

## BOOK REVIEWS

### **The Cost of Rights: Why Liberty Depends on Taxes**

Stephen Holmes and Cass R. Sunstein

New York: W. W. Norton & Co., 1999, 255 pp.

*The Cost of Rights* is the work of two leading left-liberal legal theorists who are determined to undermine and replace the entire structure of modern law, the very concept of individual rights, and the law-governed polity.

*The Cost of Rights* has a fairly clear goal, which is to eliminate even the possibility of making a conceptual distinction between “negative rights” to noninterference (e.g., the right not to be murdered or the right to free exercise of religion) and “positive rights” or “welfare rights” (e.g., the right to a subsidized education or to a house built at someone else’s expense). Thus, they claim that “apparently nonwelfare rights are welfare rights too” (p. 219) and that “all legal rights are, or aspire to be, welfare rights” (p. 222). They describe their virtually complete rejection of the liberal enterprise in terms of “a kind of communitarian or collectivist theme, though with deep roots in the liberal political tradition” (p. 224). Collectivist it certainly is, but they fail to show any roots in the liberal tradition.

The first page of the book starts by identifying the traditional idea of rights with alleged libertarian “opposition to government,” a sly move intended to make libertarian critics of statism seem obtuse, for, as Holmes and Sunstein note on the very next page, “individual rights and freedoms depend fundamentally on vigorous state action” (p. 14). More radically, “Statelessness spells rightslessness” (p. 19). But what Holmes and Sunstein intend by the phrase “depend fundamentally” is not that government is charged by citizens with the delegated powers necessary to defend rights and secure justice, but that government creates rights *ex nihilo*. The authors brush aside discussion of moral rights and consider only legal rights, i.e., those rights that a state will actually enforce, for “When they are not backed by legal force, by contrast, moral rights are toothless by definition. Unenforced moral rights are aspirations binding on conscience, not powers binding on officials” (p. 17). Having set aside moral rights, Holmes and Sunstein then borrow (without acknowledgment) the

definition of rights associated with Joseph Raz, viz., that rights are interests of persons that are sufficiently weighty to generate duties on the part of others, to which they add a heavy dollop of legal positivism. Thus, for Holmes and Sunstein, “an interest qualifies as a right when an effective legal system treats it as such by using collective resources to defend it” (p. 17). The authors then breezily claim that “Under American law, rights are powers granted by the political community” (p. 17).

The invocation of “American law” is otiose, for the theory they advance applies to all exercises of political power; it is a conceptual claim and not one limited to any particular political history. Further, there is nothing specifically “American” about the thesis, for any identifiable “American” theory of government rests on the idea that the people, in order to secure certain ends (“these Rights,” “establish Justice,” “the common defence,” “the general Welfare,” “the Blessings of Liberty,” etc.), delegate certain powers to government. The rights that are secured are not “granted” by the political community, for, as the Declaration of Independence states,

all Men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

If Holmes and Sunstein wish to argue against that thesis and on behalf of a radically positivist theory, they are welcome to do so, but asserting *en passant* that pure positivism is somehow a matter of “American law” is shifty and devious. (It is especially bizarre when you consider that they attack a number of Supreme Court decisions that contradict their thesis; what, then, do they mean by “American law”?)

Setting aside the claim that this is a matter of “American law,” let’s examine the case they advance for positivism, i.e., for the thesis that law and rights are posited or laid down rather than discovered or recognized. First, they claim that focusing only on legal rights, i.e., those rights that are actually enforced by a political authority with the power to secure compliance, “can be justified by an enhanced clarity of focus” (p. 21). That is the promise, but nowhere do they fulfill it. Instead, they produce an account of rights that is both incoherent and self-contradictory.

Holmes and Sunstein claim to ground their claims on a common sense observation: all choices have costs. That is a conceptual or analytical claim, for to choose *X* over *Y* is to give up *Y*, which (if it is the most highly valued alternative forgone) is defined as the cost of choosing *X*. I have no objection thus far. They proceed to note that the act of choosing to enforce a right, like all choices, has a cost, viz., the most highly valued opportunity forgone. Combining that insight with the claim that the only

