**A Critical Review of *The Cost of Rights: Why Liberty Depends on Taxes* by Stephen Holmes & Cass R. Sunstein**

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*The Cost of Rights*[1] by Stephen Holmes and Cass Sunstein is as much a blueprint for American political discourse on public policymaking as it is an analysis of the budgetary, legalistic dimension of "Rights Talk." While decisions need not "be made by accountants," Holmes and Sunstein argue that "public officials and democratic citizens must take budgetary costs into account" when discussing fundamental rights (pg. 98). The first section of their book outlines how a budgetary analysis of rights sheds new light on longstanding debates concerning rights protections. Aware that such a perspective may well reinforce calls for rights curtailment as means of balancing budgets, in the second half of the book the authors engage in a defense of the American rights culture. This critical review begins by providing an overview of the book's argument and concludes with a brief critique that seeks to qualify the authors' legalistic interpretation of rights.

**Part I: A Budgetary Analysis of Rights**

Holmes and Sunstein are transparent in noting that their analytical approach treats "costs" as "budgetary costs" and "rights" as "important interests that can be reliably protected by individuals or groups using the instrumentalities of government" (pg. 16). This has two implications for their argument. The first is that Holmes and Sunstein conceptualize rights in legalistic terms: "moral rights have budgetary costs only if their precise nature and scope are politically stipulated and interpreted – that is, only if they are recognized under law" (pg. 18). The second consequence that they take a rather statist (in the Weberian sense of a rational-legal state) perspective, noting that "statelessness spells rightlessness. A legal right exists, in reality, only when and if it has budgetary costs" (pg. 19). It is no wonder, then, that Holmes and Sunstein's agents of rights enforcement are formal, legal institutions (particularly courts and government agencies), whose compliance-inducement toolbox consists primarily of public law backed by the coercive power of the state.

The primacy of state actors in Holmes and Sunstein's narrative is crucial, for they argue that is the necessity of public enforcement of individual and collective rights that justifies their budgetary analysis. Thus the "negative rights/positive rights distinction" turns out to "be based on fundamental confusions," for "all legally enforced rights are necessarily positive rights," as the legal maxim "where

[1] Stephen Holmes and Cass Sunstein. 1999. *The Cost of Rights: Why Liberty Depends on Taxes*. New York, NY: W.W. Norton.

there is a right, there is a remedy" highlights (pg. 43). Every first generation civil/political right is exercised in the shadow of public enforcement: the right to vote requires a publicly-funded polling station; the right to property must be protected by firefighters and the police; contracts would be useless if creditors could not instigate a public judicial procedure against a defaulting debtor (pgs. 53; 13; 48). Thus rights cannot fall under the domain of self-enforced private law, as even "rights in contract law and tort law are not only enforced but also created, interpreted, and revised by public agencies" (pg. 49). The fact that private law is sanctioned by public authorities blurs the distinctions between civil law (private) and criminal law (public), for both serve the same function: to "conduct a permanent, two-front, and publicly financed war on those who offend against the rights of owners" (pgs. 60-61). In short, the "opposition between "government" and "free markets"" turns out to be largely spurious (pg. 64). Finally, a budgetary perspective of rights undermines the notion that some rights are non-derogable, or "absolutes," for if rights imply budgetary costs, then their enforcement engenders opportunity costs, and in a world of scarce resources a "no-compromise attitude will therefore produce confusion and arbitrariness and may, on balance, disserve the very rights it intends to promote" (pg. 125). In short, the "cost of rights" approach undermines a plethora of conventional binary oppositions (negative rights vs. positive rights; private law vs. public law; government vs. free markets; civil law vs. criminal law; derogable rights vs. non-derogable rights)) which may obfuscate more than they clarify.

