way from the new rights to receive medical care or safe and affordable housing. However, the rural-to-urban hypothesis for the cause of this change is not especially persuasive. Laissez-faire thinking of autonomous private spheres was at its height in the late eighteenth and early nineteenth centuries, among conditions far more urban and commercial than had historically been the case and among countries such as England and Holland that were more urban than most at the time.[4] It has also made a remarkable comeback in the late twentieth and early twenty-first centuries in countries where urban crowding can make Manhattan seem bucolic.

I do not want to overstate the criticism. It is certainly true that the ability of people to do whatever they want with what they own can be challenged by conditions of urban living. For example, the animals I could keep on a farm are a nuisance in the city. And subtle environmental problems such as the depletion of the ozone layer remind us that local decisions in a hugely populated and technologically powerful world can have consequences far beyond any defined physical sphere. Broad

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3. Jeremy Bentham, *Anarchical Fallacies*, *in* NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987).

4. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 25 (7th ed. 2007) ("Many legal doctrines date back to the nineteenth century, when a laissez-faire ideology based on classical economics was the dominant ideology of the educated classes.").

environmental awareness, however, has been a rather recent phenomenon, and commentators had administered an enormous beating to private rights for a hundred years before the Clean Air Act.[5] Moreover, it is perfectly possible to tackle environmental problems by creating new spheres of autonomous decisionmaking through careful institutional use of rights, such as tradeable pollution permits.

In any event, there is something fundamentally wrong about the theory that regards interdependence and complexity as inconsistent with spheres of private jurisdiction or rights. The system of private spheres is one that connects all owners of property—including property in labor—in a worldwide network of contractual relations. It is precisely because people are interdependent that it is essential to receive ongoing signals about changing relative scarcities everywhere on the planet, and that is the principal function of the system of private spheres of property connected by free contract. The institution of private rights is really nothing but a mechanism for internalizing the externalities that arise from increasing interdependence. If one thinks of the issue as status versus contract, then the more complex the world becomes, the more incredible it is to imagine that the state could be on top of every potential status that could arise and would know the rules to optimally govern persons in that status, including the prices that every producer should charge.

If the change from simple rural to complex urban conditions is not a compelling hypothesis for the definitional metamorphosis of the word *rights*, what is? Perhaps we should ask, in the manner of a detective investigation, who benefitted from the change in meaning? The older conception of rights is one of jurisdictional limits, of respect for the autonomous decisionmaking of others, and of the necessity to refrain from intervening in defined spheres. In contrast, the newer conception of rights is one of restructuring end states to ensure that individuals have particular interests satisfied. The beneficiaries of the change in meaning are those people who chafe under the jurisdictional limits of the earlier rights approach and who yearn for the power to rearrange end states in order to enable themselves to author reforms that will help save individual victims of the previous end states.

It is possible that several different groups of people would benefit from this change, but the most obvious winners are those who make

5. 42 U.S.C. §§ 7401–7671 (2003).

their living reimagining and—at least in aspiration—remaking the world. Let us call this group the intelligentsia, which includes not only professors in academia but also journalists and policy wonks in government. The idea of large private spheres that are off limits to intervention is anathema to the interests and worldview of the intelligentsia. After all, these spheres contain the resources that are needed for building the newly imagined worlds. And intellectuals are especially disinclined to defer to the decisionmaking authority of nonintellectuals, people who are often uneducated, inarticulate, and wise only in pragmatically knowing *how*, rather than in theoretically knowing *that*. In support of the hypothesis of intelligentsia power, one can note that freedom of speech and of the press is the one sphere of off-limits jurisdictional limitation that has thrived and expanded in the last century.[6]

Rights is not the only term that has undergone the metamorphosis that Professor Spector identifies. Other normative terms, such as *justice*, have also been rethought in directions that feed the appetite for power of the intellectual classes. Justice was once thought of as a constraint on human actions.[7] It was unjust to lie, break promises, steal, kill, or maim. These deontic constraints can be a frustration for the impatient intellectual, especially one with radical or revolutionary aspirations. How much happier it is to think of justice as a property of desirable end states that can be achieved by imagining comprehensive rearrangements of the elements on the human chess board!

There is no need to postulate illiberal or otherwise unattractive motives for the intelligentsia; indeed, imagining such motives would misunderstand the essential process that took place. Normative philosophers who thought about concepts like rights and justice were usually trying to hold onto as much of the older conceptions of the terms as they felt they could in good conscience and were trying to come up with newer conceptions that would better promote the attractive features of the earlier values. Most people who speak of rights strongly desire to see the individual human being flourish and specifically hope to ensure that identity will not be lost in an abstract collective. Similarly, "social justice" is often thought of as being especially protective of the status of the individual—an improvement on utilitarian norms that would allow the sacrifice of one individual, without limit, if required to promote

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6. Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 375 (1995) (noting the dramatic expansion of free speech rights in the third quarter of the twentieth century).

7. 2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 33 (1976).

enough utility for the rest of the group. The intelligentsia was trying to hold onto the best features of rights and justice rhetoric without building severe jurisdictional barriers on the only interventions that would make the securing of these conceptions of rights and justice possible.

If Professor Spector's hypothesis for the cause of meaning change in terms such as *rights* and *justice* is accepted, what are its implications? In the end, I believe I would draw conclusions very similar to those of Professor Spector, notwithstanding our differences regarding causal origins. The most important thing is to recognize that there are two different conceptions of rights and two different conceptions of justice. The conceptions are not similar enough to go by the same name without confusion. Perhaps they both are enforceable claims of individuals, but the nature of those claims and their sources and rationales are too different to elide. It is not a matter of the newer conceptions lacking value. We surely do need concepts of rights and of justice that will stand as guarantors that the weakest among us are not simply abandoned and left to suffer. But we also need the earlier concepts of rights as jurisdictional limitations and of justice as constraints on violating those limits, if we are to retain the vital benefits that come from such a system of protected spheres.