rights that are meaningful are those that are actually enforced, they conclude that since the enforcement of rights has costs, rights themselves have costs. Thus the subtitle to the book: “Why Liberty Depends on Taxes.” All acts of enforcement have costs and require the mobilization of resources—police, judges, jailers, executioners, etc.—and are therefore positive claims on the expenditure of taxes (or other forms of compulsion; conscription would fill the bill as well as taxation) to secure those resources. The right not to be killed is thereby converted into the right to police protection, which entails the expenditure of resources and therefore choices among alternative uses of those resources. Thus, the allegedly “negative” right not to be killed is indistinguishable from the “positive” right to the expenditure of resources to hire or conscript police. Indeed, Holmes and Sunstein see no difference between expenditures on police departments and expenditures on fire departments, both of which “protect private property.” The implication is that there is no difference between an arsonist and lightning, which tells us a lot about Holmes and Sunstein’s theory of moral agency and their dismissal of moral rights as mere “aspirations.” In an appendix toting up the “cost of rights,” the complete list of items under “Protecting Property Rights” is: “Patent and trademark protection,” “Disaster relief and insurance,” “Federal emergency management,” “Community disaster loans,” “Management and protection of forests,” “Real property activities,” “Fund for rural America (agricultural support),” and “Records management connected with property.”

According to Holmes and Sunstein, “Rights are costly because remedies are costly. Enforcement is expensive, especially uniform and fair enforcement; and legal rights are hollow to the extent that they remain unenforced. Formulated differently, almost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the public purse” (p. 43). Even “the right against being tortured by police officers and prison guards” (p. 44) is, contrary to traditional liberal thinking, not a negative right not to be harmed, but a positive right to have monitors hired by the state to supervise the police officers and prison guards: “A state that cannot arrange prompt visits to jails and prisons by taxpayer-salaried doctors, prepared to submit credible evidence at trial, cannot effectively protect the incarcerated against torture and beatings. All rights are costly because all rights presuppose taxpayer-funding of effective supervisory machinery for monitoring and enforcement” (p. 44).

This is the first striking example of the complete incoherence of their theory, for the theory of rights and obligations on which they base their theory generates an infinite regress. Holmes and Sunstein argue that I cannot have a right not to be tortured by the police unless the police have an obligation not to torture me, and the police can only have an obligation not to torture me if there are some taxpayer-funded persons (monitors) above the police who can punish them (since “duties are taken

seriously only when dereliction is punished by the public power drawing on the public purse”). But to have a right not to be tortured I would have to have a right that the monitors exercise their power to punish the police for torturing me. Do I have that right? According to Holmes and Sunstein, I would have such a right only if the monitors had a duty to punish the police, and the monitors would have a duty to punish the police only if there were some taxpayer-funded persons above the monitors who could (and would) punish the monitors for failing to punish the police, and so on, *ad infinitum*. For there ever to be a right of any sort, by Holmes and Sunstein’s own theory, there would have to be an infinite hierarchy of people threatening to punish those lower in the hierarchy. Since there is no infinite hierarchy, we are forced to conclude that Holmes and Sunstein have actually offered an impossibility theorem of rights in the logical form of *modus tollens*: If there are rights, then there must be an infinite hierarchy of power; there is not an infinite hierarchy of power; therefore there are no rights.

The theory of liberty that Holmes and Sunstein advance also leads to strange conclusions. Throughout the book, Holmes and Sunstein use the terms “rights” and “liberty” interchangeably (e.g., pp. 39, 46, 83, 93). Taking their definition of a right as an interest that “qualifies as a right when an effective legal system treats it as such by using collective resources to defend it” (p. 17), we are justified in deducing the following:

If I have an interest in not taking habit-forming drugs,  
*and*  
 If the state uses collective resources to stop me from taking drugs,  
*then*  
 I have a right that the state use collective resources to stop me from  
 taking drugs.

Let us stipulate that the state places me in prison in order to keep me from taking drugs (and let’s set aside the fact that real states have failed to keep drugs out of prison). Since, according to Holmes and Sunstein, to have my rights enforced is to enjoy the protection of my liberty, by putting me into prison the state is making me free. Indeed, if the state were somehow to fail to imprison me, they would be violating my rights and making me unfree. (But then, if the right were not actually enforced by the state, it would be no right. Trying to follow the implications of Holmes and Sunstein’s theory is like thinking out the implications of the elevation of evil to good by the members of “The Addams Family.” Ultimately, the attempt collapses into incoherence.) Holmes and Sunstein have advanced a profoundly collectivist theory of liberty, without any identifiable connection to the liberal political tradition.