The budgetary perspective and prominence of governmental institutions in Holmes and Sunstein's account is also amenable to a discussion of constitutional design. Here, rights are neither fantasies of ethical discourse nor the fruits of nature: the authors follow Hobbes in noting that in a "state of nature […] individuals lack "even a right to one another's body"" (pg. 152). They echo William Blackstone in underscoring that in an atomized world absent of institutions of government, "the strong would give law to the weak, and every man would revert to the state of nature" (pg. 161). Institutions therefore help fulfill the promise of rights and endow hollow concepts with concrete power. As a consequence, "all legally enforceable rights are "artificial" in the sense that they presuppose the existence of that imposing human artifice, the public power," and thus presumably there exists substantial room for individuals to engineer rights-protecting constitutional frameworks (pg. 152). The authors are frustratingly ambiguous when it comes to outlining which principles of institutional design may be most desirable, but they provide us with a critical clue in noting that "an abusive power can be successfully counterattacked only by another power" (pg. 77). Here, Holmes and Sunstein evoke the writings of Bernard Mandeville, of David Hume, of Publius, and of Montesquieu as outlined in Albert Hirschman's classic *The Passions and the Interests*: "[T]he ambition of one part of

government" is, for these philosophers, "expected to counter that of another […] It may be a reflection on human nature that such devices should be necessary to control the abuses of government" (Hirschman 1977: 30).[2] A federal structure bolstered by checks and balances seems to serve the function of pitting power against power, and thus of protecting individual liberty. Indeed, Holmes and Sunstein approvingly underscore the "incorporation doctrine" of the US Constitution's Fourteenth Amendment's due process clause ("which extends most of the Bill of Rights to the States"), for this doctrine "protects individual liberties not by removing government from the scene, but by giving national authorities the power to overrule state authorities" (pg. 56). Thus a budgetary perspective does not necessarily imply that a taxpayer-funded government institution will always protect individuals from private parties; rather, government institutions may well serve as checks against the abuses of other public authorities within a fragmented constitutional system.

**Part II: A Defense of "Rights Talk"**

According to the likes of legal scholar Mary Ann Glendon, journalist George Will, and General Colin Powell, "rights talk" has "drawn Americans into greater selfishness and atomism […] [and] devalued altruism, mutual concern, and assistance to one another" (pg. 137). Rights thus breed socially irresponsible behavior and dependence. But for Holmes and Sunstein, a budgetary treatment of rights substantially undermines such claims. First, if all rights are positive rights, then the wealthy are just as dependent on government and public law for the protection of their property rights as the poor are dependent on government and public law for the protection of their welfare rights. In short, "what Americans cherish as "independence" is actually dependence on a certain set of (liberal) institutions" (pg. 205).

Second, the "artificial" scaffolding for rights-protection described earlier serves to underscore the degree to which public laws, disproportionately crafted by the very disparagers of welfare rights and dependency culture, themselves generate structural inequalities. Thus the African American mother living in the south side of Chicago is not poor because she lacks the self-reliance that would have graced her were it not for the dependence engendered by Medicaid and Food Stamps; rather, "however hard people work, it is always an oversimplification to attribute differences of acquired wealth solely to the wealthy's "own efforts,"" for "existing distributions of resources are a function of law" (pgs. 193; 199). If the disproportionate influence of the rich are generating laws that disadvantage the poor, then "rights talk" amongst the latter is neither selfish not lazy; rather, it is an observable

[2] Albert Hirschman. 1977. *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph.* Princeton, NJ: Princeton University Press.

implication of a bargain implicit in the American social contract, a means "to enhance mutually beneficial social cooperation" and to manage conflict (pg. 178).

Third, rights engender responsible behavior just as often, if not more often, than they engender irresponsible behavior. Property rights, for example, "compel owners to pay the costs of their own property's dilapidation [and] nourish responsibility by allowing individuals to capture the returns on their investments," thus helping to "lengthen the time horizon of owners" (pg. 150). Similarly, the right against arbitrary arrest and torture renders government more responsible vis-à-vis the rights of its citizens (pg. 145). Even criminal defendants "[have] a right to get out of jail […] before trial in order to prepare a better defense. In this case, the rightsholder himself has a right to act responsibly" (pg. 149).

Finally, rights can strengthen community ties instead of producing social atomism and individual anomie. First, a budgetary perspective of rights helps highlight how thoroughly individual's "freedoms depend on community contributions" (pg. 140). Second, rights enfranchise and incorporate individuals within the political community recognized by the state. This is particularly true of civil and political rights, which Holmes and Sunstein view not as "negative protections from government interference [but as] ways of pulling individuals into the community" (pg. 197). Even such "time-honored American liberties" as the right to a jury trial demonstrate that "rights talk" need not spark excessive individualism, for "in these cases, the community purchases a right that ensures an important role for ordinary citizens in adjudicative proceedings" (pg. 160). The ghost of Emile Durkheim's notion of "organic solidarity" (namely solidarity in difference/diversity) articulated in *The Division of Labor in Society*[3] permeates these claims, and comes to the forefront most prominently when Holmes and Sunstein interpret the First Amendment's Free Exercise clause as a demonstration that a "pluralist society" can be "held together by division" (pg. 186).