Finally, the theory Holmes and Sunstein advance collapses into contradiction by page 203 of the book, which contains the first consideration of “moral ideas” since the introduction, where moral rights were dismissed in order to achieve “an enhanced clarity of focus.” After maintaining for 200 pages that rights are dependent upon power, which they defined as

the power to impose punishment (“duties are taken seriously only when dereliction is punished by the public power drawing on the public purse”), they make the following startling admission: “The dependency of rights on power does not spell cynicism because power itself has various sources. It arises not from money or office or social status alone. It also comes from moral ideas capable of rallying organized social support” (p. 203). The example they give is the civil rights movement, which dragged the state into protecting the civil rights of African Americans. But if moral ideas count as a form of “power,” then what is the justification for the dismissal of moral rights at the outset? Could we not say that a police officer should abstain from torturing me firstly because it is a wicked and immoral thing to do—because it is a violation of my right not to be tortured—and not *merely* because the officer fears being punished by his superiors, who, in turn, must fear being punished by their superiors? The theory of Holmes and Sunstein collapses into incoherence when they incorporate “moral ideas” into their definition of power, which was offered as an alternative to moral ideas in the first place. (This shiftiness also shows up when they shift from terms such as “creation” and “grant” to describe the origins of rights to “recognition” when discussing the rather more touchy subject of “religious liberty” [p. 182].)

Their theory not only implodes as a moral theory, but it is incoherent as a political theory as well. Holmes and Sunstein cannot decide whether government is a power separate from the people that bargains with them or is the representative of the people:

For its part, the government is willing to refrain from imposing confiscatory tax rates, not only because of political incentives, but also because public officials understand that reliable long-term revenues will be augmented if citizens are encouraged to accumulate private wealth, keep honest books, and bank and invest their earnings inside the country, or at least within the purview and reach of the IRS [p. 195].

Here, government is a party separate from the citizenry that *bargains with* them. But:

If supposedly impartial rights accrued solely to the advantage of the rich, the American government’s vital claim to represent society as a whole, rather than being a tool of special interests, would not only be tarnished. It would crumble [p. 207].

Here, government *represents* society.

One should expect of theorists who trumpet their attachment to democracy some coherent statement of the relationship between government and society. Their theory is not only incoherent and contradictory on the level of rights theory, but it fails as a political theory, as well.

This work is the logical combination of the views of two intelligent men who are profoundly hostile to individual liberty and limited government. Sunstein has gained some notoriety for advancing a novel “expressive”

theory of law, according to which law is not about the securing of justice or the conditions of social cooperation, but about “norm management.” That is the theory that conservatives have advanced against eliminating sodomy laws; it is not necessarily that they want sodomy laws to be uniformly enforced, you see, but repealing them would send the “wrong message” about “society’s” estimation of homosexuality. The theory is profoundly anti-liberal. Holmes, in an earlier book, *Passions and Constraint: On the Theory of Liberal Democracy* (1995), had advanced the historically implausible thesis that the American founding was purely an act of “positive constitutionalism,” with the emphasis on enabling the state to provide collective goods for the people and little or no concern with limiting the power of the state to do evil (which Holmes terms “negative constitutionalism”). That runs into some difficulty when we consider the language of the founding documents, not to mention the Kentucky Resolutions, in which Jefferson wrote that “confidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go.” (Holmes even misstates Locke’s theory of property as “a monopoly granted and guaranteed by government for the sake of the public interest” [p. 254]; compare Locke’s Second Treatise, §27, along with many other passages.)

It should not go unremarked that *The Cost of Rights* is extraordinarily polemical, unscholarly, and nasty in its criticisms of those with differing views. For example, immediately after gallantly conceding that “Many critics of the regulatory-welfare state are in perfectly good faith” (p. 216) they turn around to tar all critics of the welfare state with the charge of racism: “But their claim that ‘positive rights’ are somehow un-American and should be replaced by a policy of nonintervention is so implausible on its face that we may well wonder why it persists. What explains the survival of such a grievously inadequate way of thinking? There are many possible answers, but inherited biases—including racial prejudice, conscious and unconscious—probably play a role. Indeed, the claim that the only real liberties are the rights of property and contract can sometimes verge on a form of white separatism: prison-building should supplant Head Start. Withdrawal into gated communities should replace a politics of inclusion” (p. 216). The charge is not only unsubstantiated, it is beneath contempt. Still, despite their slithery style of argument, Holmes and Sunstein have advanced a thesis deserving of a rebuttal that does not sink to the level of its advocates. I hope that I have succeeded.

Holmes and Sunstein have produced a statement of collectivism clothed largely in liberal language. But a sheep’s coat does not a sheep make.

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