**A Brief Critique**

Arguments are often persuasive not because of their logical infallibility, but because their underlying premise or assumptions necessarily lead to the desired conclusion. Thus if one accepts Holmes and Sunstein's premise that statelessness implies rightlessness, and thus that all rights are legal rights, then it necessarily follows that all rights engender budgetary costs and that courts and government agencies should be the primary defenders of rights. But aside from the briefest and most inadequate discussion of "social norms" (pgs. 168-170), Homes and Sunstein seem incapable of imagining the possibility of

[3] Emile Durkheim. 1997. *The Division of Labor in Society*. New York, NY: The Free Press: pg. 69.

an ordered world of rights protection without the everpresent sanction of public law. This is an underlying assumption of the new institutionalist economics literature more broadly. Douglass North, for example, argues that that "impersonal exchange with third-party enforcement" has "been the critical underpinning of successful modern economies involved in the complex contracting necessary for modern economic growth" (1990: 35).[4] Whereas primitive societies engaging in simple economic transactions could rely on informal institutions – norms, kinship ties, and tradition – backed by the threat of violence to achieve relative harmony, North argues that complex societies also require formal institutions – particularly a constitution and an effective judiciary – to reduce transaction costs and protect property rights (1990: 38-40; 35; 44; 59). Thus the litigiousness of American legal culture, so skeptically detailed in Robert Kagan's book, *Adversarial Legalism*,[5] would seem to actually be a desirable functional adaptation to the needs of a modern society.

Yet this assumption needs qualification, particularly if it is to be generalized. One need only reference Robert Ellickson's magnum opus, *Order Without Law*,[6] to witness the degree to which a legalistic, budgetary treatment of rights may not even travel to the farmlands of northern California. There, below the snowcapped slopes of Mount Shasta, farmers relied on social norms to resolve disputes and enforce property rights: if a farmer's cattle trampled on his neighbor's property, the latter would first alert the neighbor and seek an apology; if this first step failed, the farmer would proceed to spread negative gossip about the accused; and if all else failed, the farmer would either injure the cattle or drive them far away from their master's property (Ellickson 1994). What no farmer ever did was to take his/her neighbor to court, and this approach proved largely successful: norms, privately enforced, preserved social harmony. Similarly in postwar Japan (far from the exemplar of a "primitive" society!), "resort to litigation has been condemned as morally wrong" because "of the resulting disorganization of traditional social groups" (Kawashima 1963: 45).[7] The term "harmony" is a focal point, a leitmotif in Japanese culture that is structurally reproduced in day-to-day interactions, whereby "there is a strong expectation that a dispute should not and will not arise; even when one does occur, it is to be solved by mutual understanding" (Kawashima 1963: 44). If, even in modern societies, social norms may engender solidarity and protect individual rights while formal government remedies are disavowed, then rights *need not always* incur budgetary costs or require government intervention. Tocqueville's observation that in America "scarcely any political question arises […] that is not resolved, sooner or

[4] Douglass North. 1990. *Institutions, Institutional Change and Economic Performance.* New York, NY: Cambridge University Press.
[5] Robert A Kagan. 2003. *Adversarial Legalism: the American Way of Law*. Cambridge, MA: Harvard University Press.
[6] Robert Ellickson. 1994. *Order Without Law: How Neighbors Settle Disputes.* Cambridge, MA: Harvard University Press.
[7] Takeyoshi Kawashima. 1963. "Dispute Resolution in Contemporary Japan." In Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society*. Cambridge, MA: Harvard University Press.

later, into a judicial question"[8] is well taken only insofar as it is treated as *an American tendency* rather than generalized as *a necessary consequence* of rights protection.

[8] Alexis de Tocqueville. 2002. *Democracy in America.* Washington, DC: Gegnery Publishing: pg. 223.